



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISCELLANEOUS APPLICATION NO. 51 OF 2019

RONALD INGANGA LUDAH.....APPLICANT/TENANT

VERSUS

DAVID ABDALLAH ITEMERE.....1ST RESPONDENT/LANDLORD

KENNEDY SHITUVI Omutanyi.....2ND RESPONDENT/LANDLORD

RULING

1. The application that I am tasked with determining, a Motion dated 30th April 2019, was filed by herein by Ronald Inganga Itemere, to be referred hereafter as the applicant, seeking orders that that the orders made by the Business Premises Rent Tribunal, on a reference dated 21st July 2015, be enforced and that the 1st and 2nd respondents be directed to return to the applicant his business and business property, the 1st and 2nd respondents to furnish the court with legal documents of ownership of Marama/Lunza/1960 as the two were claiming ownership of the same property, and to direct the Butere Police Station to supervise or enforce the opening of the applicant's business and return of his business property and records.
2. The matter was placed before me on 2nd May 2019, under certificate of urgency. I directed that the same be served on the respondents. It was to be heard *inter partes* on 22nd May 2019, but come that date the same was not heard and was allocated another date. It was eventually heard on 26th November 2019.
3. Before I can consider the Motion on its merits, I must first of all determine whether or not the same was served on the respondents, as there is no reply on record by them. After the order on service was made on 2nd May 2019, the applicant purportedly effected service, not personally or directly, on the respondents, but through substituted service, by way posting the same to certain postal addresses. I note that he did the same with respect to the hearings slated for 24th October 2019 and 26th November 2019.
4. The law of procedure is that parties must initially be served personally or directly. That is the norm, so that whenever a court directs service, it is presumed, and expected, that the party to effect service would serve on the party to be served directly or personally. That means by taking the document, to be served, directly and personally to the person to be served, and to deliver it to that person physically.
5. Substituted service is resorted to where personal service has become impossible, either because the person to be served cannot be found or the person is outside jurisdiction and personal service cannot be procured without considerable expense to the other party. Substituted service, so called because it is a substitute to the normal mode of service, personal service, has to be done after leave or permission of court has been obtained. It can be through postage of the document to be served to the last known postage address of the party to be served, or through advertisement in the press or other media, or such other means as are permissible in law.
6. Both respondents in this cause have not filed responses to the application. They were not served personally, but through postage. That would mean they were served through substituted service. It is not clear whether the applicant ever sought to serve the application personally on the respondents, and encountered difficulties. There is nothing on record to indicate that an order was sought and granted by the court for substituted service. There is equally no material before me that establishes whether or not the postal addresses used by the applicant were the respondents last known addresses or not. I am, therefore, not prepared to find that the respondents were ever served with the papers to enable them respond to the application.
7. Service of court process is a critical matter in the civil cases, for it is by it that the other parties get to know that there is a suit or cause that has been brought against them, and it is by it that they get furnished with the cause papers stating the case that they are expected to meet. A party who wishes to obtain any orders from a court must first of all provide credible proof that he complied with the rules that relate to notifying the other party of the case, and of furnishing that other party with the cause papers for them to respond to the accusations made against them.
8. In view of that, the application ought not been determined, until the applicant first serves the Motion personally on the respondents as

envisaged by the law. Substituted service is an easier way out, but it is secondary to personal service, and it has to be resorted to only with leave of court. I do not think that the applicant would have difficulty serving the respondents, for they are his landlords, and it is expected that he pays or was paying rent to them, and consequently he should be able to trace them for personal service without any challenge.

9. Be that as it may. Before I send the applicant away to go and effect personal service on the respondents, I feel that there is an issue that I have to address, and that is in connection with jurisdiction that appears to be popping up on the question being which court, between the High Court and the Environment and Land Court, has jurisdiction to deal with enforcement of orders of the Business Premises Rent Tribunal.

10. Jurisdiction is at the heart of any class of proceedings before a court of law. It is something that the court before whom the matter is placed would address before it exercises discretion, whether or not the issue is raised before it by any of the parties. That position was articulated by the Court of Appeal in *Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd* [1989] eKLR in the following terms:

"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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

11. The Supreme Court with the same the same question in *Republic vs. Karisa Chengo & 2 others* (2017) eKLR , where it said:

"... in almost all the legal systems of the world, the term 'jurisdiction' has emerged as a critical concept in litigation. Halsbury's Laws of England (6th Ed.) Vol.9 at page 350 thus defines 'jurisdiction' as '... the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way of decision.' John Beecroft Saunders in his treatise Words and Phrases Legally Defined Vol. 3, at page 113 reiterates the latter definition of the term 'jurisdiction' as follows:

'By jurisdiction' is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and any be extended or restricted by the like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend. Or it may partake both these characteristics ... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."

12. What has been placed before me is a motion for enforcement of orders that were made by the Business Premises Rent Tribunal, in the following words:

"1. The Landlord is ordered to open the premises occupied by the Tenant to enable the Tenant access the premises and carry on with business forthwith.

2. The OCS Butere Police Station to enforce compliance and that peace prevails.

3. Costs of the Tenant assessed at Kshs. 15, 000/- to be paid within thirty (30) days in default the Tenants to deduct the same from future rents. "

13. I have not had the benefit of seeing the pleadings that were placed before the Business Premises Rent Tribunal, but the gist of it, from what is before me, it appears to be that the applicant was a tenant in premises standing on Marama/Lunza/1960, a piece of land belonging to the 1st respondent. The Business Premises Rent Tribunal exercises jurisdiction under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301, Laws of Kenya, which creates the Business Premises Rent Tribunal at section 11. A lease or tenancy or rental agreement is a contract where one party, the owner of land or premises, allows the other party, to move in and occupy the premises or land, for use at a consideration referred to as rent. At the heart of a lease or tenancy agreement is use and occupation. 'Tenancy' , 'tenant' and 'rent' are defined in section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, in the following terms:

" 'tenancy' means a tenancy created by a lease or underlease, by an agreement for a lease or underlease by a tenant agreement or by operation of law, and includes a subtenancy but does not include any relationship between a mortgagor and mortgagee as ..."

" '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 a subtenant ..."

" 'rent' includes any sum paid as valuable consideration for the occupation of any premises, and any sum paid as rent or hire for the use of furniture or as a service charge where premises are let furnished or where premises are let furnished or where premises are let and furniture therein is hired by the landlord to the tenant or where premises, furnished or unfurnished are let with services."

14. As will be seen from the definition of tenancy in section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, a tenancy is created by a lease or sublease. Leases and subleases are currently governed by the Land Registration Act, No. 3 of 2012, and the Land Act, No. 6 of 2012. The Land Registration Act provides for, among other things, registration of land and registration of leases created over properties registered under the Act. The provisions on registration of leases are set out in Part IV of the Land Registration Act, sections 54 and 55. The Land Act carries elaborate provisions on leases at Part VI, running from section 55 to 77, both inclusive. The provisions cover such matters as the power to lease land, the various types of leases, termination, possession under the lease, covenants and conditions, transfer and assignments of leases, remedies and relief.

15. It follows from the above, that leases that are created over property registered under Land Registration Act, and Marama/Lunza/1960 is one such property, are registrable under the Act. By virtue of the provisions in Part VI of the Land Act, Marama/Lunza/1960, being private land is subject to the Land Act, inclusive of Part VI thereof, relating to leases.

16. The question is, which court, as between the Environment and Land Court and the High Court, on appeals and enforcement of orders from the Business Premises Rent Tribunal, has jurisdiction to address issues or questions or disputes that may arise with respect to leases and tenancies? I believe the answer to that question lies with the Land Registration Act and the Land Act. Both statutes carry provisions which state the jurisdiction of the court with regard to the administration, operationalization, application and interpretation of the two statutes. These provisions are to be found in sections 2 and 101 of the Land Registration Act and sections 2 and 150 of the Land Act.

17. The provisions in the Land Registration Act state as follows:

“Interpretation.

2. In this Act, unless the context otherwise requires—

“Court” means the Environment and Land Court established under the Environment and Land Court Act, 2011, No. 19 of 2011: ...”

“Jurisdiction of court.

101. The Environment and Land Court established by the Environment and Land Court Act, 2011 No. 19 of 2011 has jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”

18. The Land Act carries similar provisions , which state as follows:

“2. Interpretation

In this Act, unless the context otherwise requires—

“Court” means the Environment and Land Court established under the Environment and Land Court Act, 2011 (No. 19 of 2011); ...”

“150. Jurisdiction of the Environment and Land Court

The Environment and Land Court established in the Environment and Land Court Act and the subordinate courts as empowered by any written law shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”

19. I understand these provisions, in the context of the matter before me, to mean that any disputes or questions or issues that require court intervention which revolve around leases and tenancies, to the extent that the same relate to use and occupation of land, fall within the jurisdiction of the Environment and Land Court. The Land Registration Act and the Land Act, confer jurisdiction on the Environment and Land Court with regard to all the processes that are subject to the two statutes, and, therefore, any reference to court in the two statutes is meant to refer to the Environment and Land Court, and any subordinate court that has been conferred with jurisdiction over the processes the subject of the two statutes. For the purposes of the instant matter, the Business Premises Rent Tribunal is one such subordinate court or tribunal.

20. Does the High Court have jurisdiction over the processes the subject of the Land Registration Act, the Land Act and the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, or does the Environment and Land Court have exclusive jurisdiction over them? In answer to that question I shall advert to the Constitution. Article 162 of the Constitution identifies the Supreme Court, the Court of Appeal and the High Court as superior courts, and envisages the establishment, through legislation, as per Article 162(2), of a court, with status equal to the High Court, to hear and determine disputes relating to use and occupation of and title to land. Article 162(3) provides that Parliament, while making legislation to establish that court, shall determine its functions and jurisdiction. That of itself would suggest that the High Court would have no jurisdiction to handle disputes that centre on the use and occupation of and title to land. Article 165 of the Constitution specifically establishes the High Court and delineates its jurisdiction. Article 165(5) of the Constitution declares that the High Court shall exercise no jurisdiction over matters that fall within the jurisdiction of the court envisaged in Article 162(2) of the Constitution.

21. For avoidance of doubt the relevant portions of Articles 162 and 165 state as follows:

“162. (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) ...

(b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2)..

165 (5) *The High Court shall not have jurisdiction in respect of matters—*

(a) ...

(b) *falling within the jurisdiction of the courts contemplated in Article 162 (2)."*

22. Parliament complied with Article 162(2) (3) of the Constitution, by passing the Environment and Land Court Act, No. 19 of 2011, bringing into existence the Environment and Land Court. The object of that law is set out in the preamble to the said Act, which is:

"... to give effect to Article 162(2)(b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land; and to make provision for its jurisdiction functions and powers and for connected purposes."

23. The scope and jurisdiction of the Environment and Land Court is set out in section 13 of the Environment and Land Court Act, which states as follows:

"13. Jurisdiction of the Court

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to the environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes –

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private, and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land."

24. The plain effect of all these provisions is that the High Court has no jurisdiction to handle matters that fall under the jurisdiction of the Environment and Land Court, and, it specifically has no jurisdiction or power to address itself to any of the disputes that arise around the processes provided for under the Land Registration Act and the Land Act, which are subject to the exclusive jurisdiction of the Environment and Land Court.

25. The dispute that has been placed before me relates to tenancies and leases, in short to use and occupation of premises. The premises in question stand on Marama/Lunza/1960, which is property registered under the Land Registration Act. The dispute relates to a tenancy created by lease, which is registrable under the Land Registration Act, and which is administered under the Land Act. Commercial tenancies are in addition governed by the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. Leases and tenancies over business premises are processes governed by the Land Registration Act and the Land Act, but are subject to the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act with respect to protection of tenants and disputes that may arise over such tenancies in connection with such protection. Under the Land Registration Act and the Land Act, the court with jurisdiction to deal with any dispute or issue that may arise over the processes governed by those statutes is the Environment and Land Court; by extension the same court has jurisdiction over disputes that emanate from the Business Premises Rent Tribunal with regard to commercial tenancies, such as the instant one.

26. Commercial tenancies or leases are processes which confer a right to one party to occupy the land the subject thereof, or premises standing on such land, belonging to another for a particular use at a consideration. Consequently, it is a process around use and occupation of land. Therefore, it is a matter to which Articles 162(2) and 165(5) of the Constitution apply.

27. The dispute before me is on land. The principal prayer in the Motion is for enforcement of an order relating to the reopening of premises for occupation to enable a tenant continue with using the same for business. There is a secondary order for the police to assist with the enforcement of the order, for the reopening of the premises to enable the tenant occupy or retake possession of the premises. The third order is on costs, which are tied up with rent, which is the consideration for the occupation of the property. The dispute is plainly over occupation and use of premises, it is not about rent; and even if it were over rent, the rent issue would be at the core of possession and use of property. The High Court has no jurisdiction over the dispute since it turns on leases that are created under and regulated, or administered by, the Land Act, and it is about use and occupation of premises, which stand on some land.

28. The matter raised in the said application would best be handled by the Environment and Land Court. Granting the orders sought would amount to me assuming a jurisdiction that I do not have, and usurping a jurisdiction that belongs to another court. It would be tantamount to acting contrary the Constitution of Kenya, I believe the most just order to make in the circumstances is for transfer of the matter to the

Environment and Land Court. Any party aggrieved by the striking out has liberty to move the Court of Appeal appropriately within twenty eight (28) days.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 7th DAY OF FEBRUARY, 2020

W. MUSYOKA

JUDGE