

REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT NAIROBI
ELCA NO. E004 OF 2023

KABUKU INVESTMENTS LIMITED -
APPELLANT/TENANT

VS

KAPS ENTERPRISES LIMITED -
RESPONDENT/LANDLORD

**(Being an appeal against the judgment of Hon Cyprian Mugambi
on 16/12/2022 in the Business Premises Rent Tribunal, in BPRT
No 9 of 2017).**

JUDGMENT

1. The background of this appeal is traced to a reference filed by the appellant on 5/1/2016 against the Respondent in the following terms;
“In accordance with the provision of Section 12(4) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap. 301) do hereby refer to the Tribunal a Complaint relating to KAP ENTERPRISES LIMITED, who is the Landlord in premises known as L. R NO. 209/136/321, along Kirinyaga road, Nairobi.....tenancy. The complaint concerns the landlord that they have made efforts to wrongfully and illegally terminate the tenancy by unlawfully issuing a defective notice to terminate tenancy by the 31/12/2016, in blatant disregard to the rule of law and purporting to lease over the premises to a new tenant effective January 2017”
2. Upon hearing the parties, the Tribunal held that it was devoid of jurisdiction to hear and determine the reference and dismissed the same on that account.
3. Aggrieved by the decision of the Tribunal, the appellant proffered this appeal on the grounds set out below, namely;

- a. That Learned Chairperson erred in law and fact by failing to apply the law and established jurisprudence and/or principles on pleadings by prematurely dismissing the Reference, thus driving the Tenant from the seat of justice.
 - b. That the Learned Chairperson erred when he misdirected himself in law and fact by dismissing the Reference on account of lack of Jurisdiction when, clearly, as per the evidence supplied, there was a clear and open Landlord/Tenant relationship between the parties.
 - c. That the Learned Chairperson erred in law and misdirected himself on the principles of law and evidence applicable in all the circumstances of the case and thereby failed to exercise his discretion judiciously.
 - d. That the Learned Chairperson erred in law by disregarding and thus failing to appreciate the evident on record as adduced and/or tendered by the Tenant's witnesses.
 - e. That the Learned Chairperson evaluation of the evidence before her was wanting and he undoubtedly exhibited actual bias as against the Appellant and against the rules of Natural Justice, and indeed he was compromised as was evident.
 - f. That the Learned Chairperson erred in and fact by failing to appreciate the submissions and case law authorities filed by the Tenant's Counsel and thereby arriving at an erroneous decision.
 - g. That the Learned Chairperson erred in law and fact by dismissing the Tenant's Reference despite the overwhelming facts and evidence rendered by prove the same as against the Landlord's story.
4. Consequently, the appellant sought orders as follows;
- a. The appeal be allowed
 - b. The judgment of the court be set aside
 - c. Costs of the appeal are to be borne by the respondent

5. Upon admission of the appeal, the parties elected to canvass the appeal by way of written submissions, which I have read and considered.

The written submissions

6. The Court has considered the submissions filed by the parties.

Analysis and determination

7. Having considered the appeal, the written submissions, and the material placed before me, the key issues are;
 - a. Whether the Tribunal had jurisdiction to determine the matter;
 - b. Whether a controlled tenancy existed between the parties at the time the reference was filed;
 - c. Whether the tribunal failed to appreciate the evidence and submissions placed before it;
 - d. What orders should the court grant?
 - e. Who meets the cost of the appeal
8. Conscious of my duty as the first Appellate Court in this matter, I have to reconsider the decision Appealed against, assess it and make my own conclusions as was stated by the Court of Appeal in Paramount Bank Limited vs. First National Bank Limited & 2 Others (Civil Appeal 468 of 2018) [2023] KECA 1424 (KLR) where the court held as follows;

“A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. A first Appellate Court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. While considering the scope of section 78 of the Civil Procedure Act, a first Appellate Court can appreciate the entire evidence and come to a different conclusion.”

Whether the Tribunal had jurisdiction to determine the matter;

9. With that in mind, I shall now determine the issues as set out above. It is trite that without jurisdiction, a court would have to lay down its tools as anything done without jurisdiction is but nullities.

10. In the case of Owners of the Motor Vessel 'Lillian '(S) versus Caltex Oil (Kenya) Ltd [1989] KLR1, the court held thus:

"Jurisdiction is everything. Without it a court has no power to make one step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction. "

11. The jurisdiction of a court and or a tribunal originates from the Constitution and/or statutes, or both, and a court is not empowered to confer jurisdiction upon itself through subterfuge or any other innovations outside the legal framework.

12. In the case of Samuel Kamau Macharia & Another -vs- Kenya Commercial Bank Ltd & 2 Others (2012) eKLR the court held that:

"A court's jurisdiction flows from either the constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by the law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings."

13. Further in the case of R. V BPRT & Anor ex- parte Albert Kigera Karume [2015] eKLR cited with approval the case of Re Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195 the Court dealt with the provisions of Section 12 of Cap 301 as follows:

“The tribunal is a creature of statute and derives its powers from the statute that creates it. Its jurisdiction being limited by statute it can only do those things, which the statute has empowered it to do since its powers are express and cannot be implied.... The powers of the tribunal are contained in Section 12(1) of the Act and anything not spelled out to be done by the tribunal is outside its area of jurisdiction. It has no jurisdiction except for the additional matters listed under Section 12(1)(a) to (n). The Act was passed so as to protect tenants of certain premises from eviction and exploitation by the landlords and with that in mind the area of jurisdiction of the tribunal is to hear and determine references made to it under Section 6 of the Act. Section 9 of the Act does not give any powers to the tribunal, but merely states what the tribunal may do within its area of jurisdiction..... It would be erroneous to think that Section 12(4) confers on the tribunal any extra jurisdiction to that given by and under the Act elsewhere. For example it is not within the tribunal’s jurisdiction to deal with criminal acts committed in relation to any tenancy nor is it within its jurisdiction to entertain an action for damages for trespass. These are matters for the courts and the tribunal cannot by way of a complaint to it by the landlord or tenant purport to deal with such matters. Section 12(4) of the Act must be read together with the rest of the Act and, when this is done it becomes apparent that the complaint must be about a matter the tribunal has jurisdiction to deal with under the Act and that is why the complaint has to relate to a controlled tenancy.... The Act uses the words “any complaint” and the only qualification is that it must be “relating to a controlled tenancy”. Was the relationship between the appellant and the respondents a controlled tenancy”

14. The Jurisdiction of the Business Premises Rent Tribunal is conferred by Section 2(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, which defines a controlled tenancy 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; or
 - ii. contains provision for termination, otherwise than for breach of covenant within five years from the commencement thereof”

15. The appellant admits that there was a licence agreement dated 6/3/2016. It contends that, since the licence was for a period of one year, it should be regarded as a tenancy agreement for all purposes and intends. It argues that the tenancy agreement between itself and the respondent was a controlled tenancy under the provisions of Section 2(1) of Cap 301; therefore, the respondent, having issued a termination notice on 28/12/2016, effective 31/12/2016, claimed that the notice was issued in breach of the provisions of Section 2(1) of Cap 301. The appellant's case is that the said notice to terminate the lease was therefore illegal and contra statute.

16. The Respondents, on the other hand, plead that the relationship between the parties was governed purely by the license agreement dated 6/3/2016 for the period 1/1/2016 ending on 31/12/2016. That the agreement did not constitute a controlled tenancy and that it expired by mutual consent of the parties on 31/12/2016.

17. It is not in dispute that the parties entered into a licence agreement dated 23/3/2016, whereby the Respondent granted the appellant a non-exclusive licence to use the premises for a consideration of a licence fee for a term of one year from 1/1/2016 to 31/12/2016, at a monthly licence fee of Kshs 150,000/- payable in advance by the 5th of every month.

18. The obligations of the licensee are captured under clause 3 of the said licence. Clause 3(n) of the said license is relevant to this dispute. It states as follows;

“At the expiration of the licence period or at any time as the licensor shall deem fit, the licensee shall yield up the premises and all the licensor's fixtures and fittings thereto and all other appurtenances in good repair and condition. The licensee shall immediately remove all its requirements, machines, or any other property belonging to the licensee from the premises; failure to do so, the licensor shall procure the removal of the same at the licensee's costs immediately after the expiry of the term or on the day the licensor shall re-enter the premises to take possession. It is further agreed that before the expiry of the license period the licensee shall ensure that it has legally and sufficiently served all the licensees tenants [if any], employees and agents with notice to vacate the property by the 31/12/2016 and the licensee shall be solely liable for any loss, expense, damage or cause of action by any third party against the Licensor and the licensee hereby indemnifies the licensor of any loss costs expenses and damages incurred by the licensor as a result of breach of this clause.”

19. Clause 4 provided that the respondent shall not be liable for any loss, damages, or injury to the licensee incurred in the course of the license period.

20. Evidence was presented by the Respondent that it called for tenders for the lease of the property and that the appellant participated in the process, in recognition that the licence was expiring on 31/12/2016. It is noted that the appellant, via a letter dated 24/12/2016, submitted a bid or offer to the respondent to continue leasing the property for another term of one year at an increased rent of 10%. The respondent responded to this letter on 28/12/2016. In my view, the wording of the letter of 28/12/2016 cannot be construed as a notice to the appellant. The respondent was replying to the appellant's bid or offer dated

24/12/2016 and was rejecting it. With the said rejection, the licence therefore came to a natural halt on 31/12/2016.

21. By the time of filing the reference on 5/1/2016, there was no licence or tenancy relationship between the parties.
22. In the case of Pritam vs Ratilal & Another (1972) EA 560, the Court of Appeal held as follows; -

“Therefore, the existence of the relationship of Landlord and Tenant is a prerequisite to the application of the provisions of the Act. Where such a relationship does not exist or it has come to or been brought to an end, the provisions of the Act will not apply. The applicability of the Act is a condition precedent to the exercise of jurisdiction by the Tribunal. Otherwise, the Tribunal will have no jurisdiction. There must be a controlled tenancy as defined in Section 2 to which the provisions of the Act can be made to apply outside it; the Tribunal has no jurisdiction.”

23. Even if the license were to be regarded as a lease, it expired on 31/12/2016. The applicant's grievance, if any, lies elsewhere, not with the Tribunal. I therefore find no fault with the Tribunal's decision on jurisdiction.
24. Based on the finding of the court above, I find no necessity to determine the other issues set out above. They therefore remain otiose in view of my decision that the Tribunal lacked jurisdiction to entertain the matter before it.
25. **Final orders for disposal**
 - a. For the above reasons, therefore, the appeal is unmerited.
 - b. It is dismissed with costs in favour of the Respondent.
26. Orders accordingly

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 12TH DAY OF MARCH 2026 VIA MICROSOFT TEAMS.

J. G. KEMEI
JUDGE

Delivered Online in the presence of:

1. Ms. Odago H/B for Mr. Mwanza for the Appellant
2. Ms. Makhoha for the Respondent
3. CA- Ms Yvette Njoroge

ORIGINAL FILE COPY