



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL SUIT NO. 96 OF 2014

MELO TWENTY SEVEN HOLDINGS LTD.....PLAINTIFF

VERSUS

MICHAEL JEFWA TINGA

JOSEPHINE MARIE GOMMANS.....DEFENDANTS

JUDGMENT

BACKGROUND

1. By a Plaint dated 27th May 2014 as filed herein on 28th May 2014, Melo Twenty Seven Holding Company Ltd (the Plaintiff) prays for:-
 - a) *A declaration that the Defendants are trespassers in the suit property;*
 - b) *An eviction order from the suit property;*
 - c) *An order of permanent injunction restraining the Defendants from trespassing and/or interfering in any way with the Plaintiff's quiet possession of the suit property; and*
 - d) *Costs of this suit and interest.*
2. The prayers arise from the Plaintiff's contention that it is the registered proprietor of all that parcel of land known as Portion No. 10594/9 (CR No. 34880) Malindi measuring approximately 0.3843 Ha and more particularly known as Market Village (the Suit Property).
3. The Plaintiff asserts that one of its directors by the name Rose Achieng William leased the suit property to the two Defendants herein for a period of five years effective 24th September 2005. Upon expiry of the said lease in the year 2010, the Defendants were issued with a notice to vacate the property but they contested on the ground that they had renovated the same and that it was a term of the contract that they recover their renovation cost from the rent payable.
4. The Plaintiff avers that it has since learnt that the Defendants moved to the Business Premises Rent Tribunal at Mombasa vide *Miscellaneous Suit No. 8 of 2013* challenging the notice to vacate the premises until they recover the full cost of renovation. The suit was dismissed on 19th March 2013.
5. The Plaintiff asserts that the Defendants who have not been paying rent since July 2013 have since recovered their renovation costs in full but despite various demand notices issued, they have ignored, refused and/or neglected to vacate the suit premises.
6. But in their joint Statement of Defence dated 7th October 2014 Michael Jefwa Tinga and Josephine Marie Gommans (the Defendants) while admitting that the Plaintiff owns the land aver that they are the ones who made the developments thereon with the consent and blessings of the Plaintiff. The Defendants asserts that those developments were to be compensated by the Plaintiff through retention of part of the rent until full recovery.
7. The Defendants aver that they are yet to recover in full the development costs and those of subsequent repairs and interest. The Defendants further aver that upon expiry of the first agreement, the lease was not renewed in writing even though the Defendants continue in occupation of the suit premises. The Defendants therefore contend that the tenancy was automatically reduced to a tenancy without a written contract and they are hence protected under Section 4 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301.

8. The Defendants further aver that the Plaintiff was always aware of ***Tribunal Case No. 148 of 2010*** whose determination was filed and adopted in ***Mombasa CMCC No. 8 of 2013***. It is the Defendant's case however that their claim was not dismissed as alleged by the Plaintiff. On the contrary, they aver that they were only directed to go back to the Tribunal for clarification of the determination.

9. The Defendants further asserts that the Plaintiff has also filed a similar suit before the Business Premises Rent Tribunal and it has therefore come to this Court with soiled hands and should not benefit from equity for reasons of material non-disclosure. They accordingly urge that this suit be dismissed with costs.

THE PLAINTIFF'S CASE

10. At the trial herein, the Plaintiff called one witness who testified in support of its case.

11. PW1-Rose Achieng William is a director of the Plaintiff company. She told the Court that she is married to one Massimo Mellasi and that the two of them are the Directors of the Plaintiff company. Her Co-director has donated to her a power of attorney to run and transact the business of the company.

12. PW1 testified that the Plaintiff owns the piece of land known as Portion No. 10594/9 (CR No. 34880) Malindi and all the developments therein known as Market Village. In the year 2005, the company leased the property to the two Defendants for a period of five (5) years. That lease has long since expired but the Defendants have refused to vacate it and/or hand it back to the Plaintiff.

13. During cross-examination PW1 told the Court that the lease was to terminate in 2010. She conceded that they had agreed with the Defendants to renovate the building and that the Defendants took the Plaintiff to the Business Premises Tribunal which allowed them to continue staying in the building to recover their costs. She denied owing the Defendants a sum of Kshs 4 million.

THE DEFENCE CASE

14. The Defence similarly called one witness who testified in support of their case.

15. DW1-Michael Tinga Jefwa is the 1st Defendant and a tenant in the suit property. He told the Court that the 2nd Defendant and himself have developed the property into a business hub known as Market Village. The developments were carried out with the consent and blessings of the Plaintiff on condition that they would retain part of the rent payable until such a time that they shall have recovered their costs in full.

16. DW1 testified that they are yet to recover in full the development costs and the subsequent repairs and that the title to the suit property is accordingly yet to be transferred to the Plaintiff. DW1 told the Court that when the lease period came to an end, they did not renew it but continued in occupation. The Plaintiff continued to accept the rent until sometime when it closed its Bank account and refused to disclose any other channels of payment.

17. DW1 testified that their tenancy was thereby reduced to an unwritten one and hence they became the beneficiaries of the protection granted under Section 4 of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act. Sometime after becoming such protected tenants, the Plaintiff served them with a Notice to terminate the Tenancy.

18. DW1 further testified that the notice was improper and could not be enforced without compliance with Section 9 of the Act. They accordingly challenged it in ***Tribunal Case No. 148 of 2010***. The determination was then filed in ***Malindi CMCC No. 8 of 2013*** but the Court declined to adopt it stating that it was ambiguous. The Court urged them to go back to the Tribunal for clarification.

19. DW1 told the Court that without appealing or challenging the Tribunal's decision, the Plaintiff proceeded to file this case yet they were served and were aware of the case before the Tribunal. DW1 further told the Court that the Plaintiff had also filed a similar case before the Business Premises Rent Tribunal and urged the Court to terminate these proceedings as the issues raised herein are the same ones pending before the Tribunal.

20. During cross-examination, DW1 conceded that Paragraph C of the Lease Agreement required the parties to negotiate new terms on renewal of the lease. He told the Court that they have not had any such negotiations. He also conceded that he had not produced a Valuation Report as evidence of the costs they incurred in the renovations.

21. DW1 further told the Court that even though he did not have receipts to prove it, they had been paying rent from 2014 to 2018. He admitted that he had been served with a Notice from the Rent Tribunal to vacate the premises on 22nd August 2014. He has since not vacated the premises.

ANALYSIS AND DETERMINATION

22. I have perused and considered the pleadings filed by the parties, the oral testimonies of the witnesses who testified at the trial and the evidence adduced herein. I have similarly considered the written submissions placed before me by the Learned Advocates for the parties.

23. The Plaintiff instituted the suit herein on 27th May 2014 seeking a declaration that the Defendants are trespassers in its parcel of land known as Portion No. 10594/9 (CR No. 34880) Malindi. It accordingly prays for an order of eviction against the Defendants as well as a permanent injunction restraining them from trespassing into or interfering in any way with the suit property.

24. As it turned out, the Defendants do not deny being in occupation of the suit property. It is however their case that contrary to the

Plaintiff's contention that they are trespassers, they are lawful tenants who entered the premises with the permission of the Plaintiff. The Defendants further assert that they made certain developments on the suit property with the consent and blessings of the Plaintiff.

25. The Defendants assert that prior to the making of those improvements on the suit property, they had agreed with the Plaintiff that they would recover their costs by retaining a portion of the rent payable until such a time that they recovered the costs in full. They accuse the Plaintiff of going against the agreement and trying to evict them from the suit property before they could recover the full costs they incurred in renovating the premises.

26. More significantly, the Defendants aver that when the Plaintiff initially moved to evict them, they filed a suit before the Business Premises Rent Tribunal being **Mombasa BPRT Case No. 148 of 2013** against the Plaintiff and one of its directors Rose Achieng William. The Defendants accuse the Plaintiff of filing this suit for the purposes of circumventing the suit before the Tribunal and urge this Court to decline jurisdiction over the subject matter of the dispute.

27. From the record, the issue regarding the existence of the suit before the Business Premises Rent Tribunal has been raised severally by the Defendants. The Plaintiff's sole witness herein indeed conceded during cross-examination that indeed the suit did exist and that the Defendants had at one point in time obtained orders therein which allowed them to continue staying in the premises.

28. From the material placed before me, it is evident that though the suit filed before the Tribunal was filed about a year before this present one, the Plaintiff did not consider that the Tribunal had jurisdiction to hear and determine the same. Accordingly by a Notice of Preliminary Objection filed before the Tribunal on 21st August 2014, they objected to the proceedings citing the presence of these very proceedings.

29. In a Ruling delivered on 3rd October 2014 by the Tribunal Chair Honourable Mbichi Mboroki, the Tribunal dismissed the objection and determined that it is the only Court with the primary jurisdiction to hear and determine issues arising out of a controlled tenancy.

30. From their arguments herein, it is apparent that the Plaintiff is of the view that there was no longer any subsisting tenancy between itself and the Defendants and hence the determination to proceed with the suit herein. The proceedings before the Tribunal have however apparently remained pending and on-going parallel to these proceedings.

31. The question of jurisdiction as it were is a threshold issue that ought to have been determined at the earliest stage to avoid the scenario that we found ourselves in in the cause of these proceedings. I did not however think there is any bar to its being raised at any stage of the proceedings.

32. As Nyarangi *J A stated in Owners of the Motor Vessel "Lillian S" –vs- Caltex Oil (Kenya) Ltd(1989) eKLR:-*

"By jurisdiction is meant the authority which a Court has to decide matters that are before it or take cognizance of the 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 may 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 of these characteristics. If the jurisdiction of an inferior Court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the Court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction, but, except where the Court or tribunal has been given power to determine conclusively whether the facts exists" (Emphasis mine).

33. As it were, this Court has original and appellate jurisdiction in all disputes touching on environment and land. However, with regard to disputes falling under the Business Premises (Shops, Hotels and Catering Establishments) Act, the law has conferred upon this Court an appellate jurisdiction only. That jurisdiction is conferred by Section 15 of the Act.

34. A party challenging the jurisdiction of a Court or Tribunal ought to raise the issue before the Court or Tribunal whose decision is under challenge for consideration. That is what the Plaintiff herein did when they raised a Preliminary Objection before the Tribunal. Having failed to stop that Tribunal, they could only come to this Court to challenge its decision on appeal under Section 15 of the Business Premises (Shops, Hotels and Catering Establishments) Act.

35. From the material placed before me, it was evident that there are existing orders of injunction against the Plaintiff before the Tribunal. There was no appeal or review against the orders. If this Court were to make any other determination, that would lead to judicial anarchy.

36. In the premises, I am persuaded that the suit before me is misconceived and filed in abuse of the Court process. The same is hereby struck out.

37. Each party shall bear their own costs.

Dated, signed and delivered at Malindi this 13th day of May, 2020.

J.O. OLOLA

JUDGE