



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ELC APPEAL NO. 1 OF 2018**

**FAUSTINE MVOI.....1<sup>ST</sup> APPELLANT**

**CATHERINE MWAENGO.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**NICHOLAS MUUMBI MANTHI.....RESPONDENT**

**JUDGMENT**

1. The Appellants were the defendants in Mombasa RMCC No.1907 of 2017 between **Nicholas Muumbi Manthi –v- Faustin Mvoi & Catherine Mwaengo**. The Appellants had sought to strike out the Plaintiff's suit for want of jurisdiction and had raised a formal objection on the grounds that the matter involved business premises that fell under the Business Premises Rent Tribunal pursuant to the provisions of the Landlord and Tenants (Shops, Hotels and Catering Establishment) Act, Cap 301 Laws of Kenya.

2. By a ruling dated 24<sup>th</sup> January 2018 the trial court (Hon. Mutunga RM) dismissed the said preliminary objection. It is the above ruling which has provoked this appeal.

3. The following grounds of appeal have been listed, being: -

- 1) **The learned Magistrate erred in law and fact by failing to consider the appellants' submissions.**
- 2) **The learned Magistrate erred in fact and in law by dismissing the appellants preliminary objection on jurisdiction filed on 24<sup>th</sup> November 2017 despite overwhelming evidence to the contrary.**
- 3) **The learned Magistrate erred in law and in fact by failing to appreciate that the matter squarely fell under the purview of Cap 301 – Landlord and Tenants (Shops, Hotels and Catering Establishments) Act and therefore he did not have jurisdiction to hear the same.**
- 4) **That the learned Magistrate erred in law and in fact by failing to understand the cause of action of the case filed by the respondent.**
- 5) **That the learned Magistrate erred in law and in fact by failing to understand that it is not the jurisdiction of the court to draw or anticipate a contract/tenancy agreement for the parties in a dispute and if there was a finding that there was no tenancy or agreement between the parties then there was indeed no cause of action and therefore dismissal of the entire suit for want of jurisdiction was inevitable.**
- 6) **That the learned Magistrate erred in law and in fact by failing to appreciate that a tenancy agreement just like any other agreement is a voluntary process which cannot be forced by the court before it is complete.**
- 7) **That the learned Magistrate erred in fact and in law by holding that the respondent was seeking for repossession and not enforcement of tenancy a fact that had not even been pleaded by the respondent. In any case there is no legal distinction between the two.**
- 8) **That the learned Magistrate erred in law and in fact by holding that there was no agreement yet between the parties whereas the respondent was seeking enforcement of an alleged oral agreement.**
- 9) **That the learned Magistrate erred in law and in fact by making a holding contrary to the pleadings filed by the parties and going into issues not pleaded by any party.**

4. The appellants have now asked that the ruling of the magistrate's court be set aside and the preliminary objection raised be allowed with costs for this appeal and in the lower court.

5. In their submissions, M/s Jackson Muchiri Associates Advocates for the Appellants relied on the case of **John Edward Ouko –v- National Industrial Credit Bank Ltd (2013)eKLR** to support their submission that it is not the work of the court to write or rewrite contract for the parties. They submitted that the fact that the tenancy was not reduced into writing makes the alleged tenancy a controlled tenancy falling under Cap 301 Laws of Kenya. It is the appellants' contention that the matter ought to have been filed in the Business Premises Rent Tribunal and not the Magistrates court. They further relied on **Gazette Notice Number 5178 of 28.7. 2014** on practice directions by then Chief Justice Willy Mutunga and the case of **Beatrice Nduta Kairie –v- John Mwangi Thuo (2013) eKLR** and **Mary Njambi Karuga t/a Prime Rose Salon & Kinyozi –v- Samuel Mwai Nyaga Muchiri & Another (2016)eKLR**, stressing that the Business Premises Rent Tribunal had jurisdiction to determine if a tenancy is controlled or not and to make orders for recovery of possession and payment for arrears of rent and mesne profits.

6. On his part, Mr. Mulei, Counsel for the respondent submitted inter alia that the lower court had jurisdiction, adding that there was no tenancy between the parties as there was no possession and use. He relied on the case of **DL Koisagat Tea Estate Ltd –v- Eritrea Orthodox Tewado Church Ltd (2015)eKLR**. He urged the court to dismiss the appeal with costs and order the suit to proceed for determination before the subordinate court.

7. I have considered the matter alongside the submissions of both the Appellants and the respondent. I think I need first to deal with the complaint that the learned Magistrate did not consider the appellants submission. I note from the ruling of the learned Magistrate that the issues raised by the appellants were addressed by the learned Magistrate. There were two issues that the learned Magistrate found for determination, namely, whether there was tenancy created between the parties and whether the court had jurisdiction. Upon analyzing the submissions made by the parties, the learned Magistrate found that tenancy relationship did not exist hence concluded that the court had jurisdiction over the matter. It follows therefore that the appellant's complaint that the Magistrate did not consider their submissions is unfounded.

8. The other issue I need to deal with is the complaint that the Magistrate's court did not have jurisdiction in the matter and ought not to have dismissed the Preliminary Objection.

9. I need not empathize the point that 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.”**

10. I did mention that the appellants' preliminary objection was to the effect that the Magistrate's court did not have jurisdiction to hear and determine the matter. According to the appellants, the matter which involved sale of business premises, fell within the purview of Cap 301, and ought to have been filed before the Business Premises Rent Tribunal. In the Complaint, it is pleaded that “on 18<sup>th</sup> July 2017 the plaintiff entered into an oral agreement by which the defendants were to sell to the plaintiff a business and the space occupied by the said business on **PLOT NO.XVII/839** within Tononoka area for the sum of Kshs.350,00 (three hundred and fifty thousand only)”. It is further pleaded that in breach of the said agreement the appellants gave possession to a third party despite receiving payment from the respondents. From the pleadings, the respondents herein sought inter alia a declaration that the said agreement was binding and an injunction ordering the appellants to put him into possession of the said premises.

11. In their defence, the appellants have pleaded, inter alia that the respondent was offered to buy goodwill for the said premises for the sum of Kshs.350,000 but the respondent only paid the sum of Kshs.300,000 and therefore the premises were given to someone else. The appellants further pleaded that in the circumstances, the respondent is only entitled to his refund of Kshs.300,000.00.

12. Under the Landlord and Tenant (Shops, Hotels and Catering Establishments ) Act, tenancy is defined as a tenancy created by a lease or under lease, by an agreement for a lease or under lease by a tenancy agreement or by operation of law, and included a sub-tenancy...” Under the same Act, a “landlord” in relation to a tenancy means the person for the time being entitled as between himself and the tenant, to the rents and profits of the premises payable under the terms of the tenancy, while “tenant” in relation to a tenancy means the person for the time being entitled to the tenancy whether or not he is in occupation of the holding, and includes a sub-tenant.

13. From the pleadings it is clear, in my view, that the relationship of the appellants and the respondent herein was that of seller and buyer. There was no tenancy relationship created. In other words the sale pleaded did not create landlord and tenant relationship. It is my view that since the relationship between the parties herein was that of a seller and buyer, the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act did not apply. It is my find that the trial court had jurisdiction to hear the case and the learned Magistrate rightly dismissed the appellants' preliminary objection.

14. 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 at Mombasa this 20<sup>th</sup> day of December, 2018.**

**C. K. YANO**

**JUDGE**