



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA IN BUSIA**

**ENVIRONMENT AND LAND COURT**

**ELC NO. 114 OF 2017**

**KAKA MOHAMED.....PLAINTIFF/APPLICANT**

**VERSUS**

**MOHAMED ALLI.....DEFENDANT/RESPONDENT**

**RULING**

1. This ruling relates to a Preliminary Objection whose notice was filed here on 19/11/2017. The Preliminary Objection is essentially an attack on the Plaintiff's suit and is premised on two propositions viz:

- (a) That the court lacks jurisdiction to hear this matter.
- (b) That the Plaintiff lacks capacity to bring this suit.

Given that the objection is about the suit, it is necessary first to appreciate the nature of the Plaintiff's suit.

2. The Plaintiff – **KAKA MOHAMED** – filed this suit against the Defendant – **MOHAMED ALI** – vide a plaint dated 8/6/2017 and filed on 12/6/2017. That plaint was later amended and re-filed on 30/10/2017. The Plaintiff pleaded, *inter alia*, that he owns rental premises on land parcel No. **NORTH TESO/KOCHOLIA/1026** located at Amagoro trading centre. Sometimes in March 2015, he rented a room to the Defendant at a monthly sum of Kshs.4,000. The Defendant was said to have forcefully taken up two more rooms and also set up a garage.

3. The Plaintiff was not happy with all this and he served the Defendant a notice to vacate. The Defendant promised to vacate but has not done so to date. The Defendant has also stopped paying rent. The Plaintiff averred that the premises are now in a deplorable state. He would wish to repair or renovate them. The Defendant is an obstacle to all this.

4. The Plaintiff wants the Defendant evicted. He also wants a mandatory injunction against the Defendant to compel him to vacate the premises, rent arrears are also claimed plus costs of the suit and interests.

5. The objection was canvassed by way of written submissions. The Defendants submissions were filed on 23/2/2018. It is clear that he contests the jurisdiction of the court because the tenancy between the parties is a controlled tenancy which, under the Land and Tenant (Shops, Hotels and Catering Establishments) Act (cap 301), is supposed to be handled by a tribunal established under that Act. It seems also to be the position of the Defendant that his landlord is a different person, not the Plaintiff. That different person is **FATUMA MUZFURAL BACHO**, who is said to own the land on which the rental premises stand. The Defendant argued that as the Defendant is not the owner of the land, he lack *locus standi* to bring the suit.

6. The Plaintiff filed two sets of submissions. The first set was filed on 11/1/2018. In the first set, it was submitted, *inter alia*, that the court has jurisdiction to entertain the matter both under the Constitution and the Environment and Land Court Act. But his ultimate submission on the issue of jurisdiction seems to me baffling and confusing. The submissions is as follows:

**“Its our humble submission that this honourable court has jurisdiction to entertain this suit as the dispute between the Plaintiff and the Defendant DOES NOT (emphasise mine) relate to the environment, use, or the occupation of and title to the suit property”.**

To my mind, the court would have jurisdiction if a matter **“relate to the environment, use, or occupation of and title to the suit property”**. The corollary is that where a matter does not relate to all these, the court would have no jurisdiction.

7. On the issue of *locus standi*, the Plaintiff raised the issue of estoppel. To him, the Defendant is estopped from raising the issue since he

has willingly dealt with the Plaintiff as his tenant in the past. The Defendant cannot therefore turn around to argue that the Plaintiff is not a title holder. The Plaintiff anchored his arguments on Section 121 of Evidence Act (cap 80) and the observations made at paragraph 455 and 454 in Halsbury, Laws of England, 3<sup>rd</sup> Edition, Vol. 15. The legal position that emerges is that a tenancy relationship can legally exist without the landlord necessarily being a title holder to the property.

8. The second set of Plaintiff's submissions was filed on 11/5/2018 and came with a supplementary affidavit attached. It seems to me a peculiar approach by the Plaintiff to bring a supplementary affidavit in that manner. Equally peculiar is the filing of a second set of submissions. I hasten to add that all this was done without leave of court and there is nothing to show that the other side was served. It seems to me that the Plaintiff was trying to steal a march on the Defendant. This is unacceptable, and I refuse to place reliance on both the second set of submissions and the supplementary affidavit.

9. I have considered the objection raised and the submissions. On the issue of jurisdiction, the Defendant referred to controlled tenancy and anchored his submissions on the Land and Tenant (Shops, Hotels and Catering Establishments) Act (cap 301). The Plaintiff failed to address himself to this. He instead went far and wide to invoke other statutes that do not specifically deal with Landlord/Tenant relationship. The Plaintiff was wrong. The issue of jurisdiction was all about controlled tenancy.

10. It is generally true that this court has jurisdiction in matters of tenancy. But in matters of controlled tenancy, the first port of call is not this court. Under Section 2(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, (cap 301), a tenancy agreement or arrangement that is not in writing is a controlled tenancy. The tenancy between the parties herein seems to be one such tenancy because no written agreement has been availed. A person with a complaint or grievance relating to or surrounding such tenancy is duty-bound to go to the tribunal set up under the Act. This court is not one such tribunal.

11. It was the wrong approach by the Plaintiff to come to this court first. He should have gone to the tribunal. In **JOSEPH NJUGUNA MWAURA & others Vs REPUBLIC: CA Cr. Appeal No. 5 of 2008, NAIROBI** (Yes, the matter is instructive even if it is a criminal one) the Learned judges expressed themselves as follows:

**“In our understanding, courts have no jurisdiction in matters over which other arms of government have been vested with jurisdiction to act”.**

12. Further, In **ALICE MWERU NGAI Vs KENYA POWER & LIGHTING CO. LTD: ELC Case No. 287 of 2014, KERUGOYA [2015] eKLR** the court observed thus:

**“...it would be an un-warranted intrusion into the jurisdiction of another organ if this court were to purport to handle this dispute ...” “proper procedures provided for in the hierarchy of dispute resolution are to be followed and that the organs mandated to arbitrate over such dispute be respected and allowed to perform their statutory responsibilities. That is why those procedures were formulated and such organs established”.**

13. And we can even have a look at a far-off jurisdiction. In **ANISMINIC LTD Vs FOREIGN COMPENSATION COMMISSION & Another: [1969] I ALL ER 208**, Lord PEARCE (as he then was) observed as follows:

**“My Lords, the courts have a general jurisdiction over the administration of justice in this country. From time to time parliament sets up special tribunals to deal with special matters and give them jurisdiction to decide these matters without any appeals to the courts. When this happens, the courts cannot hear appeals from such tribunal or substitute their own views on matters which have been specifically committed by parliament to the tribunal”.**

14. I think the position now is clear. And the position is that while this court has general jurisdiction to handle matters relating to tenancy, the first port of call where the tenancy in question is a controlled one is a tribunal set up under The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act cap 301. Such matter can only be entertained by this court on appeal.

15. On the issue of jurisdiction therefore, the Defendant was right.

16. There was the second issue that related to locus standi. On this issue, the Defendant was wrong. The law applicable is as articulated by the Plaintiff. A tenancy relationship can properly exist in law even where the Landlord has no title to show for the property in question. And that is the meaning and purport of the observations made in Halsbury, Laws of England quoted by the Plaintiff. And it is also true that where, as in this matter, a tenant has been paying rent to the landlord, such tenant cannot be allowed to turn around later and deny such tenancy. As correctly observed by the Plaintiff, that is the import of Section 121 of the Evidence Act (cap 80).

17. I think it is necessary, for the sake of clarity, to quote the law as it is. Section 121 of the Evidence Act (cap 80) states as follows:

**“The relationship of Landlord and Tenant may be brought into being even though the Landlord has no title to the land of which he has purported to create a tenancy. If a landlord who has no title to do so, grants a lease under seal, the tenant being a party to the deed, is estopped from disputing his lessor's title. The doctrine of estoppel between the landlord and tenant is not however, confined to leases by deed”.**

18. I think it is clear now, in light of all the above, that the Defendant cannot start pointing to another person as his landlord, having dealt with the Plaintiff as his landlord in the first place. He cannot also raise the issue of lack of title on the part of Plaintiff. The applicable law is against all this.

19. I think it is now clear that the Preliminary Objection is only successful on the issue of jurisdiction. It fails on the issue of the capacity of the Plaintiff to sue.

20. The upshot is that this suit is struck out on jurisdictional grounds. It was instituted at the wrong forum. The costs to be in the cause.

**Dated, signed and delivered at Busia this 11<sup>th</sup> day of December, 2018.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Applicant: Absent

Respondent: Absent

Counsel for Applicant: Absent

Counsel for Respondent: Present

Court Assistant: Nelson Odame