



Ndegwa & another v Muthamia & 2 others (Environment and Land Appeal E055 of 2021) [2022] KEELC 15136 (KLR) (1 November 2022) (Judgment)

Neutral citation: [2022] KEELC 15136 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E055 OF 2021**

JA MOGENI, J

NOVEMBER 1, 2022

BETWEEN

JACKSON KAMAU NDEGWA 1ST APPELLANT

ANNE NJERI WANYEJI 2ND APPELLANT

AND

EVERLYNE MUTHAMIA 1ST RESPONDENT

MARKFORD MUOKI 2ND RESPONDENT

MAWORKS PROPERTY MANAGEMENT CO.LTD 3RD RESPONDENT

(Being an Appeal from the Judgment and Decree of the Business Premises and Rent Tribunal by Hon Andrew Muma (Vice-Chairman) on the 18/06/2021 in Nairobi BPRT No. 232 of 2021)

JUDGMENT

1. This appeal arises from the Ruling of Hon Andrew Muma, Vice-chairman of the Business Premises Rent Tribunal of Kenya delivered at Nairobi on June 18, 2021 in respect of Tribunal Case No 232 of 2021. In the said decision the Chairman dismissed the application and ordered that the applicant vacates the suit business premises and picks his belongings failure to which the landlord was at liberty to evict the tenant (applicant).
2. Being dissatisfied with the said ruling, the Appellant filed this appeal. The Appeal is based on sixteen grounds and can be summarized *inter alia* as follows:
 - a. That the Trial Magistrate erred in law by misdirecting and misapplying his judicial powers by declining to give orders to re-open a Business Premise closed illegally



- b. The Trial Magistrate Andrew Muma erred in law and fact by failing to capture the gravity of the matter that is so Grave.
 - c. The Trial Magistrate erred in law and facts by presiding over the subject matter in a manner that falls below the threshold
 - d. That the Trial Magistrate erred in law and facts by giving a Hearing date in court only for the same to be varied by the Registry after the service is effected
 - e. That the Trial Magistrate erred in law and facts by upholding that the rent of the illegally closed shop is payable during the closure as demanded, while the matter is before court
 - f. That the learned Magistrate erred in law and facts by acting in bad faith contrary to section 6 of the Judicature Act Chapter 8 by denying the subjects their human right and freedoms as enshrined in the Constitution of the Republic of Kenya 2010 by dwelling on technicalities contrary to Article 159 (2d).
3. The Appeal was dispensed by way of written submissions.
 4. The 1st Appellant in his submissions gave a summary of how he came to be a Tenant on the demised premises and what led to the filing of a reference at the Tribunal which is reasons for this appeal. He alleged that he rented the business premises of the 1st Respondent who is a director of the company that owns the business premises, Maworks Property Management Company Limited and the 2nd Respondent is a care-taker of the suit premises. He contends that he paid the 1st Respondent rent so that he could enter the rented premises and run a beauty pallor through the 2nd Appellant.
 5. In his Complaint dated 9/03/2021, averred that he had been running a business managed by the 2nd Appellant on premises leased from the 1st Respondent. He claimed that in the month of March on 6/03/2021, the 1st Respondent entered upon those premises and closed them alleging that he had not paid rent for the month of October, November and December including service charge yet according to him he had paid the rent fully including the month of January and February of 2021. The rent was paid by the 2nd Appellant.
 6. He claimed that as a result of the illegal acts of the Respondents, he suffered loss of business and also his business tools were locked in the suit premises except a few which were in use on the morning of 6/03/2021 for which he seeks on appeal the quashing of the judgment, damages, compensation for fittings and loss of business, conservatory orders and that the Respondent deposits with court Ksh 2 million pending the hearing and determination of this suit.
 7. The Tribunal in its ruling stated the 1st Appellant in their application dated 9/03/2021 stated that the tenant's rights had been violated by the action of the landlord of illegal closure of the suit premises on 9/03/2021 and the Tribunal had jurisdiction to order the re-opening of the suit premises since there was no legal justification for closing the premises
 8. Further that the 1st Appellant's notice of motion was premised on the fact that their rights of dignity had been eroded despite the same being guaranteed under the constitution.
 9. The 1st Respondent on her part averred that the 1st Appellant failed on their part to honor the tenancy agreement by accumulating rent upto Ksh 52,500 making it untenable to have the Appellants as tenants in the suit premises.



10. That the burden of proof to produce receipts to show payment of rent as had been agreed between the 1st Appellant and the 1st Respondent was an obligation of the 1st Appellant and he was not able to discharge this burden of proof effectively since the mpesa payments do not attest to full payment of rent, deposit and service charge and therefore the 1st Appellant had failed to honor his duties of a tenant. The 1st Respondent also stated that the Notice of Termination of Tenancy dated May 20, 2021 had lapsed having run its full course and therefore the 1st Appellant needed to have moved out.
11. The 1st Appellant on his part denied having been service with any notice and only got to hear about the notice from the replying affidavit filed by the 1st Respondent. As such he stated that he was illegally locked out of his business premises while there was a reference filed before the tribunal dated 9/03/2021.
12. The 1st Respondent submitted that the tribunal was right in finding that the Appellant's application dated 9/03/2021 had no legal leg to stand on and it lacked merit

Analysis and Determination

13. I have perused the entire record of the appeal and I have considered the grounds of appeal set out in the memorandum of appeal. I have also considered the parties' respective submissions. Similarly, I have considered the relevant legal framework and jurisprudence on the key issue in this appeal.
14. From the memorandum of appeal and the submissions, the issues for determination are found to be;-
 - a. Whether the tribunal had jurisdiction to hear and determine the dispute preferred before it.
 - b. Whether the tribunal erred by finding in favour of the Respondent?
 - c. Whether the Appellant is entitled to the orders sought?
15. On whether the Tribunal had jurisdiction to hear and determine the dispute preferred before it, I begin by pointing out that the Appellant had not challenged the tribunal's jurisdiction per se but only as it related to the orders made, the process of reaching its determination and what he has termed as his rights being violated. This does not go to the core issue of jurisdiction.
16. In my view, irrespective of the dispute presented before it, under Section 12(1) of Cap 301, the Tribunal had power to, inter alia, determine whether or not any tenancy is a controlled one (12(1)(a)) and make orders, upon such terms and conditions as it thought fit, for re-opening of the tenant's (Appellant's) business premises, and conservatory orders prohibiting eviction of the Appellant from the business premises to allow his quiet possession, which orders may be applicable to any person, whether or not he is a tenant, being at any material time in occupation of the premises comprised in a controlled tenancy.
17. The vice-chairman was however of the view that there is no controlled tenancy since the Appellant did not pay the deposit, service charge and was in rent arrears. He stated that controlled tenancies being contracts their substratum failed when the 1st Appellant was in rent arrears. He further stated that having established that the 1st Appellant failed to proof payment of rent and therefore collapsing the substratum of there being no valid contract where controlled tenancies also fell under then he was "....forced to down his tools.."



18. The issue of a court downing its tools was discussed in the case of *Owners of the Motor Vessel Lillian S v Caltex Kenya* [1989] KLR 1. In that case, Hon Justice Nyarangi JA (as he then was) said this of jurisdiction and the consequence of a court holding that it lacks jurisdiction: -

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

19. In the instant case the vice-chairman of the tribunal downed his tools as he stated but he then went ahead to make a finding about the application on its merit without the case being heard. This in my view prejudiced the 1st Appellant who was persuaded by filing the reference before the Tribunal that it had jurisdiction.
20. As a starting point, it is common cause that on October 19, 2021 the 1st Appellant paid the 1st Respondent a sum of Ksh 10,000 as rent for the premises that the 2nd Appellant was to set up a business enterprise. The 1st Appellant and the 1st Respondent negotiated the rent from Ksh 13,000 downwards to Ksh 10,000 according to the replying affidavit of the 1st Respondent dated 9/04/2021. Therefore, the 1st and 2nd Appellant were by operation of the law the 1st Respondent's tenant in the suit premises. It is also uncontested that the tenancy was not reduced into writing. For that fact and that the business carried out in the premises by the tenant was a beauty parlor then the tenancy would be a controlled tenancy within the meaning of Section 2 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* (the Act). I therefore do not agree with the vice-chairman of the tribunal that there was not controlled tenancy I find that the relationship between the 1st Appellant and the 1st Respondent was a controlled tenancy.
21. In his submissions at the tribunal, the advocate of the 1st Respondent was also persuaded that the relationship between the 1st Appellant and the 1st Respondent was that of a controlled tenancy and he relied on the cases of *Rogan Kamper vs Lord Grosvenor (No2)* [1977]KLR 129, *East Africa Power and Lighting Co Ltd vs Attorney General* [1978] eKLR, *Msabaha Girls Secondary School v Gaetemo Grass* [2014]eKLR.
22. Further the 1st Respondent in her affidavit notes that she issued a notice of termination of tenancy agreement. The issuance of this notice points to existence of a tenancy. I however note that there is was not copy attached by the 1st Respondent of the said notice. The 1st Respondent avers to having entered into a negotiation of payment of rent by the 1st Appellant and even reduced it to Ksh 10,000 from the initial Ksh 13,000. All this point to a tenancy relationship which was however not reduced into writing. Paragraph 11 of the Replying Affidavit has a tabulation of payment of rent by the 1st Respondent.
23. In a controlled tenancy under the Act, the tenant enjoys some protection and the termination of or alteration of the terms and conditions of such a tenancy cannot be effected without the giving of the notice required by the *Act*. In this regard Section 4 of the *Act* reads:
- 1) Notwithstanding the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be terminated, and no term or condition in, or right or service enjoyed by the tenant of, any such tenancy shall be altered, otherwise than in accordance with the following provisions of this *Act*.



- 2) A landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the tenant, any term or condition in, or right or service enjoyed by the tenant under, such a tenancy, shall give notice in that behalf to the tenant in the prescribed form.
- 3) A tenant who wishes to obtain a reassessment of the rent of a controlled tenancy or the alteration of any term or condition in, or of any right or service enjoyed by him under, such a tenancy, shall give notice in that behalf to the landlord in the prescribed form.
- 4) No tenancy notice shall take effect until such date, not being less than two months after the receipt thereof by the receiving party, as shall be specified therein:

24. Provided that—

- i. where notice is given of the termination of a controlled tenancy, the date of termination shall not be earlier than the earliest date on which, but for the provisions of this Act, the tenancy would have, or could have been, terminated;
- ii. where the terms and conditions of a controlled tenancy provide for a period of notice exceeding two months, that period shall be substituted for the said period of two months after the receipt of the tenancy notice;
- iii. the parties to the tenancy may agree in writing to any lesser period of notice.

25. A tenancy notice shall not be effective for any of the purposes of this *Act* unless it specifies the grounds upon which the requesting party seeks the termination, alteration or reassessment concerned and requires the receiving party to notify the requesting party in writing, within one month after the date of receipt of the notice, whether or not he agrees to comply with the notice.

26. A tenancy notice may be given to the receiving party by delivering it to him personally, or to an adult member of his family, or to any other servant residing within or employed in the premises concerned, or to his employer, or by sending it by prepaid registered post to his last known address, and any such notice shall be deemed to have been given on the date on which it was so delivered, or on the date of the postal receipt given by a person receiving the letter from the postal authorities, as the case may be.

27. In view of the foregoing, I find and hold that the Tribunal had jurisdiction to determine whether the tenancy that allegedly existed between the parties to this dispute was a controlled one. In doing so, the Tribunal was duty bound to consider the evidence tendered by both sides concerning that issue. By dint of the provisions of Section 15 of *Cap 301*, this court similarly, has jurisdiction to hear and determine the appeal herein.

28. It is not lost to the court that Clause 9 of the Memorandum of Appeal the Appellant refers to a Notice of Eviction which was issued by the Respondent. It therefore follows that the Respondents recognized that theirs was a controlled tenancy relationship.

29. Since the Tribunal by operation of law had power to hear the dispute presented before it for, among other purposes, determining whether there existed a tenancy agreement between the parties to the dispute and if found to exist, whether or not the tenancy was a controlled one; it is not right to say the Tribunal vice-chairman misdirected and misapplied his powers and discretion in the orders issued.



What the Appellant should be saying is that, based on the evidence adduced before it, the Tribunal should not have made the decision it made.

30. Did the Tribunal err in finding in favour of the Respondent? My answer is, it did. I say this based on the pleadings presented before the Tribunal namely that the 1st Appellant had been in use and occupation of the suit premises for a four months or thereabout and had paid monthly rent as agreed although defaulting in some months and what he stated in his plaint as service charge. The Tribunal Vice-Chairman did not however find that there was a controlled Tenancy and therefore did not apply the required standards by law to allow for an eviction. On this point therefore I find that the 1st Appellant was not given a chance to adduce evidence a controlled tenancy.
31. On the question of whether the Appellant is entitled to the orders sought.
32. The 1st Appellant has sought six orders namely:
 - i. The Appeal be allowed and judgement entered on June 18, 2021 be quashed
 - ii. That the High Court do order the Respondents to pay damages and any other reliefs, now that the Respondents have admitted in court that, they had actually confiscated the shop and sold it to the 3rd party who are not in court
 - iii. That the High Court do order the Respondents to pay for the entire conversion of a store into a shop and all the fittings plus all the working tools and equipment thereof
 - iv. That the High Court do order the Respondents to pay for the loss of business from the date we opened the shop to the closure of this appeal with the high applicable interest rates
 - v. That this High Court do issue preservative orders compelling Respondents to deposit Ksh 2 milling with the court until this appeal is heard and determined. They are already in the process of selling the business and run away
 - vi. That the court condemns the Respondent/landlord with the highest cost of this suit.
33. Having found that the vice-chairman of the tribunal erred in fact and in law by finding that there was not controlled tenancy and that the tribunal lacked jurisdiction I am reluctant to consider any of the orders sought by the 1st Appellant except to allow the prayer for the appeal and subsequently order for a retrial at the tribunal.
34. I find that there was undisputed conduct between the parties that pointed to an existing tenant and landlord relationship.
35. Whereas the matter of drafting of pleadings was not the subject in this case, I feel constrained to comment on it. The pleadings drafted by the 1st Appellant disclose a cause of action but the court noted that the brief was badly drafted and by the Appellant submitting a poorly written brief, the litigant fails the Court as well as himself. The pleadings contained conjectures which may prejudice an important matter before the court. The 1st Appellant needs to relook at this and maybe seek legal representation in future.
36. I have said enough on drafting of pleadings let me now give my disposal orders. Given the fore-going the upshot is that:



- a. The appeal is merited.
- b. I refer back this case for retrial at the tribunal within the next 21 days.
- c. Costs are awarded to the 1st Appellant.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 1ST DAY OF NOVEMBER 2022.

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MOGENI J.

JUDGE

In the Virtual Presence of :-

Mr Alosa for the Defendants

Mr Jackson Ndegwa in person (Plaintiff/Applicant)

Sagina/Yvette : Court Assistants

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MOGENI J.

JUDGE

