



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC. CASE NO. E014 OF 2021

OLA ENERGY KENYA LIMITED.....PLAINTIFF

VERSUS

RASHID OPONDO OTIENO

T/A KISUMU BREAKDOWN SERVICES LIMITED.....DEFENDANT

RULING

The plaintiff has brought this suit against the defendant seeking a permanent injunction restraining the defendant either by himself, his agents and/or assignees from entering and or staying or using in any way on Land Title no. Kisumu Municipality /Block 9/263. The Plaintiff further seeks an order of eviction of the defendant either himself, his agents and or assignees from land title Kisumu Municipality /Block 9/263. The plaintiff claims that the defendant has occupied the suit land and uses part of it for breakdown services. The plaintiff claims that the defendant has encroached on this land. The Plaintiff's main contention is that the defendant has encroached on her land. The defendant on the other hand states that he is a tenant of the plaintiff paying monthly rent of Kshs. 10,000/= . He has annexed evidence of payment of rent and a single business permit.

The defendant has raised a preliminary objection that the defendant is a protected tenant and that the tenancy between the plaintiff and the defendant is a controlled tenancy pursuant to the provisions of the section 2 of the Landlord and tenant (Shops, Hotels and catering Establishment Act) Cap 301 Laws of Kenya and therefore this court lacks statutory Jurisdiction to entertain the dispute as the dispute is within the jurisdiction of the Business Premises Rent Tribunal.

I have perused the plaint, supporting affidavit, replying affidavit on record and do find that there is an allegation of a relationship of tenant/Landlord between the plaintiff and the Defendant though the same is not reduced in writing.

Such disputes are within the consent of the Landlord and tenant (shops, Hotels catering establishment Act Cap 301 Laws of Kenya.

Section 2 of Cap 301 provides: **"2. (1) For the purposes of this Act, except where the context otherwise requires –“controlled tenancy” means a tenancy of a shop, hotel or catering establishment which has not been reduced into writing; or which has been reduced into writing and which is for a period not exceeding five years; or 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;.....“shop” means premises occupied wholly or mainly for the purposes of a retail or wholesale trade or business or for the purpose of rendering services for money or money's worth; “tenancy” means a tenancy created by a lease or under-lease, by an agreement for a lease or under-lease, by a tenancy agreement or by operation of law, and includes a sub-tenancy but does not include any relationship between a mortgagor and mortgagee as such; “tenancy notice” means a notice given under subsection (2) or subsection (3) of section 4 of this Act; “tenant” in relation to a tenancy means the person for the time being entitled to the tenancy whether or not he is in occupation of the holding, and includes sub-tenant;**

PLAINTIFF'S SUBMISSIONS

1. The defendant's preliminary objection is premised on the fact that he claims to be a controlled tenant of the plaintiff wherefore this court lacks jurisdiction to entertain the plaintiff's claim against him as any action by the plaintiff ought to have been brought before the Business Premises Tribunal under the Landlord (shops Hotels and Catering establishments) Act (cap. 301).

2. The pre-eminent decision of the Court of Appeal of east Africa in *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd (1969) EA 696* established the principle that “**a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.**”

3. By the amended plaint dated the 29th March 2021 and filed on the same date, the plaintiff sues the defendant as a trespasser of the suit property, to which the defendant’s reply is that he is a controlled tenant. Therefore, and notwithstanding that the plaintiff’s reply to defence dated the 20th May 2021 (filed on the 25th May 2021) specifically denies this claim, on the basis of the plaint and defence alone the defendant’s claim to be a controlled tenant of the plaintiff which is a response to the plaintiff’s assertion that he is a trespasser, is a fact in dispute between the parties and cannot found a preliminary objection that requires as its premise undisputed facts.

4. The defendant’ preliminary objection is accordingly ill-founded on a claim, not a fact that is at the heart of the dispute between the parties. This court is properly vested with the requisite jurisdiction to entertain the plaintiff’s claim for trespass.

5. The court is urged to dismiss the preliminary objection with costs.

THE DEFENDANT’S SUBMISSIONS

1. The plaintiff brought this suit against the Defendant seeking for his eviction from the suit land parcel Kisumu Municipality/Block 9/263. The Defendant in his defence stated that he is a controlled tenant of the suit property and has been paying rent of Kshs. 20,000/= per as a commercial tenant of the same prior to the Plaintiff changing names from Libya Oil Kenya Limited to Ola Energy Kenya Limited. The Plaintiff did not file any reply to defence to discount this fact by the Defendant that he is a controlled tenant of the Plaintiff.

2. Section 2 of the Landlord and Tenant (shops, hotels & catering establishments) Act Cap 301 defines a controlled tenancy to be a tenancy of a commercial premises that has not been reduced into writing, or which has been reduced into writing and which is for a period not exceeding five years. The Defendant claimed that his tenancy was not reduced into writing and he has been paying rent to the plaintiff.

3. The defendant has now brought a preliminary objection challenging the court’s statutory jurisdiction to hear the case. The Defendant’s argument being that being a controlled tenant by virtue of section 2 of the Landlord and Tenant (shops, hotels & catering establishments) Act cap 301 the appropriate forum for determination of the question of eviction of a controlled tenant is the business premises rent tribunal established by section 11 of the said act. The powers of the tribunal are spelt out in section 12 which at section 12 (e) includes to make order, upon such terms and conditions as it thinks fit, for the recovery of possession. The process of terminating a controlled tenancy is also enumerated under sections 4, 6 & 7 of the Act of which the Plaintiff has not complied with.

4. The Environment and Land Court only acts as an appellate court at section 15 of the Act to hear appeals from decisions of the tribunal. Hence the Environment and Land Court is not a court of first instance in matters dealing with controlled tenancy but purely as an appellate court. The case before this court is not an appeal but an initial case hence this court lacks jurisdiction.

5. Jurisdiction is everything, and where a court or tribunal lacks jurisdiction, it cannot proceed with the matter but down its tools. See the celebrated case of **Motor vessel M.V. Lillians vs Caltex Oil (Kenya) Limited (1989) LLR 1653 page 10.**

“Jurisdiction must be acquired before judgment. It is for this reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on evidence before the court. It is immaterial whether the evidence is scanty or limited...the moment the court determines that it has no jurisdiction it has to down its tools and proceed no further.”:

6. On the same breath, the supreme court rendered itself in **Samuel Kamau Macharia & Ano. Vs KCB * 2 Others Supreme Court Civil Application no. 2 of 2011** that a court’s jurisdiction flows from either the constitution or legislation or both. In this case, the tenancy in question being a controlled one, the appropriate forum to ventilate any dispute ought to be the Business Premises Rent Tribunal and not this court.

7. Accordingly, it is the humble submission of the defendant that the court finds that it lacks the statutory jurisdiction to hear this case and proceeds to strike out the suit with costs to the Defendant.

I do find that this matter is not ripe for this court and can only come to the court on appeal from the decision of the Business Premises Rent Tribunal.

The objection is upheld and this suit is struck out with costs.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 13TH DAY OF DECEMBER, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE