

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELCA NO. E013 OF 2013

PETER ANASSI NYACHIENGA APPELLANT

VERSUS

PETER ABUGA AKAO T/A SENTA VIEW STUDIO RESPONDENT

JUDGMENT

(Being an appeal from the ruling of Hon.W. Kugwa, Resident Magistrate, delivered on 29 March 2023 in the suit Kisii CMCC No. 889 of 2021)

1. The appeal herein is against a ruling of the honourable Magistrate who declined to enter summary judgment as sought by the appellant and also held that the Magistrates' Court had no jurisdiction in the suit.
2. The suit before the lower court was commenced through a plaint which was filed on 4 October 2021 by the appellant. In the plaint, the appellant averred that he was the landlord of the respondent in premises located in the land parcel Kisii Municipality Block II/130, wherein the respondent operated a business by name of Senta View Studio. He pleaded that they had a written lease commencing 1 October 2015 and terminating on 30 September 2021. He pleaded that via a notice dated 30 August 2021, he wrote to the respondent, informing him that he has no intention of renewing the lease which notice the respondent did not reply to. He contended that after 30 September 2021, the respondent became a trespasser and liable for eviction. He also claimed that the respondent was in arrears of rent. In the suit, he sought the following :
 - (a) Kshs. 1, 261, 464 /= (as arrears of rent).
 - (b) Eviction.
 - (c) Mesne profits in terms of Section 13 of the Distress of Rent Act.
 - (d) General damages.
 - (e) Costs.
 - (f) Interest on (a) – (e) at court rates.

3. The respondent entered appearance on 9 November 2021. He however did not file defence immediately. On 23 February 2022, the appellant filed a motion dated 21 December 2021, for summary judgment as prayed in the plaint. In it, he asserted that the respondent was truly indebted to him in the sum of Kshs. 1,261,464/=; that the tenancy expired on 30 January 2021; and that the continued occupation of the premises by the respondent was an act of trespass.
4. While the application was pending, the respondent filed a defence on 22 August 2022. In it he admitted being a tenant of the appellant. He however pleaded that upon service of the notice dated 30 August 2021, he filed a suit before the Business Premises Rent Tribunal (BPRT), being Kisii BPRT Cause No. 77 of 2021, to review the legality of the notice. He pleaded that the case was determined in his favour on 24 February 2022. He contended that he enjoys a controlled tenancy which is protected under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301, Laws of Kenya, as was determined by the BPRT in the said ruling of 24 February 2022. He averred that the decision of the BPRT was adopted as an order of court and a decree issued in the suit Kisii CM Miscellaneous Civil Application No. E059 of 2022. He further pleaded that there had been prior distress, which in his view was illegal, and which led him to file Kisii BPRT No. 56 of 2021 to recover his attached property. He added that it was determined by the BPRT on 24 February 2022 that the seizure of his properties, valued at Kshs. 1,486,000/= , was illegal, and the same ought to be restored to him or their value paid by the appellant, which was yet to be done. He pleaded that in view of the determinations by the BPRT in the cases No. 56 of 2021 and 77 of 2021, and Section 14 of Cap 301, the Magistrates' Court had no jurisdiction.
5. Subsequently, the respondent filed a replying affidavit sworn on 7 October 2022, more or less repeating what he pleaded in the defence, which I have already set out above , and he annexed the ruling of the BPRT of 24 February 2022.
6. Counsel filed written submissions culminating into the impugned ruling delivered on 23 March 2023. In the ruling, the trial Magistrate held that the matter has already been dealt with by the BPRT and the orders made therein bind the parties. He found that no appeal has been preferred against the BPRT orders. He held that the court does not have jurisdiction to entertain the application, and the suit, and proceeded to dismiss the application but made no orders as to costs.

7. Aggrieved, the appellant has preferred this appeal on the grounds that (paraphrased for brevity) :

- (a) The trial Magistrate erred in dismissing the application yet it was clear that the tenancy agreement was for a period of six years which removed the subject matter from the Business Premises Rent Tribunal.
- (b) The trial Magistrate erred in holding that the dispute had been resolved by Kisii BPRT Case No. 56 of 2021 yet the prayers in the suit did not relate to the issues in the Tribunal case.
- (c) The trial Magistrate erred in not addressing his mind to all the issues raised in the suit and arrived at a wrong decision.
- (d) The trial Magistrate erred in failing to consider the submissions of the appellant.

The appellant wishes that the appeal be allowed and judgment be entered against the respondent as prayed in the application.

8. The appeal was argued through written submissions and I have taken into account the submissions made by Mr. Soire, learned counsel for the appellant, and Mr. Nyamurongi, learned counsel for the respondent. In his submissions, Mr. Soire reiterated that what the parties had was not a controlled tenancy and he referred to Section 2 of Cap 301, which defines a controlled tenancy. He submitted that the lease was for six years thus not a controlled tenancy. He further submitted that what was in BPRT Case No. 56 of 2021 was different. He urged that in that matter, the respondent had sought assistance of the BPRT, purporting that he had a controlled tenancy, at a time that he had already been served with the pleadings in this suit. He further submitted that the respondent had not denied not being in rent arrears.

9. On his part, Mr. Nyamurongi asserted that the tenancy was a controlled tenancy and the court had no jurisdiction. He further urged that even if the court had jurisdiction, summary judgment could not be entered in respect of general damages.

10. I have taken all the above into consideration.

11. It will be recalled that the case of the appellant was that he had a six year lease with the respondent commencing 1 October 2015 and lapsing on 30 September 2021. He contended that the lease had expired and therefore he deserved vacant possession of the premises. He also claimed rent arrears of Kshs. 1, 261, 464 /=. The defence of the

respondent was that the dispute between the parties was already determined at the Business Premises Rent Tribunal and part of what was determined was that the tenancy was a protected tenancy under Cap 301. The respondent thus urged that the court had no jurisdiction in the matter.

12. In as much as both Mr. Soire, and Mr. Nyamurongi, made lengthy submissions on whether or not the lease is a controlled one, I think whatever the case, the issue that the trial Magistrate had to grapple with at the outset, is whether the court ought to proceed with the matter, given that there was already a decision by the BPRT, which had not been appealed against. In his reply to the application, the respondent did assert that the dispute had already been referred to the BPRT and the BPRT had determined that the tenancy was a controlled tenancy, through the ruling of the BPRT of 24 February 2022. I have not seen the full text of the ruling, which was not annexed by either party, but I have seen the extracted order of the tribunal, and I see that order (3) thereof is as follows :

(3) The tenant/applicant herein enjoys a controlled tenancy within the meaning and intendment of Section 2 of the Landlord/Tenant (Shops, Hotels and Catering Establishments Act Cap 301 of the Laws of Kenya which tenancy is protected and can only be terminated except in accordance with the provisions of section 4 (2) of the Landlord and Tenant (shops, Hotels and Catering Establishments Act Cap. 301 of the Laws of Kenya (sic).

13. From the above, it is discernible that the BPRT was of opinion that the tenancy was a controlled tenancy. I do not see how the appellant could now proceed to the Magistrates' Court to seek contrary orders, yet the Magistrates' Court is not a court that is capable of reviewing the decision of the BPRT, as both the Magistrates Court and the BPRT are subordinate courts. If the appellant was of opinion that the BPRT was wrong in its finding, that the tenancy was a controlled tenancy, then what the appellant needed to do was to prefer an appeal against the decision of the BPRT ; not to proceed to the Magistrates' Court to file a separate suit seeking orders contrary to those issued by the BPRT. It was in fact an abuse of the court process for the appellant to file the suit before the Magistrates' Court.

14. I am unable to find fault in the decision of the trial Magistrate given that he was already faced with a finding of a court of comparable status that the tenancy was a controlled tenancy. He could not be expected to sit on appeal against that decision. I find that the

trial Magistrate was correct that the court had no jurisdiction in light of the finding of the BPRT that the tenancy was a controlled tenancy. The avenue that was available to the appellant was to appeal against the decision of the BPRT if aggrieved by it. I also cannot, within the pleadings herein, go to the merits or demerits of the decision of the BPRT, as that belongs to the domain of an appeal against the BPRT decision.

15. For the reasons above, it will be seen that I find no merit in this appeal and it is hereby dismissed with costs.

16. Judgment accordingly.

DATED AND DELIVERED THIS 12 DAY OF FEBRUARY 2026

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Soire for the appellant

Ms. Kebungo for the respondent

Court Assistant : Michael Oyuko