



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

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

**ELC NO. 54 OF 2014**

**DANIEL MWANGI.....1<sup>ST</sup> PLAINTIFF**  
**FLORA WANJA MWAI.....2<sup>ND</sup> PLAINTIFF**  
**PENUELNDUNGU MUTURI.....3<sup>RD</sup> PLAINTIFF**  
**PHYLIS MWANIKI.....4<sup>TH</sup> PLAINTIFF**  
**SAMWEL MWANGI THUKU.....5<sup>TH</sup> PLAINTIFF**  
**PETER KAMAU.....6<sup>TH</sup> PLAINTIFF**  
**MOSES KAGEMA.....7<sup>TH</sup> PLAINTIFF**

**VERSUS**

**SAYANI INVESTMENT LIMITED.....1<sup>ST</sup> DEFENDANT**  
**BENSON O. KUBE T/A MAKUBO AGENCIE.....2<sup>ND</sup> DEFENDANT**  
**PDM KENYA LIMITED.....3<sup>RD</sup> DEFENDANT**  
**NAIROBI CITY COUNTY GOVERNMENT.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants filed a Notice of Preliminary Objection dated 16/10/2014 to the entire suit on grounds that:
  - i. The High Court has no jurisdiction to hear and determine the suit and make any orders prayed for in the application dated 16/7/2013 pursuant to Section 2(1) (a) and Section 6(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Cap 301.
  - ii. The Plaintiffs have been joined as Interested Parties in the Business Premises Rent Tribunal in Nairobi BPRT No. 971, 972, 973 and 974 of 2012. Thus there will be two parallel proceedings which is not allowed in law and which could lead to conflicting decisions thereby violating public policy.
  - iii. The suit is an abuse of the court process and should be struck out with costs.

2. The Objection was contested by the Plaintiffs who filed Grounds of Opposition dated 22/10/2014 based on grounds that their seeking to be joined in proceedings at the Business Premises Rent Tribunal cannot take away their right to due process before this court as parties to a tenancy contract for a period of 5 years 3 months. Further that their right to due process cannot be said to be an abuse of the court process. The Plaintiffs also aver that in their Plaint dated 16/7/2013 they made reference to a written Memorandum of Tenancy for a period of 5 years 3 Months, which is supported by documents listed in the List of Documents filed with the Plaint.
3. Counsel for both parties made oral submissions. It was submitted for the 1<sup>st</sup> and 3<sup>rd</sup> Defendants that there is no lease or tenancy between the Plaintiffs and the owners (1<sup>st</sup> Defendant), since the 2<sup>nd</sup> Defendant is the tenant and the Plaintiffs are his sub-tenants. Counsel submitted that the dispute at the Business Premises Rent Tribunal is between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant together with the Plaintiffs as Interested Parties, in respect of termination of a lease which is also the same subject matter herein. Further that there was another suit filed by the 3<sup>rd</sup> Plaintiff herein the 1<sup>st</sup> Defendant and 11 others which suit was transferred by Onyancha J. to the Business Premises Rent Tribunal. Counsel referred the Court to Section 12(1) (a) of Cap 301 and submitted that the mandate of the tribunal is to determine whether or not the tenancy is controlled and thereafter, parties can come to this court on appeal.
4. Counsel for the Plaintiffs submitted that the Preliminary Objection lacks merit as the Court has jurisdiction to determine the case. Counsel referred the Court to two letters, the first dated 6/9/2010 by the 1<sup>st</sup> Defendant addressed to all the tenants notifying them that the collecting agent with effect of that date will be the 2<sup>nd</sup> Defendant. The second letter is dated 18/11/2011 by 2<sup>nd</sup> Defendant addressed to all tenants notifying them that they had been offered a lease for a term of 5 years 3 Months with effect from 18/11/2011.

### **Determination**

5. I have perused the court record as well as the pleadings filed by both parties. The gist of the dispute is that the Plaintiffs claim to be tenants for duration of 5 years 3 months beginning 18/11/2011 and for this reason, the dispute as to termination of the said agreement is a matter that this court can entertain. The 1<sup>st</sup> Defendant deposes that the space was let out only to the 2<sup>nd</sup> Defendant and three other persons and that the 1<sup>st</sup> Defendant did not at any one time give consent to the said tenants to sub-let the space. Subsequently, and in accordance with Cap 301, it issued a notice dated 29/10/2012 terminating the said tenancy with the intention of redeveloping the premises. I have looked at what the Plaintiff's refer to as a written "Memorandum". The same is a letter authored by the 2<sup>nd</sup> Defendant addressed to all tenants. However, this letter does not meet the requirements of Section 38(1) of the Land Act, No. 6 of 2012 which provides that:

**38(1). No suit shall be brought upon a contract for the disposition of an interest in land unless—**

**a) the contract upon which the suit is founded—**

**(i) is in writing;**

**(ii) is signed by all the parties thereto; and**

**b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.**

Under Section 2 of the said Land Act the word "Disposition" includes a transfer charge, grant, partition, exchange, lease, assignment, surrender or disclaimer.

6. Effectively, the jurisdiction of this court is to determine issues relating to disposition of real

property would not exist in the absence of a formal agreement meeting the requirements of Section 38 of the Land Act.

7. The letter dated 6/9/2010 appointing the 2<sup>nd</sup> Defendant as collecting agent did not give authorization that sub-letting could be done. Neither could it be deemed as a contract between the Plaintiffs and the 1<sup>st</sup> Defendant for purposes of Section 38 of the Land Act. I also find that the Plaintiffs reliance on the letter dated 18/11/2011 is not tenable.
8. It is apparent that in the absence of any formal contract duly executed by the parties and appropriately attested, this court is divested of jurisdiction.
9. That notwithstanding it was submitted and demonstrated by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants that he Plaintiffs have actually sought the intervention of the Business Premises Rent Tribunal on the dispute regarding their tenancy either as substantive parties or interested parties. This was not contested by the Plaintiff's counsel Mr. Okwaro who submitted that the Plaintiffs have approached the Business Premises Rent Tribunal as "affected parties". I would also agree. There is already in existence proceedings involving the dispute herein between the parties herein before a competent statutory tribunal. The Plaintiffs are entitled to appear before the said tribunal as parties with genuine concerns and grievances: see Lord Denning in **Attorney General of Gambia –v- Njie [1961]2 All E R 504**. The Plaintiffs would not be joining the fray before the tribunal as mere observers. I would find, as I do, that there is already an alternate forum and procedure where the Plaintiffs grievances can be proportionately adjudicated without disproportionate expenditure. The tribunal is best placed to adjudicate the matter with the possibility that the tribunal's determination may invite an appeal to this court.
10. In the result, I would uphold the 1<sup>st</sup> and 3<sup>rd</sup> Defendants preliminary objection but would not strike out the suit. I would direct and order as I hereby do that this suit be transferred to the Business Premises Rent Tribunal to be determined alongside BPRT cases No. 971, 972, 973 and 974 of 2012.
11. The Defendants will have the costs of the Preliminary Objection in any event.

**Dated, signed and delivered at Nairobi this 22<sup>nd</sup> day of April, 2015.**

**J. L. ONGUTO**

**JUDGE**

**In the presence of:-**

..... for the Plaintiff/Applicant

..... for the Defendants/Respondent