



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

CIVIL SUIT NO. 432 OF 2015

ELIJAH MOMANYI MAGONA T/ A

ANASSI MOMANYI & CO. ADVOCATES.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA.....1ST DEFENDANT

SEDCO CONSULTANTS LIMITED.....2ND DEFENDANT

RULING

This ruling is in respect of a notice of a preliminary objection dated 8th February 2015 by the defendant/applicant herein on the following grounds:

- a) This Honourable Court does not have the requisite jurisdiction to hear and determine the suit.
- b) The suit offends the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Cap 301 of the laws of Kenya.
- c) The suit is an abuse of the court process being that the plaintiff is trying to circumvent express legal provisions.

Counsel agreed to canvass the preliminary objection by way of written submissions.

DEFENDANTS' SUBMISSIONS

Counsel for the defendants gave a brief background to the case and submitted as follows. That the Plaintiff filed this suit vide a plaint dated 11th December 2015 whereby the Plaintiff and the 1st Defendant executed a lease agreement in relation to the suit premises on the 23rd June 2010 and the same was to take effect from 1st November 2009.

That the said lease expired on the 30th October 2015 whereby the 1st Defendant instructed the 2nd Defendant to engage the Plaintiff which engagement commenced on or about September 2015 on the revised terms and/ or renewal of the lease. Further that the Bank through the 2nd Defendant which is its agent thereafter offered for execution by the Plaintiff a Letter of Offer which the plaintiff refused to sign an action that prompted the agent to write a further letter dated 8th December 2015 and that the plaintiff instead of writing back to the agent, decided to file this suit disputing the increased service charge, non-replacement of broken window panes, repair of the electrical appliances and service to the toilets.

Counsel therefore submitted that the issues raised by the Plaintiff are exclusively within the jurisdiction of the Tribunal established under section 11 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301 and thus the filing of the preliminary objection. Counsel listed the following issues for determination by the court:

- a) Whether the tenancy relationship between the Plaintiff and the 1st Defendant is a controlled one; and
- b) Whether this Honourable Court has jurisdiction to entertain disputes arising from the subject tenancy between the Plaintiff and Defendants.

On the 1st issue as to whether the tenancy relationship between the Plaintiff and the 1st Defendant is a controlled one, Counsel submitted that a controlled tenancy is defined under section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act as a tenancy of a

shop, hotel or catering establishment—

- a. Which has not been reduced into writing; or
- b. Which has been reduced into writing and which
 - i. is for a period not exceeding five years ; or
 - ii. contains a provision for termination , otherwise than for breach of a covenant , within five years from commencement thereof ; or
 - iii. Relates to premises of a class specified under subsection (2) of section 2.

It was further Counsel's submission that it is not in contention that the Plaintiff and 1st Defendant entered into a Lease Agreement on or about 23rd June 2010 for a period of 6 years commencing on the 1st November 2009 and that the said lease expired and as it is currently, there is no other lease that exists between the Plaintiff and the 1st Defendant. Section 64(1) (a) of the Registered Land Act (now repealed) stipulates that a lease can be determined upon expiry of the agreed period.

Counsel cited the case of **Aroko v Ngotho & another**[1991]KLR where the Court held as follows;

"In the absence of a lease in writing then the lease was a periodic tenancy in terms of Section 46(1) (b) of the Registered Land Act which period was a month to month tenancy as the rent was being paid monthly. Such monthly tenancy would be terminated by one month's notice".

That the said lease upon expiry was extinguished and as such it would be an exercise in futility if the Court were to consider an already extinguished document as there was no intention of continuance with the lease as evidenced by the conduct of the lessor who wished to execute another lease in place of the first one.

Counsel also relied on the case of **Josem Trust Co. Limited v Mint Holdings Limited** [2014] eKLR where there was a lease for the term of 6 years as in this case, held that there would be no valid lease upon expiry of the previous lease without express intention of the parties to renew the same. Ougo j held as follows:

"As I conclude this ruling it is notable that the lease was for a term of 6 years from 1st May 2006, if am to go by this provision the lease expired on 30th of April 2012 and therefore there is no lease between the parties. It is evident that the applicant does not wish to renew the lease".

That in this case the 1st defendant through the agency of the 2nd Defendant indicated to the plaintiff vide an offer letter dated 11th September 2015 for the plaintiff's perusal and execution. The said letter contained the renewed terms of the lease clearly showing the 1st Defendant's intention to determine the previous lease. Counsel submitted that the tenancy that exists between the plaintiff and the 1st defendant would be a periodic tenancy which is defined as follows; an agreement not in writing between the landlord and tenant for the tenant to exclusively possess the said land and pay rent at the agreed interval.

It was therefore Counsel's submission that the provisions of the Landlord & Tenant (Shops, Hotels and Catering establishments) Act Cap. 301 of the Laws of Kenya is applicable in the circumstances and in particular Section 2(1) of the said Act which reads as follows; controlled tenancy" means a tenancy of a shop, hotel or catering establishment— (a) which has not been reduced into writing; or (b) which has been reduced into writing and which— (i) is for a period not exceeding five years.

On the 2nd issue as to whether this Honourable Court has jurisdiction to entertain disputes arising from the subject tenancy between the Plaintiff and Defendants, Counsel submitted that in light of the above provisions it is clear that this is a periodic tenancy where the tenant continues to occupy the premises and continues to pay rent after the expiry. And as such it falls within the purview of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act and the proper forum to litigate disputes arising from a controlled tenancy is at the Business Premises Rent Tribunal and not this Honourable Court.

Counsel therefore urged the court to find that it does not have the requisite jurisdiction to hear and determine this matter and uphold the Objection plus strike out the suit and the Notice of Motion with costs to the Defendants.

PLAINTIFF'S SUBMISSIONS

Counsel for the plaintiff/respondent opposed the objection and submitted that parties are bound by their pleadings and that the defendants did not raise the issue of jurisdiction in their pleadings. That they filed a notice of preliminary objection after filing the defence.

Counsel further submitted that section 2 of the Act Cap 301 specifically provides which tenancies fall within the Act and it excludes contracts of more than 5 years and that the plaintiff is among them.

Mr. Ngigi also submitted that the jurisdiction of court is donated by the Environment and Land Court Act No. 19 of 2011 and particularly Section 13(1)-(7) which draws from article 162(2) (b) of the constitution of Kenya 2010. That at subsection 2 (a) to (e) all inclusive,

relationships as existed between the plaintiff and defendant which is basically tenancy, either created by contract and any disputes arising therefrom are within the province of the Environment and Land Court.

Counsel relied on the case of Mukisa Biscuit. Manufacturing Co. Ltd vs west End Distributors Ltd. where Sir Charles Newbold P. Duffus, V.P and Law J.A declared that preliminary objections comprise pure points of law, not objections disguised as preliminary objections “preliminary objection consist of pure points of law which have been pleaded, or which arise by clear implication out of pleadings and which if argued as preliminary point may dispose of the suit.” He therefore urged the court to dismiss the preliminary objection with costs to the plaintiff.

Analysis and determination

This is a straight forward case where the applicant is seeking that the court determines whether it has jurisdiction to hear this matter. This is a matter that involves an Advocate who is an officer of this court. The court had urged the parties to try mediation and sort this matter out amicably but it seems the parties did not take the cue. I will therefore make a determination on the preliminary objection filed by the defendant.

The only issue that I must determine is the issue of jurisdiction which is everything in a case. Once this is determined and if the court finds that it does not have the requisite jurisdiction, then it must down its tools and move no further. The other issue is whether the preliminary objection has merit as per the Mukisa Biscuits case which is a classical case on preliminary objections.

Section 13 of the Environment and Land Court Act provides for the jurisdiction of the court as follows:

(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 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; Relating to land administration and management;

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

(d) Any other dispute relating to environment and land.

This section gives the court unlimited jurisdiction of the issues mentioned above which include rents. This gives the court concurrent jurisdiction on issues of tenancies with the Business Premises Tribunal Cap 301. The plaintiff further seeks for orders for injunction and a declaration that the plaintiff is a lawful tenant of the 1st defendant. From the defence filed by the defendants I notice that there is a counterclaim and set off of rent owing by the plaintiff. The defendant also admitted the jurisdiction of this court to hear and determine the matter. There was not notice that they would raise an objection to the jurisdiction of the court.

It is trite law that parties and the court are bound by their pleadings. See the the decision of the **Malawi Supreme Court of Appeal** in **MALAWI RAILWAYS LTD Vs. NYASULU** [1998] MWSC 3, in which the learned judges quoted with approval from an article by Sir Jack Jacob entitled “The Present Importance of Pleadings.” The same was published in [1960] Current Legal problems, at P174 whereof the author had stated;

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....”

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

This is a very old matter which should have been finalised expeditiously as it involves payment of rent. The defendant should have raised the objection immediately when the matter was filed and not 4 years after the fact. Were they not aware at the filing of the defence that the court did not have jurisdiction to hear and determine this matter. The sections cited in Cap 301 do not apply to the current case as this lease is for a period exceeding 5 years and the situation has been made worse by the fact that this matter has been pending in court for this period.

The preliminary objection is supposed to be purely on matter of law which does not require any evidence to be adduced and the same can be addressed through a notice of an objection. But when it goes beyond points of law then an application must be filed together with affidavits stating the reason why the court should strike out proceedings. The submission by Counsel for the applicant included details which should have been reduced to an affidavit to enable the respondent file a replying affidavit. I find that the notice does not fit the threshold of preliminary objections and is therefore dismissed with no orders as to costs.

I therefore urge the parties to try the Court annexed mediation so that this matter is finalized.

Dated and delivered at Eldoret on this 24th day of May, 2019.

M.A. ODENY

JUDGE

RULING READ IN OPEN COURT in the presence of Mr.Mogambi holding brief for Mr.Ngigi for Plaintiff/Respondent and in the absence of Counsel for the Defendant/Applicant.

Mr.Mwelem – Court Assistant