



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**LAND CASE NO 154 OF 2014**

**MICHAEL CHOLE LUGALIA (*suing as administrator*)**

***of the estate of Ezekiel Majani Lugalia*).....PLAINTIFF**

**VERSUS**

**JONATHAN LIGURE AYODI.....DEFENDANT**

**R U L I N G**

**BACKGROUND**

1. When this matter came up for hearing on 22/10/2015, the advocate for the Defendant indicated that a Notice of Preliminary Objection had been filed and that the Preliminary Objection had to be heard first. It was agreed that Parties file written submissions on the issue.
2. The Preliminary Objection was based on two grounds. The first ground is that this court lacks jurisdiction to determine the subject of the dispute. The second ground is that the Plaintiff lacks the requisite authority to commence the suit herein.
3. The Defendant had entered into a lease agreement with the administrators and board of trustees of the estate of the late **Ezekiel Majani Lugalia** (deceased). The Defendant became a tenant in a building standing on **LR No 2116/4/46** within Kitala town. The tenancy commenced on 1/8/2011 and terminated on 30/1/2013. The Defendant was asked to move out of the premises but he declined to do so. He continued paying rent after the termination of the tenancy but ran into arrears. This prompted the Plaintiff who is one of the administrators of the estate of the deceased to file suit seeking orders of eviction, recovery of rent arrears and mesne profits.

**DEFENDANT'S SUBMISSIONS**

4. The Defendant through his counsel submitted that after the termination of the tenancy by effluxion of time, the estate of the Deceased continued to accept rent and that therefore the relationship between the Defendant and administrators of the deceased's estate became a tenancy from month to month which is protected under the provisions of the Landlord and Tenant (Shops and Catering Establishments) Act CAP 301 Laws of Kenya and as such any relationship between the parties can only be dealt with by the Business Premises Rent Tribunal (BPRT) established under the Act
5. The Defendant therefore urges that this court has no jurisdiction to hear any dispute relating to the premises.

6. On the second ground, the Defendant contends that the Plaintiff herein is one of the administrators of the estate of the deceased and that he cannot bring a suit alone without involvement of the other co-administrators. The Defendant argues that the Plaintiff's action is contrary to the provisions of the Law of Succession Act and therefore has no capacity to commence or continue with this suit.

### **PLAINTIFF'S SUBMISSIONS**

7. The Plaintiff contends that as the Defendant's tenancy was terminated by effluxion of time on 30/1/2013, the Defendant therefore became a trespasser who is not a protected tenant. He therefore contends that Business Premises Rent Tribunal has no jurisdiction to deal with trespassers.

8. The Plaintiff argues that the fact that the Plaintiff did not involve the other administrators of the estate of the deceased is something which should not defeat this suit as there can be amendment of the plaint to bring on board the other administrators of the estate of the deceased.

### **ANALYSIS OF SUBMISSIONS**

9. To determine whether the Defendant is a protected tenant, a look at the definition of what constitutes a controlled tenancy is necessary. **Section 2(1) of Cap 301** defines it 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 terminating, otherwise than for breach of covenant, within five years from the commencement thereof; or**

**(iii) relates to premises of a class specified under subsection (2) of this section”.**

10. The lease between the administrators of the estate of the deceased and the Defendant terminated on 30/1/2013. After 30/1/2013, the Defendant remained in possession of the premises. He continued to pay rent which was accepted. The act of acceptance of rent from the Defendant whose lease had been determined converted the relationship between the two to a periodic lease from month to month and as there was no written lease, the relationship was that of a controlled tenancy which can only be ended in accordance with the provisions of Cap 301. Such manner of termination was through notice in accordance with the Act.

11. Section 60(2) of the Land Act provided as follows:-

**“ A lessor who accepts rent in respect of any period after the lease has been terminated or the term of lease has expired, shall not, by reason of that fact, be deemed to have consented to the lessee remaining in possession of the land, or as having given up on any of the rights or remedies of the lesser against the lessee for breach of a covenant or condition of the lease, and if the lessor continues to accept rent from a tenant who remains in possession for two months, after the termination of the lease, a periodic lease from month to month shall be deemed to have come into force”.**

12. It is clear from the plaint that the Plaintiff is seeking arrears of rent to the tune of Kshs 460,000/= and mesne profits of Kshs 230,000/= per month from 1/10/2014 until delivery of possession. The rent prevailing as at the determination of tenancy was kshs 230,000/= per month. It therefore follows that the Defendant continued to pay rent which rent was accepted. There was therefore creation of a periodic tenancy from month to month which is protected under Cap 301. If a dispute has arisen, the proper

forum to seek redress is in the Business Premises Rent Tribunal which is established under Cap 301. I entirely agree with the decision of Justice Kasango in Mombasa HCCC No 61 of 2013 Jane Wangari T/a Top in Town Dry Cleaners – vs – James Mutunga Mulinge T/a California Dream Hotel which was availed by the Defendant's counsel. I therefore find that this court lacks jurisdiction.

13. On the second point, **Section 82 of the Law of succession Act Cap 160 Laws of Kenya** provides as follows:-

“Personal representative shall, subject only to any limitation imposed by their grant, have the following powers:-

***(a) to enforce by suit or otherwise, all causes of action which by virtue of any law, survive the deceased or arise out of his death for his estate .....***”

14. It is not contested that the Plaintiff is one of the administrators of the estate of the deceased. The grant of letters of administration in respect of the deceased were granted on 31/7/2008 to the Plaintiff and 3 others. The Plaintiff cannot therefore seek to bring a suit to enforce rights due to the estate of the deceased without involving the other administrators. I was referred to a decision by Justice Gitumbi in Milimani ELC No. 207 of 2013 Simon Kamau Muhindi (Suing as the administrator of the estate of Esther Nyokabi Muhindi – vs Monica Wambui Ngugi & another). In this case there were two administrators who had been appointed to represent the estate of the late Esther Nyokabi Muhindi. One of the administrators brought a suit on behalf of the estate without naming the other co-administrator or seeking his consent. A preliminary objection was raised on among other grounds that the Plaintiff had no capacity to bring a suit without the authority or inclusion of his co-administrator. The judge upheld the preliminary objection and quoted Justice Majanja's decision in Misc Civil Application No 103”b” of 2013 Republic -vs- Nairobi City council where the Judge stated as follows:-

***“ The capacity to agitate any suit on behalf of the estate of the deceased inheres in the administrators duly appointed by the court. They act jointly at all times .....***

***One administrator out of the others lacks the capacity to bind the estate or any of the administrators or file suit alone on behalf of the estate”***

15. Based on the decision above herein to which I entirely agree, I find that the Plaintiff herein had no capacity to bring a suit on behalf of the estate of the deceased. He left out the other co-administrators and this cannot be taken to be a mere procedural technicality which can be cured by Article 159 of the constitution.

16. It is patently clear that this court has no jurisdiction to entertain this suit. The plaintiff had no capacity to file it alone on behalf of the estate without seeking authority of the other co-administrator or naming them as his co-plaintiff. I uphold the preliminary objection on both ground and proceed to strike out the entire suit with costs to the Defendant .

It is so ordered.

Dated, signed and delivered at Kitale on this 26th day of April 2016.

**E. OBAGA**

**JUDGE**

In the presence of Mr Yano for Plaintiff and M/s Oketch for Defendant.

Court Assistant – Winnie

**E. OBAGA**

**JUDGE**

**26/4/16**