



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC APPEAL NO. E047 OF 2024

ELIAS BARAGU WAITHANJI.....
APPELLANT

VERSUS

ZIPPORAH NJOKI
KIMANI.....RESPONDENT

JUDGMENT

1. The Appellant was the Defendant in **Nairobi BPRT No. E1171 of 2023 Zipporah Njoki Kimani vs Elias Baragu Waithanji**. The Appellant had sought to strike out the Respondent's Application suit for want of jurisdiction and had raised a formal objection on the grounds that there is a lease for five years and three months between the Applicant and the Respondent. That the tenancy is not a controlled tenancy within the meaning of Section 2 (1) of Cap 301 Laws of Kenya.
2. By a Ruling dated 13/03/2024 the Business Premises Rent Tribunal (Hon. Ndegwa Wahome Member) dismissed the Preliminary Objection dated 6/12/2023 filed by the Appellant. It is the above Ruling which has provoked this appeal.
3. The following grounds of appeal have been listed, being:-

- 1) The learned member of the Tribunal erred in law in failing to appreciate the law in respect of the Preliminary Objections and by rewriting the lease agreement between parties.
- 2) The learned member of the Tribunal erred in law in failing to appreciate that the lease agreement before the parties was self-explanatory and spoke for itself and took into account extraneous factors and created a controlled tenancy when there was none between the parties in accordance with the provisions of section 2 (1) of Cap 301.
- 3) The learned member of the Tribunal erred in law in demonstrating open bias in favour of the tenant by taking into account extraneous factors.
- 4) The learned member of the Tribunal erred in law failing to appreciate that the tenant did not dispute and or challenge the lease agreement between her and the landlord nor did she allege any undue influence in execution of the same.
- 5) The learned member of the Tribunal erred in law in failing to appreciate that the parties had a right to backdate the effective date of the lease agreement taking into account all the relevant factors to decontrol the tenancy.

4. The Appellant has now asked that the appeal be allowed and the Ruling of the Tribunal be set aside and the Appellant be awarded costs for the lower Court and for the appeal.
5. The Appellant filed this appeal on 3rd August, 2018 against the Ruling and orders of the Business Premises Rent Tribunal (“the **Tribunal**”) made on 6th July, 2018. The genesis of the dispute between the parties is difficult to decipher from the material before the Court. From the little that I have managed to gather from the record, the Appellant is the registered proprietor of all that parcel of land known as L.R No. 209/2455/1 together with the building standing thereon known as Latema Nairobi Plaza formerly known as Transcom House (hereinafter referred to as “**the suit property**”). The Appellant acquired the suit property from Transcom Co-operative Savings & Credit Society Ltd on 1st November, 2017.
6. The suit property was sold to the Appellant with a number of tenants in occupation. The Respondent was one of the tenants who were in occupation of the property. The Respondent had entered into a 5 years and 3 months lease with the previous owner of the suit property on 1st May, 2015. After the Appellant acquired the suit property, all the tenants were instructed by the Appellant to direct all inquiries and matters relating to the suit property including the payment of rent to the Appellant. The Appellant discovered that the Respondent had partitioned and sub-let

the Ground Floor of the suit property to a number of sub-tenants. The Appellant entered into new leases with some of these sub-tenants who were now to pay rent directly to it. On 27th November 2017, the Appellant served the Respondent with a 21 days' notice terminating its tenancy.

7. The Respondent contended that it was a controlled tenant under the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya ("**the Act**") and termed the Appellant's notice defective and purported termination of its tenancy unlawful. The Respondent filed a reference at the Tribunal in **Tribunal Case No. 865/2017** and urged the Tribunal to investigate and determine the validity of the said notice and other issues it raised in the said reference.
8. The Appeal is opposed. The Respondent acting in person, filed her response to the appeal dated 6/06/2024. It is her response she stated that the Appeal is brought in bad faith, it is premature and an afterthought and that it should not be entertained.
9. It was her contention that she had been a tenant of the Appellant paying a monthly rent of Kshs. 30,000/- and that she did not owe any rent arrears and to support her averment she had produced copies of the monthly rent payment mpesa statements and copies of the tenancy agreements.

10. She gave a history of her tenancy moving from the earlier landlord leading to regularization of her lease agreement and issuance of a new lease and that on 3/10/2023 she was issued with a notice to vacate since the Landlord would not be renewing the lease agreement.
11. It is her case that she owes no rent arrears and that she has faced constant harassment and threats of eviction from the Appellant and that the harassment is unjustified since she makes effort to pay rent on time. That other tenants have received offers to continue their tenancy but that she has been served with a notice to vacate.
12. That she is servicing loans and has school going children. Further that she has been given a new account to which she has to pay rent yet other tenants are using the previous account. She asks the Court to dismiss the appeal.
13. The parties were directed to dispose of the Appeal by way of written submissions. The Appellant filed its submissions on 9/10/2024. I have perused and scanned the CTS but I have not come across the submissions of the Respondent.

Analysis and Determination

14. I have carefully considered the Grounds of Appeal, set out in the Memorandum of Appeal, the Appellant's submissions, the relevant legal frameworks and the prevailing jurisprudence on the key question falling for determination in this appeal. Although the Appellant

itemized five Grounds of Appeal, only one key question fall for determination in this appeal. The question is whether the Tribunal erred in holding that it had jurisdiction to entertain the reference filed before it.

15. As a first Appellate Court my duty is to evaluate the proceedings before the BPRT and reach my own conclusion. As can be seen from the background which has been given above, this is an appeal from an interlocutory application. The reference which was filed before the Tribunal is still pending.

16. From the Record of Appeal it is not in dispute that the first lease agreement is dated 1/06/2018 for a term of five (5) years and three (3) months and also the second lease agreement is dated 8/02/2022 for a term of five (5) years and three (3) months that the lease was not registered. Further that the Appellant who issued the 2nd lease agreement issued a notice to the Respondent of intention not to renew the lease agreement between himself and the Respondent stating that it was expiring on 30/11/2023.

17. The Chairman in his Ruling referred to Section 2(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301 Laws of Kenya, defines that: a “controlled tenancy” 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 provision for termination otherwise than for breach of covenant, within five years from the commencement thereof.”

18. This being an interlocutory appeal, the Court will certainly restrain itself from making findings that would prejudice the hearing of the complaints that are pending determination before the Tribunal. I will therefore focus on the issue of jurisdiction of the Tribunal over the reference filed before it.

19. Now, Kenya’s Superior Courts have settled the principle of law applicable to questions of jurisdiction of Courts and Tribunals. The Court of Appeal in **Owners of Motor Vessel “Lillian “S” v Caltex Oil (Kenya) Ltd (1989)** eKLR summed up the principle in the following words:

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

20. The Supreme Court of Kenya echoed this principle in **Samuel Kamau Macharia & Another v Kenya**

Commercial Bank Limited & 2 others [2012] eKLR in the following words:

“(68) 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 to itself jurisdiction exceeding that which is conferred upon it by law.”

21. In their submissions, **M/s Mbichi Mboroki & Kinyua Advocates** for the Appellant relied on the case of **Jiwaji v Jiwaji [1986] EA 547** as cited in **Centurion Engineers & Builders Limited v Kenya Bureau of Standards (Civil Appeal E398 of 2021) [2023] KECA 1289 (KLR) (27 October 2023) (Judgment)** to support their submission that where there is no ambiguity in an agreement it must be construed according to the clear words that the party has used.

22. The Hon Member Wahome observed in his Ruling that the Appellant through his lawyers wrote to the Respondent and stated thus:

“That pursuant to the Decree of the Court in HELC No. 501 of 2017 dated 15/12/2021 a copy herein attached, he is the bona fide owner of plot no 209/2279 and therefore your rightful landlord with effect from the said date of 15th December 2021. You are HEREBY therefore advised to pay

all your future rents rated at Kesh 45,000/- directly to the Landlord.”

23. Given the above statement the Honorable Member stated that the implication and import of the statement is the tenancy relationship between the parties commenced on 15/12/2021 and was to lapse by 30/11/2023 meaning it was for 5 years and 3 months but for 11 months and 15 days.
24. I agree with the Honorable Member Ndegwa Wahome that given the import then this is a controlled tenancy and the Tribunal has jurisdiction to hear the reference. Whereas the Lease Agreement herein is dated 1/08/2018 the Judgment declaring the Appellant the owner of the suit premises is dated 15/12/2021.
25. I am therefore persuaded with the Honorable Member's observation and position that the Tribunal is well seized of the reference. This is because, if a Court has no jurisdiction, then everything that it does is a nullity. The Supreme Court has had occasion to pronounce itself on the issue of jurisdiction in several cases. In the case of **Samuel Kamau Macharia & Another Vs. Kenya Commercial Bank Ltd & 2 Others (2012) eKLR** it was held that Court cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law, and that jurisdiction is not a mere technicality but goes to the very heart of the matter. The Court pronounced itself as follows: -

“A Court’s jurisdiction flow 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.”

26. According to the Appellant, this matter involved a tenancy agreement that incorporated the timeframe of 5 years and 3 months. However as already observed the Appellant who is the owner of the suit premises only assumed ownership after the Court’s Judgment dated 15/12/2021. The Appellant stated in one of its grounds thus:-

“The learned member of the Tribunal erred in law in failing to appreciate that the parties had a right to backdate the effective date of the lease agreement taking into account all the relevant factors to decontrol the tenancy.”

27. Despite the above observation the Appellant did not show in the tenancy agreement where it stated that it had been

backdated with the consent of the Respondent herein. It is not clear how the Honorable Member needed to take this into consideration if it is not expressly stated or even inferred. The Court cannot and should not rewrite contracts for parties or at worse imagine for the parties what they would have wanted to say and say it for them!

28. From the pleadings it is clear, in my view, that the relationship of the Appellant and the Respondent herein was that of controlled tenancy because the Respondent paid rent month to month. This being the case then, the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act does apply and therefore the Tribunal has jurisdiction as provided for in Section 2 (1) of Cap 301. It is my finding that the trial Court had jurisdiction to hear the case and the learned Honorable Member rightly dismissed the Appellants' Preliminary Objection.

29. With the foregoing, I hold that the appeal herein has no merit and the same is hereby dismissed with costs. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS
3RD DAY OF
MARCH 2025 VIA MICROSOFT TEAMS.**

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**MOGENI J
JUDGE**

In the presence of:

Ms. Mburukua holding brief for Mr. Kinyua for Appellant

Respondent - Absent

Mr. Melita - Court Assistant

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**MOGENI J
JUDGE**

ORIGINAL