



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT NO. 207 OF 2013

ASHBURTON GROVE LIMITED.....PLAINTIFF

-VERSUS-

BRUCE MUTIE MUTUKU T/A DIANI BUSINESS CENTRE.....1ST DEFENDANT

THE BUSINESS PREMISES RENT TRIBUNAL.....2ND DEFENDANT

RULING

1. The plaintiff who is now the defendant by way of counter – claim moved the Court through a preliminary objection seeking to have the 1st defendant's suit as per the counter – claim dated 27th September 2013 struck out. The preliminary objection is contained in paragraphs 2, 3, 6, 8, 12, 15 and 16 of the defence to the counter – claim.
2. Briefly, the defendant in the counter – claim pleads that this Court lacks jurisdiction to adjudicate the counter – claim. The want of jurisdiction is also on account that the tenancy the subject matter of this suit is controlled thus it falls within the ambit of the Business Premises Rent Tribunal and not this Court. Secondly that there is a matter pending in the Business Premises Rent Tribunal Cause No 75 of 2016. The defendant also state that the counter – claim is devoid of material particulars thus an abuse of the Court process. Lastly that the main suit having been struck out on grounds of jurisdiction, the counter – claim cannot stand.
3. The parties' advocates rendered oral submissions. Miss Muyaa appearing for the defendant reiterated the issues contained in their defence. She further stated that the Business Premises Rent Tribunal has powers to deal with issues of rent and repairs under section 9 (1) (c) of Cap 301 of the Laws of Kenya. She also submitted that the tribunal has powers under section 12 (1) to make orders of compensation. That the particulars of loss are not captured in the body of the pleadings and prayers. Lastly that the plaintiff (by counter – claim) has raised similar issues before the Tribunal. She thus urged the Court to strike out the claim.
4. Mr Wachenje advocate for the claimant on his part submitted that this Court is clothed with jurisdiction under article 162 (2) (b) of the Constitution to hear the dispute. That the Court enjoys original jurisdiction. He stated further that the issues raised in the Business Premises Rent Tribunal cause No 75 of 2016 are different from the ones before this Court. That they have filed an application seeking to amend the counter – claim to include the particulars of loss. He urged the Court to dismiss the objections with costs.
5. From the proceedings of 18th September 2014, the suit brought by the original plaintiff (now defendant) was struck out on the basis of an application dated 11th December 2013 brought by the 1st defendant (now plaintiff). In ground 4 of that motion it was pleaded thus:

“That in any event all or a substantial part of the reliefs sought are not available to the plaintiff in the manner sought not only because the prerogative orders of certiorari and prohibition are not available in the manner envisaged by the plaintiff but that the premises are themselves amenable to the jurisdiction conferred by the Landlord and Tenant Act, Cap 301 in so far as it relates to the recovery of possession which jurisdiction has not been invoked.”
6. The plaintiff in the counter – claim admitted the jurisdiction of the Court at paragraph 10 of his defence but still proceeded to move the Court that the plaintiff ought to have filed the suit in the Business Premises Rent Tribunal. The question then arises of whether this Court has jurisdiction to hear and determine the counter – claim.
7. In the counter – claim, the prayers sought were:

(i) Repair or replacement of damaged goods.

(ii) Costs and interest.

The defendant in the counter – claim submits that his suit having been dismissed for want of jurisdiction, this suit should also not proceed before the same Court. Secondly that the prayers sought herein are similar to those in the claim pending in Business Premises Rent Tribunal Cause No 75 of 2016. The plaintiff by counter – claim said the issues were different but fell short of citing the differences.

8. Section 12 (1) of Cap 301 states thus;

“A tribunal shall in relation to its area of jurisdiction have power to do all things which it is required to do under the Act and in addition to and without prejudice to the generality of the foregoing have power to . (l) award compensation for any loss incurred by a tenant on termination of a controlled tenancy in respect of goodwill and improvements carried out by the tenant with the Landlord’s consent.”

“(g) where the landlord fails to carry out repairs for which he is liable;

(i) To have the required repairs carried out at the cost of the landlord and where the landlord fails to pay such costs, the tenant to pay rent to the tribunal for such period as may be required to defray the costs of such repairs.”

9. Section 12 thus grants the Tribunal powers to make such orders as relates to repairs and or replacements (compensation) where such is claimed and proved. In the pleading both parties agree that the tenancy which forms the subject of the dispute herein is controlled. Therefore in as much as the Environment and Land Court has original jurisdiction to hear all disputes relating to land, it would beat the purpose of Cap 301 for this Court to exercise such Original Jurisdiction for two reasons. First because the original plaintiff’s suit was dismissed for want of jurisdiction after the current plaintiff moved the Court to do so inter alia because of the provisions of Cap 301. The second reason is that this Court has been made aware of the existence of a suit in the Business Premises Rent Tribunal Cause No 75 of 2016 where issues in dispute are said to be similar and the parties are the same. It will thus cause confusion and embarrassment were this Court and the Tribunal to reach different decisions over the same dispute. Since this Court also has appellate jurisdiction over decisions of the Business Premises Rent Tribunal, it is only just that parties exercise their rights in that Court first. Lastly this Court also has appellate jurisdiction over the Business Premises Rent Tribunal which requires good order for parties to follow instead of prosecuting the same dispute in both Courts merely because the Environment and Land Court has original jurisdiction. If allowed, the same amount to abuse of the Court process.

10. In light of the foregoing, I am persuaded that the preliminary objections raised are merited. Consequently, I do allow the objections and order the suit herein by way of counter – claim struck out. However I do not award any costs to the defendant by way of counter claim since the plaintiff (by counter – claim) did not file his claim during the subsistence of Business Premises Rent Tribunal Cause No 75 of 2016.

Dated, signed & delivered at Mombasa this 22nd February 2019

A. OMOLLO

JUDGE