



Serem v Bett (Civil Appeal 48 of 2019) [2023] KEHC 17698 (KLR) (17 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17698 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 48 OF 2019
RN NYAKUNDI, J
MAY 17, 2023**

BETWEEN

SALLY SEREM APPELLANT

AND

KIPSOE NELSON BETT RESPONDENT

(Being an appeal from the Ruling of Hon. N. Moseti (SRM) dated 29th March, 2019 at Eldoret Chief Magistrate's Court in Civil Case No. 670 of 2015)

JUDGMENT

Coram:

Before Hon. Justice R. Nyakundi

Keter, Nyolei & Co. Advocates

Chepkitway & Co. Advocates

This is an appeal arising from the ruling delivered on 29th March, 2019 by **Hon. N. Moseti** (SRM) in ***Eldoret CMCC No. 670 of 2015***.

Background

- 1 At the trial Court the Appellant herein filed a Preliminary Objection dated November 13, 2018 challenging the jurisdiction of the Court therein to hear and determine the matter. According to the Appellant, the trial Court lacked jurisdiction to hear and determine landlord and tenant disputes as such disputes fall under the express jurisdiction of the Business Premises Rent Tribunal and not the Magistrate's Court.
- 2 Aggrieved by the said ruling, the Appellant on April 11, 2019 filed a Memorandum of Appeal raising the following grounds:



1. That the learned Magistrate erred in law and fact by failing to uphold/allow the Preliminary Objection dated November 13, 2018 challenging the jurisdiction of the Magistrate Court to hear and determine the matter.
 2. That the learned Magistrate erred in law and fact by failing to appreciate the applicable laws governing the landlord/tenant relationship that existed between the parties herein in particular the *Landlord and Tenant (Shops, Hotels and Catering establishments) Act*, Cap 301 Laws of Kenya.
 3. That the learned Magistrate erred in law and fact by failing to evaluate consider and determine all the issues raised in the Preliminary Objection by the Appellant hence arriving at a wrong decision.
 4. That the learned Magistrate erred in law and fact in dismissing the Preliminary Object and in effect usurping the jurisdiction of the Business Premises Rent Tribunal to herein and determine the matter.
 5. That the learned Magistrate erred in law and fact by misdirecting and/or contradicted himself when he on one hand held that the Respondent was a tenant by operation of law after he did not vacate the suit premises on expiry of the tenancy agreement and hence subject to the *Landlord and Tenant (Shops, Hotels and Catering establishments) Act* Cap 301 Laws of Kenya and on the other hand proceeding to dismiss the Preliminary Objection by holding that there existed no controlled tenancy between the Appellant and the Respondent.
 6. That the learned Magistrate erred in law and fact by misapprehending/misinterpreting the authorities in *Beatrice Nduta Kiarie v John Mwangi Thuo* [2013] eKLR and *Jitendra Mathurdas Kanabar & 2 Others v Fish and Meat limited* [1997] eKLR which were in support of the Appellant's position that it is the Business Premises Tribunal which had jurisdiction to hear and determine disputes relating to controlled tenancies.
 7. That the learned Magistrate erred in law and fact by failing to uphold the Preliminary Objection based on the pleadings filed which clearly pointed to the existence of controlled tenancy governed by the *Landlord and Tenant (Shops, Hotels and Catering establishments) Act*, Cap 201 Laws of Kenya.
 8. That the learned Magistrate erred in law and fact by misinterpreting Section 6 (1) of the *Landlord and Tenant (Shops, Hotels and Catering establishments) Act*, Cap 201 Laws of Kenya as to which party was to file a reference to the Business Premises Rent Tribunal once termination Notice was issued.
 9. That the learned Magistrate erred in law and fact in dismissing the Appellant's Preliminary Objection dated November 13, 2018 without due regard to the Appellant's Claim against the Defendant therein now the Respondent herein.
 10. That the learned Magistrate erred in law and fact by failing to take into account, and consider the Appellant's submissions, the applicable law and judicial precedents hence an erroneous decision.
3. On 21/3/2023 the Court directed parties to file their respective submissions. The Respondent through his Counsel on 19th April, 2023 filed submissions dated April 18, 2023 whereas the Appellant did not file any.



The respondent's submissions

4. Mr. Keter, Counsel for the Respondent submitted that the trial Court had the requisite jurisdiction to hear and determine the dispute at hand. Counsel maintained that the preliminary Objection filed by the Appellant herein is without merit and ought to be dismissed with costs.
5. Counsel submitted that the Business Premises Rent Tribunal as established under Section 11 of the *Landlord and Tenant (Shop, Hotels and Catering Establishment) Act* Cap 301 (2012) is only mandated to entertain disputes in instances where the tenancy relationship between a landlord and tenant still exists. According to Counsel, it is not in dispute that there exists a tenancy agreement between the parties herein. What is in dispute is only the issue of jurisdiction.
6. Counsel argued that the dispute between the parties herein arose after the expiry of the tenancy period and thus the tribunal lacked the jurisdiction to entertain the matter. Counsel further submitted that the parties herein on May 1, 2014 entered into a lease agreement for the period of 12 months. That lease period was supposed to end on May 1, 2015 which it did. Counsel further submitted that during the lease period the Respondent herein paid all the rent in the sum of Kshs 3,500/= per month making a total of Kshs 42,000/=.
7. Counsel further submitted that the trouble between the Respondent and the Appellant begun in May 2015 being the period outside the initial tenancy period of 12 months. Counsel maintained that on August 8, 2015 the Appellant and her husband one Isaac Serem and others came to the premises and forcefully removed the doors thereon leaving the Respondents 's goods exposed to loss.
8. Counsel argued that Courts of law do not make contracts between parties but only construe them in case of dispute. According to Counsel, therefore any assertion that there exist a tenancy agreement still existed by August 6, 2015 between the Respondent and the Appellant will only amount to an injustice on the part of the Respondent herein. Counsel maintained that the actions by the Appellant together with her husband, on or about 6th August, 2015 of forcefully removing the grill doors to the let premises exposing the Respondent's goods to damage, loss and theft and further returning the said doors but locking the premises on August 10, 2015 clearly amounted to the termination of the lease agreement between the Appellant and the Respondent herein.
9. Counsel relied on the following cases; Jtendra Mathurdas Kanabar & 2 Others v Fish and Meat limited, Msa Civil Appeal No 267 of 1996 and DI Koisagat Tea Estate Ltd v Eritrea Othodox Tewhdo Church Ltd [2015] eKLR to buttress his submissions
10. Counsel urged the Court to dismiss the appeal in its entirety with costs to the Respondent.

Determination

11. I have considered the appeal and the submissions by learned Counsel. The only issue for determination in my view is whether the trial Court was clothed with the requisite jurisdiction to here and determine the dispute between the parties herein in the first instance.
12. In the case of Samuel Kamau Macharia & Another v 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.”

13. The jurisdiction of BPRT Tribunal was aptly discussed in the case of Republic vs Business Premises Rent Tribunal & Another Ex- Parte Albert Kigera Karume [2015] eKLR which 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 and stated 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...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”.

14. The Tribunal derives its jurisdiction from the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, with respect to certain premises for the protection of tenants of such premises from eviction or from exploitation and for matters connected therewith and incidental thereto.
15. In the present appeal, the Appellant has faulted the trial Magistrate for failing to appreciate the applicable laws governing the landlord/tenant relationship that existed between the parties herein and as a result of which the trial Magistrate usurped the powers of the Business Premises and Rent Tribunal. The Appellant further contends that the trial Magistrate contradicted himself by finding that the Respondent herein had become a tenant by operation of law for failing to vacate the suit premises on expiry of the tenancy agreement and thereafter proceeded to dismiss the preliminary objection by finding that there was no controlled tenancy between the parties herein.
16. From the evidence on record, it is not disputed that the Appellant and Respondent entered into a tenancy agreement for a period of (12) months starting May 1, 2014 and ending on May 1, 2015 with a monthly rent of Kshs 3,500/=. The Appellant on May 8, 2015 issue the Respondent a notice of termination of the lease agreement.
17. According to the Respondent, the cause of action herein arose on August 8, 2015 when the Appellant, her husband Isaac Serem and others came to the suit premises and forcefully removed the doors and took them away leaving the Respondent’s goods exposed to loss. It is further also not disputed that the initial tenancy agreement between the parties herein had expired on May 1, 2015 but the Respondent herein continued to be in occupation of the suit premises despite not having the Appellant’s express consent to do so.



18. The only bone of contention in this appeal is whether the continued stay in the suit premise by the Respondent herein culminated into a controlled tenancy.
19. The *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* cap 31 section 2 defines controlled tenancy as: -
- a) A tenancy of a shop, hotel or catering establishment-
 - b) Which has not been reduced into writing; or
 - c) Which has been reduced into 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.

Provided that no tenancy to which the Government, the Community or a local authority is a party, whether as landlord or as tenant, shall be a controlled tenancy;

20. The Appellant is therefore expected to sufficiently a substantively prove that the extended stay by the Respondent yielded a contract for a controlled tenancy to be presumed to have ensued. It is trite law that he who alleges must prove.
21. I have gone through the pleadings filed by both the Appellant and the Respondent and I have not seen any evidence of payment of rent by the tenant and acceptance thereof by the landlord after May 1, 2015 being the time when the tenancy agreement expired. The argument by the Appellant that the Respondent became a tenant by operation of law after the expiry of the tenancy agreement cannot therefore stand.
22. Further in the absence of a renewal of the tenancy agreement between the parties herein, it becomes irresistible to find that there no longer existed a tenancy agreement between the Appellant and the Respondent after 1/4/2015.
23. The Landlord having not continued to receive any rent from the Tenant after the expiry of the lease agreement, I do further find that there no longer exists any landlord/tenant relationship between the two parties and the Tribunal thus did not to have any jurisdiction in the matter. The question is whether property and contract analysis in the instant case differ significantly in their determination of substantial performance and if so which would have been the proper forum of conveniens. The law as it stands for now the tenant's rent obligation is excused if the landlord evicts the tenant from possession of the premises. The source of this obligation is to protect the tenant possession is to express or implied covenant of quiet enjoyment. That is generally conceded as the key features in property law. The landlord obligation is to secure vacant possession of the premises and to refrain from any conduct which disturbs or inconveniences the tenant from enjoying the use of the property.
24. From the facts of this appeal there was an invention by the landlord of the tenants right to physical use and possession of the property thus triggering a dispute. This was done on the alleged sensible ground that the landlord was no longer interested in renewing the lease agreement. Apparently the lease had expired and the landlord specifically took a step of not receiving any rent from the tenant. In this context there was constructive eviction of the tenant by the landlord from possession of the property. Certainly in my opinion it would be regarded as an act of material breach of the covenant of quiet enjoyment by the tenant.



25. Therefore, part of the question that can be said to arise for determination is whether the landlord's conduct excused the tenant from substantially performing her part of the bargain. In my judgement refusal to receive or acknowledge rent from the tenant manifest itself as a specific intent by the landlord to dispossess the tenant of his rights to the premises. A panoramic view of the record presents a typical case of constructive eviction of the appellant's breach of an expressed term of the lease which is considered indispensable to possession and use of the rentable premises. Undoubtedly, the substantial breach involving disconnection of electricity and other utilities which are essential for the beneficial use of the tenant denotes that the premises was unavailable to the tenant within the contractual obligations of such a tenancy. Since possession in all in its context disconnection of essential utilities is prima facie a substantial interference of the lease agreement to constitute a material breach. The failure of the appellant to do what is lawful required of her either by the terms of the lease or otherwise by the operation of the law rendered the demised premises unfit for the purposes of which the tenant intended to put it into profitable business use.
26. I know of course, the jurisdiction expressed and provided for under mandatory provision of the *Landlord and Tenant (Shop, Hotels and Catering Establishment) Act* cap 301 (2012) (Rev. 2015). However, the uniqueness of this appeal is that it is not possible to argue a lease agreement existed with full covenants in Landlord – Tenant Law. The rule as to the preliminary objection is therefore not applicable in the circumstances of the cause of action before the trial court. I have simply attempted to spell out and to put into more concrete terms of what is usually perceived to be the essentials of the Landlord and Tenant Establishment Act (Supra) the central point is that the relationship between the landlord and tenant had irretrievably broken down and cannot be salvaged by articulation of issues in another independent forum as premised in Article 50(1) of the *Constitution*.
27. Once the contracting parties to a contract frustrate any of the occurrence of the terms which form part of the foundation of the contract it is difficult to construe sustainability. To effectuate this newly created rights as between the parties when the bare livability of the premises is not guaranteed there is no jurisdiction to be exercised by the Rent Tribunal as known under *Cap 301* of the Laws of Kenya. It is therefore, difficult to argue as the appellant did that the trial court had no jurisdiction. This rationale presents a conclusion that the appeal as filed was on sinking sand as the contractual relationship between the appellant and the respondent had fundamentally abated. The upshot of it the interlocutory appeal be and is hereby dismissed with cost to the respondent. Immediately after this decision the court seized of jurisdiction shall proceed in earnest to determine the issues in the scope pleaded in the plaint.
28. It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 17TH DAY OF MAY, 2023.

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R. NYAKUNDI

JUDGE

In the presence:

