REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

APPEAL NO. 13 OF 2020

DAVID CULLEN.....APPELLANT

VERSUS

SAMUEL KIPTALAI.....1ST RESPONDENT

ISAAC KIPTAYOR CHEPTOO.....2ND RESPONDENT

MARIKO KISERICH LIMO.....3RD RESPONDENT

(Being an Appeal arising from the decision judgment/ruling of the Chairman Business

Premises Tribunal in NAKURU BPRT Case No. 149 of 2019 delivered on 26th May 2020)

JUDGMENT

This appeal arises from a reference filed by the respondents against the appellant at the Business Premises Tribunal seeking to levy distress for rent arrears and an order for the appellant to vacate the suit premises.

In response to the reference the appellant filed a preliminary objection challenging the jurisdiction of the Business Premises Tribunal to hear and determine the reference on the ground that the leased premise was a house and neither a shop, hotel nor catering establishment.

The Appellant being aggrieved by the BPRT ruling dated 26th May 2020 has preferred this appeal seeking to have the decision of the Tribunal reviewed and or set aside and costs of the Appeal. The Appellant raised the following grounds of Appeal:

a) The Tribunal misdirected itself by arriving at the conclusion that the Sale Agreement dated 4th June, 2016 was breached and as such the Lease Agreement that was previously in place stood revived.

b) The Tribunal misdirected itself by upholding the decision to convert the sum of Kshs. 120,000.00 advanced towards the purchase price to cover the rent due from the Appellant;

c) The Tribunal had no jurisdiction to handle the reference noting that the property in issue was not a shop, a hotel or a catering establishment.

d) The Tribunal misdirected itself in arriving at the conclusion that a Landlord Tenant relationship existed between the Appellant and the Respondents when the same had been extinguished by the execution of the Sale Agreement.

e) The Tribunal misdirected itself by making a finding that Appellant and the Respondents had a controlled tenancy when the Lease Agreements clearly indicated that the subject of the Leases was a Two (2) bedroom house and not a shop, hotel or a catering establishment.

f) The Tribunal misdirected itself by making a finding that the Appellant was using the premises to run a hotel business without substantive proof thus establishing the existence of a non-existent Lease Agreement.

g) The Tribunal delivered a Ruling without addressing the facts and the issues and also failing to give the *ratio decidendi*.

Counsel agreed to canvas the appeal by way of written submissions which were duly filed by both counsel.

APPELLANT'S SUBMISSIONS

Counsel for the appellant gave a brief background to the appeal and submitted that the appellant and the respondent entered into a lease agreement dated 2nd January 2009 for a 2 bedroomed semi- permanent house for 5 years at a monthly rent of Kshs. 12,000/. That this lease expired and they entered into another one on 1st January 2014 for the same house which lease was to expired on 31st December 2018.

It was the appellant's submission that in 2016 they entered into a sale agreement dated 4th June 2016 where the respondent agreed to sell the house and entire 1 acre of land on which the suit premises was situate at a consideration of Kshs, 1,000,000/. That it was a term of the agreement that the sale was to be confirmed by the appellant's wife of which the appellant later paid Kshs. 120,000/.

The appellant submitted that the he requested for title deeds to enable him pay the balance but the respondent did not do so. That the respondent therefore filed a reference seeking to levy distress for rent which is the subject of this appeal.

Counsel listed two issues for determination as follows:

a) Whether there existed a controlled tenancy between the appellant and the respondent and whether the respondents proved their case on a balance of probabilities.

b) Whether the Tribunal had jurisdiction to hear and determine the matter.

Counsel relied on section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establi shments) ActCap 301 2012 (Revised 2015) where a Controlled tenancy means a tenancy of a shop, hotel or catering establishment—

a) Which has not been reduced into writing; or

b) Which has been reduced to writing and which-

i. is for a period not exceeding five years; or

ii. contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or

iii. Relates to premises of a class specified under subsection (2) of this section.

Counsel therefore submitted that the leased premises were neither a shop, hotel nor a catering establishment but a private home used as a holiday home. Counsel further relied on the descriptive clause of the lease agreement which reads as follows:

"Whereas the Lessor is the owner of plot situated at KAMBI YA SAMAKI with a 2 Bedroomed Semi- permanent house, the lessor has agreed to lease the plot and the lessee is desirous of leasing the same"

Mr Wekhomba further submitted that there was no evidence that the appellant had leased a business premise and the lease being in writing there was no room for extrinsic evidence to qualify the written contract and relied on the case of **JOHN ONYANCHA ZURWE VS ORETI ATINDE CIVIL APPEAL NO. 217 of 2003** where the following passage from Halsbury's Laws of England 4th Edition Vol. 12 was adopted:

"Where the intention of the parties has been reduced to writing it is, in general not permissible to adduce extrinsic evidence, whether oral or contained in writings such as instructions, drafts, articles, conditions of sale or preliminary agreements either to show that intention or to contradict, vary, or add to the terms of the document. "

Mr Wekhomba also cited the case of **POTGIETER V STUMBERG AND ANOR. (CIVIL APPEAL NO 20 OF 1971) [1972] EACA 19** where the court held that:

"The court ascertains the intention of the parties from the terms of the contract, the conduct of the parties and the circumstances of the case".

Counsel therefore submitted that the oral submissions of the respondent in the tribunal that the premises was a restaurant was flawed and stated that the Tribunal had no jurisdiction to make a determination of the reference that was placed before it and relied on the case of **THE OWNERS OF MOTOR VESSEL "LILLIAN S" VS CALTEX OIL KENYA** [**1989] KLR 1 on** jurisdiction.

"Jurisdiction is everything. Without it a court has no power to make one step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction. "

Mr Wekhomba also relied on the case of **LUCY NJERI NJOROGE V KAIYAHE NJOROGE [2015] eKLR** where it was held as follows:

" The Landlord and Tenant Act is unequivocal on the mandate of the Business Premises Tribunal, which is limited to controlled tenancies within the meaning of the Landlord and Tenant Act, and does not extend towards other contractual arrangements between parties. The Respondent was aware that the basis of the Appellant occupation of the suit property was a sale agreement and not a tenant arrangement. This being the case, she could not have been considered a controlled tenant within the meaning of the Landlord and Tenant Act, and therefore this was not the forum within which to prosecute any grievance that he may have had against the Appellant. With this in mind, the only conclusion that can be drawn is that, the Business Premises Tribunal had no jurisdiction to intervene in the vendor/purchaser relationship between the parties. From the record, the appellant, at all times sought to clarify her relationship with the Respondents in the courts below, but despite this, the courts below nevertheless, erroneously reached a finding of the existence of a tenancy arrangement, based on the ruling of the Business Premises Tribunal. On the basis of these principles we wish to reiterate our earlier stand that since the Business Premises Tribunal orders were based on non-existent tenancy, they were, and still are incapable of enforcement."

It was counsel's submission that the fact that the respondents admitted that there was a sale agreement, the tribunal totally lacked jurisdiction to proceed with this suit as any issue on the validity or breach of the agreement is out of the tribunal's jurisdiction. That the Tribunal erred in its ruling by converting purchase price into rent as the Honorable chairman noted that,

"the sale agreement dated 4th June did not refer to and/or invalidate the lease agreement dated 1st January 2014, in any event, the sale agreement was not completed and the tenant did not become the owner of the suit premises."

Mr Wekhomba also cited the case of **Choitram & Others vs Mystety Model Hair Saloon (1972) EA 525** where Madan J, (as he then was) upheld Lord Denning's decision in **Barnard vs National Dock Labour Board** and stated thus,

"This is a case in which in my opinion it is right and proper in the exercise of the Court's discretion to intervene. There will be judgment for the plaintiffs for a declaration that the orders (a) and (e) made by the tribunal on 15 January 1971 without jurisdiction and are accordingly a nullity and an injunction restraining the defendants from enforcing them. On the basis of this principle, we wish to reiterate our earlier stand but since the tribunal's orders were nonexistent, they were and still were incapable of enforcement."

Counsel further submitted that it is s trite law that every judgment of a court (the Tribunal included) should contain the issues arising from the facts in dispute between the parties, the law on the basis of those issues, analysis and a conclusion as per Order 21 of the Civil Procedure Rules 2010 which provides that:

"*[Order 21, rule 4.] Contents of judgment*

Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

[Order 21, rule 5.] Court to state its issue

In suits in which issues have been framed, the court shall state its finding or decision, with the reasons therefor, upon each separate decision on each issue."

Counsel therefore urged the court to allow the appeal and set aside the award at the tribunal with costs to the appellant.

RESPONDENTS'SUBMISSIONS

Counsel for the respondents gave a brief background to the case and stated that the respondents duly informed the appellant that the sale agreement had been rescinded for want of ratification and failure to pay the balance of the purchase price and further informed him that they had converted the part payment of the purchase price to cover the rent arrears and demanded rent from the appellant.

It was the respondents 'submission that the Appellant expanded the premises in terms of clause 7 of the Lease Agreement by adding premises and tents to cater for more tourists and that the Sale Agreement did not confer ownership of the premises to the Appellant thus the Appellant remained a tenant.

Mr Chebii submitted that the fact that the appellant challenged the respondents' ownership of the premises was in itself a repudiation of the sale agreement by the appellant. Further that the appellant could only cease being a tenant upon outright purchase of the premises.

Counsel therefore urged the court to dismiss the appeal with costs to the respondents.

ANALYSIS AND DETERMINATION

The issues for determination in this appeal are as to whether the Business Premises Rent Tribunal had jurisdiction to hear and determine the reference which is the subject of this appeal. Whether the sale agreement dated 4th June 2016 extinguished the lease agreement.

On the issue of jurisdiction, it should be noted that a court or a tribunal cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law or legislation. The jurisdiction of a court or tribunal is not a mere technicality but that which goes to the root or heart of the matter.

In the case of **Samuel Kamau Macharia & Another –vs- Kenya Commercial Bank Ltd & 2 Others (2012) eKLR** it was held that : -

> *"A court's jurisdiction flows from either the constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by the law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings."*

The question that the court must answer is whether the Tribunal had jurisdiction to handle the reference or it arrogated itself the jurisdiction that was non-existent. The Tribunal's jurisdiction was aptly discussed in the case of **REPUBLIC V BUSINESS PREMISES RENT TRIBUNAL & ANOTHER EX- PARTE ALBERT KIGERA KARUME [2015] eKLR** cited with approval the case of **Re Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195** where the Court dealt *with* the provisions of section 12 of Cap 301 as follows:

> *"The tribunal is a creature of statute and derives its powers from the statute that creates it. Its jurisdiction being limited by statute it can only do those things, which the statute has empowered it to do since its powers are expressed and cannot be implied…. …. The powers of the tribunal are contained in section 12(1) of the Act and anything not spelled out to be done by the tribunal is outside its area of jurisdiction. It has no jurisdiction except for the additional matters listed under section 12(1)(a) to (n). The Act was passed so as to protect tenants of certain premises from eviction and exploitation by the landlords and with that in mind the area of jurisdiction of the tribunal is to hear and determine references made to it under section 6 of the Act. Section 9 of the Act does not give any powers to the tribunal, but merely states what the tribunal may do within its area of jurisdiction.…… It would be erroneous to think that section 12(4) confers on the tribunal any extra jurisdiction to that given by and under the Act elsewhere. For example it is not within the tribunal's jurisdiction to deal with criminal acts committed in relation to any tenancy nor is it within its jurisdiction to entertain an action for damages for trespass. These are matters for the courts and the tribunal cannot by way of a complaint to it by the landlord or tenant purport to deal with such matters. Section 12(4) of the Act must be read together with the rest of the Act and, when this is done it becomes apparent that the complaint must be about a matter the tribunal has jurisdiction to deal with under the Act and that is why the complaint has to relate to a controlled tenancy…. The Act uses the words "any complaint" and the only qualification is that it must be "relating to a controlled tenancy".*

Was the relationship between the appellant and the respondents a controlled tenancy? What is the meaning of a controlled tenancy as per the Act? controlled in terms of Controlled Tenancy is defined under section **2(1) (a)** of the Act as follows:

> *c) Which has not been reduced into writing; or*
>
> *d) Which has been reduced to writing and which-*
>
> *iv. is for a period not exceeding five years; or*
>
> *v. contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or*
>
> *vi. Relates to premises of a class specified under subsection (2) of this section.*

It is not in dispute that the lease was in writing for a period of 5 years renewable and that the same was renewed and later the appellant and the respondents entered into a sale agreement. This means that the tenancy was terminated when the parties entered into the sale of the house.

The descriptive clause of the lease agreement stated that it was for a two bedroomed house and not a hotel or a shop. The clause states as follows:

> *"Whereas the Lessor is the owner of plot situated at KAMBI YA SAMAKI with a 2 Bedroomed Semi- permanent house, the lessor has agreed to lease the plot and the lessee is desirous of leasing the same"*

This is what the parties entered into hence the terms were specific for lease of a house. The Tribunal had no business rewriting the contract for the parties as was held in the case of **Housing Finance Company of Kenya Ltd v Njuguna KLR 1176(CCK)** that:

> *"courts shall not be the fora where parties indulging in varying terms of their agreements with others will get sanction to enforce the varied contracts. Contracts belong to parties and they are at liberty to negotiate and even vary the terms as and when they are at liberty to negotiate and even vary the terms as and when they choose. This they must do together with the meeting of the minds. If is appears to a court that one party varied the terms of a contract with another, without the knowledge, consent or otherwise of the other, and the other demonstrates that the contract did not permit such variation, this court will say no to the enforcement of such a contract."*

It follows that the transaction moved from being within the purview of the BPRT and within the jurisdiction of the court. The extrinsic evidence that was adduced outside the agreement did not confer jurisdiction to the Tribunal.

This court being an appeal court in respect of this case is aware of the principle that it will not interfere with a discretionary decision of a court appealed against as the court did not have an opportunity to hear the facts and appreciate the demeanour of the parties as was held in the case of the case of **United India Insurance Co. Ltd Versus East African Underwriters (Kenya) Ltd [1985] EA 898** wherein it was

held that:-

> *"The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting as at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of consideration of which he should have taken account of; or fifthly, that his decision albeit a discretionary one is plainly wrong."*

Having said that, I find that the tribunal did not have jurisdiction to hear and determine the reference. The appeal herein has merit as is therefore allowed as prayed with costs to the appellant.

DATED AND DELIVERED AT ELDORET THIS 1ST DAY OF APRIL, 2021

M. A. ODENY

JUDGE