



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC NO.462 OF 2014

VINEYARD HOLDINGS LIMITED.....PLAINTIFF

VERSUS

HAROLD ANDREW KINYANJUI

MARY MWIHAKI KURIA

ERASTUS GITAU KIARIE

(Sued as the Administrators of the Estate of

JOYCE WANJA GITAU).....DEFENDANTS

RULING

In application dated 15/4/2014, the Plaintiff *ex-parte* obtained temporary orders of injunction restraining the Defendant from levying distress, attaching, advertising for sale or selling the Plaintiff's properties in furtherance of the distress rent levied by Ms. Kiriiyu Merchants on their behalf on 3/4/2014 or in any manner whatsoever interfering with the Plaintiff's quiet enjoyment of its business premises situated on the property known as **L.R. No. 13459/63** Karen pending the hearing of the application *inter-partes*.

The Defendant filed a notice of preliminary objection on being served with the Plaintiffs pleadings on grounds that:

- a. The application is incompetent, incurably defective, bad in law and unsustainable as against the Defendant for contravening Sections 7 of the Civil Procedure Act, and Order 4 Rule 1 (1) of the Civil Procedure Rules;
- b. The suit is an abuse of the process of the court;
- c. The failure to comply with the provisions of the Civil Procedure Act renders the application and the entire suit a non-starter and the same should be struck out with costs; and
- d. The Court lacks jurisdiction to hear and determine the issues raised in the application and in the entire suit.

By consent of both parties, the preliminary objection was canvassed by way of written submissions. Ndegwa Kiarie & Co. Advocates for the Defendants filed submissions dated 25/5/2014 wherein counsel submitted that there is a suit filed by the Plaintiff at the Business Premises Rent Tribunal vide **BPR**

Tribunal Case No. 417/2013, which suit is still pending. Moreover, that the Plaintiff had filed suit at the Chief Magistrates Court Milimani being **Misc. Appl. No. 578 of 2013** which suit was dismissed after the said court found that it had no jurisdiction to entertain the matter.

It is counsel's submission that the BPR Tribunal is competent and the suit herein is wrongly filed before this court which lacks jurisdiction on the basis that the Plaintiff and Defendant have a tenancy relationship which is controlled and therefore any dispute in relation to controlled tenancies can only be adjudicated over by the Tribunal as established under **Cap 301 of the Laws of Kenya**. Counsel also submitted that the suit is *res judicata* as the issues herein are directly and substantially in issue with that in **Nairobi CMCC Misc. App. No. 578 of 2013**, which involves the same parties, and which suit was heard and determined on its merits.

Theuri Wanjohi & Co. Advocates for the Plaintiff filed submissions dated 21/7/2014 wherein counsel submitted that the Plaintiff did file suit at the Tribunal but moved the Magistrates court to obtain a conservatory order awaiting the resumption of the operations of the Tribunal. However, that after the matter was mentioned severally, the lower court struck out the Plaintiff's application citing lack of jurisdiction, the effect of which discharged the conservatory orders. Subsequently, that the Defendant instructed auctioneers to levy distress for the recovery of alleged rent arrears in the sum of Kshs. 1,080,000/- It is counsel's submission that the suit herein was prompted by the distress for rent levied by the auctioneers.

As regards the allegation that the matter is *res judicata*, counsel for the Plaintiff submitted that the matter at the Tribunal had not been determined in view of the absence of a chairman since the complaint was filed. It was further submitted that the suit having been struck out by the lower court for want of jurisdiction, it was never determined. In support of this submission, counsel relied on the case of **Enock Kirao Muhanji v Hamid Abdalla Mbarak Civil Suit Malindi No. 58 of 2012 (2013) eKLR** where the Court found that *the suit was neither res judicata nor an abuse of the court process since the issues were never determined*.

Counsel further submitted that this court does have jurisdiction to entertain disputes arising out of a controlled tenancy notwithstanding that the BPR Tribunal has the original jurisdiction. Counsel cited extensively the provisions of the law, including; Article 162 (2) (b) of the Constitution, Section 13 of the Environment and Land Court Act, ELC Practice Directions issued by the Chief Justice vide Gazette Notice No. 16268 dated 9/11/2012 and the Land Registration Act in support of his submission that this court did in fact have jurisdiction to hear and determine landlord and tenant disputes.

Having now considered the pleadings generally and the written submissions, finds that: -

The salient aspects raised in the preliminary objection are: the jurisdiction of the court to entertain landlord and tenant disputes, and secondly whether the suit is *res judicata*. These issues, in accordance with the finding of their lordships in **Mukisa Biscuit Co. Ltd v West End Distributors Ltd (1969) EA** raises pure points of law. It is argued by the Defendant that the dispute between the parties who are in a landlord – tenant relationship ought to be determined by the BPR Tribunal which is established under Cap 301. This argument is refuted by the Plaintiff who maintains that this Court has jurisdiction to adjudicate over all disputes relating to the environment, and pertaining to use, occupation and title to land in view of the provisions of the Constitution, Statute and Practice Directions.

The jurisdiction of the court to hear and determine disputes relating to the environment and the use and the occupation of and title to land is unlimited in accordance with Section 162 (2) of the Constitution and Section 13 of the Environment and Land Act. This notwithstanding, Cap 301 establishes the BPR Tribunal at Section 11 to adjudicate over disputes in respect of controlled tenancies and powers outlined under Section 12(1) thereof. I agree with the interpretation of my brother Ombwayo J. in the case of **Kanthilal Ramji Bhundia & 2 others v Joseph Waitiki Ndegwa ELC Nyeri Misc. Appl. No. 2, 3 & 8 of 2014 [2014] eKLR** where he made the following observation:

Although Section 162 of the Constitution gives the High Court unlimited jurisdiction, it

cannot be understood to mean that it can be used to clothe the High Court with jurisdiction to deal with matters which a statute has directed should be done by the Tribunal as part of its statutory duty; it is otherwise where the statute is silent on what is to be done in the event of absence of the Tribunal that this court can be called to exercise its unlimited original jurisdiction. It is trite law that where the court acts without jurisdiction, the proceedings are a nullity. The extent of the jurisdiction of the High Court may not only, be that which is conferred or limited by the Constitution but also, that which any other law, may by express provisions or by necessary implication, so confer or limit. The jurisdiction of the High Court can be ousted by an Act of parliament...

The Court also stated:

I have perused Cap 301 and do find that section 12 of the Act does not make provision for injunctions and declarations by the Business Premises Rent Tribunal and therefore this court will not be overstepping its jurisdiction in issuing the injunction sought to prevent the eviction of the applicants and disconnection of water and electricity supply until the dispute is determined by the Tribunal. The powers of the Tribunal as stipulated in Section 12(1) of the Act are very clear and this court cannot purport to exercise them. What is being sought by the applicants is within the jurisdiction of this court as provided for by Section 13 of Environment and Land Court Act No.19 of 2011.

From the foregoing, I am in agreement that this court can exercise its original jurisdiction in circumstances where:

- a. the statute is silent on what is to be done in the event of absence of the Tribunal; or
- b. the tribunal lacks powers to issues certain order such as injunctions and declarations.

The circumstances in this suit is that there was no injunction orders in force after they were discharged with the striking out of the suit filed in the lower court. It is also averred by the Plaintiff, which this court acknowledges that there has not been a chairman of the tribunal for a considerably long time. In the absence of a sitting chairman, it is my view that it is only just, fair and reasonable for this court to exercise its original jurisdiction. Having said that, this court is aware that Mr. Denis Silas Mbichi Mboroki, was appointed as Chairman pursuant to a **Gazette Notice No. 714 Vol. CXVI-No. 15 dated 3/2/2014 Pg. 235** for a period of 3 years commencing 1/8/2013. As to whether the chairman is sitting is something the court will, on its own motion, establish.

On the second issue as to whether the suit herein is res judicata, the principles of res judicata are well settled. **If a court of competent jurisdiction has adjudicated over a matter between parties or parties whom they claim and determined the issues raised in such matters then the same parties or others litigating through them are barred from re-litigating the same issues before any other court. Such a determination inevitably includes any judgments or orders issued following by consent of the litigating parties. See Kenya Commercial Bank Limited v Muiri Cofee Estate Limited & 3 others Civil Appeal 100 & 106 of 2010 [2013] eKLR**

It is without doubt that there is a complaint filed at the BPR Tribunal involving the same parties. It is also not in contention that there was a suit at the Chief Magistrate Court involving the same parties over the issues, subject matter of the suit herein. However, it is imperative to note that the suit at the lower court was struck out for want of jurisdiction and in that regard, two things, first, the court lacked jurisdiction and secondly, the matter was not adjudicated upon.

This court finds that Defendant's preliminary objection lacks merit and is dismissed.

To enable this court make appropriate orders, the Deputy Registrar of this court is hereby directed to establish the current status of the Business Premises Rent Tribunal. The matter shall be mentioned after 14 days for further orders. In the meantime, interim orders to be extended.

It is so ordered.

Dated, Signed and Delivered this **11th** day of **November**, 2014

L.N. GACHERU

JUDGE

In the Presence of:-

.....For the Plaintiff

.....For the Defendants

..... Court Clerk

Court:

Further mention on 26th November, 2014. Mention Notice to issue.

L.N. GACHERU

JUDGE

11/11/2014