



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CIVIL APPEAL NO.10 OF 2017

BETWEEN

HARRIET ISMAIL ALIAS NERIMA HAJALAAPPELLANT

AND

FREDRICK BULUMA OKECH.....RESPONDENT

(Being an Appeal from the ruling delivered in Busia Chief Magistrate's Court Civil Case No. 152 of 2017 by Hon. J.N Maragia- Resident Magistrate).

JUDGMENT

1. The appellant herein, was the defendant in the Busia Chief Magistrate's Court Civil Case Number 152 of 2017. On 22nd August 2017, the learned trial magistrate delivered a ruling and held that the court had jurisdiction to hear and determine the case.
2. The appellant was aggrieved after her preliminary objection was dismissed and filed this appeal. The appellant was represented by the firm of Ashioya & Company, Advocates. She raised the following grounds:
 - a. That the learned magistrate erred in law and in fact in dismissing the preliminary objection and clothing herself with jurisdiction she did not have.
 - b. That the learned magistrate erred in law and in fact in failing to find that the respondent had conceded that there was a matter pending before the Kakamega Business Premises Rent Tribunal.
 - c. That the learned magistrate erred in law and in fact by not comprehending and dealing with the matter before her.
 - d. That the learned magistrate erred in law and in fact by irregularly handling the matter.
3. The respondent was represented by the firm of Calistus & Company Advocates. The respondent did not file any grounds in opposition.
4. On 23rd September 2019 this court gave directions that the appeal be disposed of by way of written submissions. The appellant filed her submissions but the respondent in spite of seeking an extension by a week did not do so. When the matter was mentioned on 10th December 2019, the respondent had not filed any submissions.
5. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.
6. The dispute between the appellant and the respondent is an issue of sub tenancy and non-remittance of some profits as agreed. The tenancy issue was at the time of filing of this suit pending in Kakamega Business Premises Rent Tribunal.
7. The Landlord And Tenant (Shops, Hotels And Catering Establishments) Act, CAP. 301 laws of Kenya at section 12 provides as follows:

1. A Tribunal shall, in relation to its area of jurisdiction have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in addition to and without prejudice to the generality of the foregoing shall have

power—

- (a) to determine whether or not any tenancy is a controlled tenancy;
- (b) to determine or vary the rent to be payable in respect of any controlled tenancy, having regard to all the circumstances thereof;
- (c) to apportion the payment of rent payable under a controlled tenancy among tenants sharing the occupation of the premises comprised in the controlled tenancy;
- (d) where the rent chargeable in respect of any controlled tenancy includes a payment by way of service charge, to fix the amount of such service charge;
- (e) to make orders, upon such terms and conditions as it thinks fit, for the recovery of possession and for the payment of arrears of rent and mesne profits, 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

From this section, it is clear that the dispute on tenancy is seized by the Business Premises Rent Tribunal. The learned trial magistrate therefore erred in assuming the jurisdiction to determine this dispute.

8. The court may have had jurisdiction to determine the issue of remittance of profits. However, since this was tied to the issue of tenancy and which the court lacked jurisdiction, the proper way was to down tools as was held by the Court of appeal in the case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** held as follows:

I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

In the instant case, the issue of jurisdiction was raised at the earliest opportunity but the learned trial magistrate failed to appreciate the fact that the jurisdiction on the issue of tenancy was in the Tribunal. She also failed to appreciate that at the time, the matter was pending at the Kakamega Business Premises Rent Tribunal.

9. From the foregoing analysis of the evidence, I allow the appeal with costs. The ruling by the learned magistrate dated 22nd August 2017 is hereby set aside.

DELIVERED and SIGNED at BUSIA this 6th day of February, 2020

KIARIE WAWERU KIARIE

JUDGE