Githiomi v Maina (Civil Appeal 111 of 2019)
[2025] KECA 175 (KLR) (6 February 2025) (Judgment)

Neutral citation: [2025] KECA 175 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 111 OF 2019

S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA

FEBRUARY 6, 2025

BETWEEN

ROSE WANGUI GITHIOMI ..... APPELLANT

AND

NANCY NYAMBURA MAINA ..... RESPONDENT

(Being an appeal from the Judgment of the High Court at Nyeri (Matheka, J.) delivered on 25th May 2018 in HCCA No. 24 of 2015)

JUDGMENT

1. The respondent instituted a suit against the appellant in the Chief Magistrate's Court in Civil Case No. 475 of 2016. In an amended plaint dated 6th July 2011, she sought a permanent injunction restraining the appellant from interfering with her business, general damages for loss of business, and special damages for lost stock in trade, costs, and interests. The respondent outlined the particulars of breach, damages, loss, and malice.

2. On her part, the appellant filed a defence to the amended plaint dated 13th August 2007, where she contended that on/or about the 8th of July 2006, the respondent, without notice, moved away all goods from the shop and locked up the premises. She had reliably learned that the respondent was in the process of subletting the premises without her consent. As a safeguard measure, she placed a padlock on the premises and, on 10th July 2006, gave a notice severing the tenant-landlord relationship.

3. In reply to the defence dated 27th August 2007, the respondent generally denied the appellant's averments and stated further that the appellant unlawfully seized the suit premises while the lease agreement between the parties was still in force.

4. It was the respondent's case that on 7th March 2005, she entered into a written tenancy agreement over the suit premises with the appellant for a period of 5 years and 6 months, which commenced on 1st

September 2004 at a monthly rent of Kshs. 10,000 payable on/or before the 5th day of each subsequent month. That when she took possession of the premises, she stocked the shop with consumable goods worth Kshs. 600,000 and was in business until 9th July 2006, when the appellant, with no justifiable cause, seized the premises and locked it up without giving the respondent the necessary notice in line with the tenancy agreement.

5. On the other hand, the appellant admitted that there was a tenancy agreement between the two, and it was her case that the respondent had run the shop well until the 9th of July 2006, when she removed her stock from the shop and left because of financial difficulties. She had information that the respondent wanted to sublet the shop without informing her. To safeguard the premises, she put a padlock and wrote to the respondent, severing the tenant-landlord relationship. She pursued the respondent to open the premises, and when the respondent failed to do so, with the assistance of the police, she broke in. She only found 1 small old plastic bucket, 5 metal plates, 1 spoon, 10 litres of empty plastic jerrican, and empty shelves. Due to the respondent's constructively vacating the premises, she took possession. The appellant felt she could mitigate her losses by renting out the space. She also asserted that there was no valid lawsuit against her, as she had never been served with proper summons, and claimed that the respondent's case was merely an afterthought.

6. In a judgment delivered on 15th July 2015, the trial magistrate found that the respondent had proved her case on a balance of probabilities by placing before the court evidence of the tenancy agreement, which was prematurely terminated without the requisite 3 months' notice. The court further found that the respondent was entitled to damages for loss of business and breach of contract for three months. However, the learned magistrate declined to award loss of profit as that fell within the category of special damages which had not been pleaded. In the end, the court entered judgment for general damages of Khs. 300,000 and costs of the suit.

7. The appellant was aggrieved by the decision and lodged an appeal to the High Court in a memorandum of appeal dated 30th July 2015 listing 6 grounds, which can be summarized as follows: the court failed to grasp the essential issues in the case when it awarded general damages for an alleged breach of contract; by concluding that the appellant had evicted the respondent; the court failed to recognize that the tenancy was a controlled tenancy, which meant it lacked the jurisdiction to hear the claim.

8. In a judgment dated 25th May 2018, the High Court found that the trial magistrate had exercised her discretion properly in awarding general damages for breach of contract. Thus, the appeal was found without merits and dismissed with costs to the respondent.

9. Aggrieved by the judgment of the High Court, the appellant has raised 3 grounds of appeal in her memorandum of appeal dated 28th May 2019 as follows: the learned judge erred in law in misapprehending the evidence, thereby reaching a wrong conclusion; in concluding that the trial court had jurisdiction to entertain the matter when the lease contained a clause for termination within 5 years; and finding that the general damages are awardable under a contract or that an award for general damage for loss of business would be applicable in the circumstances of the case.

10. In submissions filed on behalf of the appellant dated 24th January 2024 and a list of authorities dated 5th August 2024, learned counsel for the appellant submitted that Clause 9 of the lease agreement brought the lease under the ambit of a controlled tenancy as provided for under section 2(1)(b)(ii) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* ('the Act") and any ensuing dispute such as the instant one ought to have been resolved by the Business Premises Rent Tribunal.

11. It is submitted further that the courts below unanimously found that the respondent had carried away her stock; her claim for loss of profits was in the nature of a claim for special damage that was not

proved, yet the trial court proceeded to award the respondent the sum of Kshs. 300,000 as general damages for loss of business and breach of contract of 3 months. It is contended that the court laid no basis for this award, and it is a paradox that the trial court dismissed the claim for loss of profits as being in the nature of special damages yet upheld a claim for general damages for loss of business. It was incumbent on the respondent to specifically plead and strictly prove any special damages; the hefty award was not justified.

12. On jurisdiction, it was submitted that the issue was raised, but the first appellate court dismissed it as an afterthought, having not been raised in the trial court, which was a fundamental error of law; jurisdiction is everything, and it may be raised at any time, and when raised the court is bound to consider the issue.

13. Learned counsel further submitted that the first appellate court erred by introducing evidence and describing the appellant's actions as oppressive, high-handed, outrageous, insolent, and vindictive, which erroneously provided the basis for the award without justification. Yet, there was no proof of malice or ill will, and further general damages are not awardable for breach of contract, more so in the instant case where the fault could not correctly be apportioned to the appellant.

14. This being a second appeal, we are guided by the holding in the case of Nkuene Dairy Farmers Co-op Society Ltd & another vs. Ngacha Ndeiya [2010] KECA 20 (KLR), where the Court of Appeal held that this being a second appeal only issues of law fall for consideration.

15. Considering the pleadings, rival submissions, case law, and the law, we find that the issues that merit consideration are whether the tenancy subject matter was a controlled tenancy and whether general damages for loss of business were properly awarded.

16. Both parties are agreeable that they entered into a lease agreement. This was found as a matter of fact by the two courts below. The courts also found, as a matter of fact, that the agreement was for 5 years and 6 months. As stated earlier, this Court must confine itself to only issues of law. Jurisdiction of the court is a matter of law. Notably, this issue was not raised at the trial court; it was first raised in the first appeal, and the judge had this to say; -

> " The lease agreement in this case was in writing, was for a period of 5 years 6 months. It does not contain the termination clause of "within 5 years' from the date of commencement but gives each party the leeway to terminate through a 3 months' notice. Hence the manner in which it was drawn was clearly intended to remove it from the realm of controlled tenancies as provided for under section 12 Cap 301.
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> ..... I find that the Magistrates Court had jurisdiction."

17. The undisputed agreement between the parties dated the 7th of March 2005 states in paragraph *1*:

> " That the premises are let for a period of 5 years and 6 months commencing the 1st day of September 2004."

Paragraph 9 thereof states:

> " That neither the landlady nor the tenant shall terminate the tenancy without giving the other party three (3) months' notice in writing."

18. Learned counsel for the appellant submitted in paragraph *9* that the termination of lease required that a 3 months' notice was to be issued and the lease term being for a period of 5 years.

19. Regarding the findings of the first appellate court. Section 2 of the Act defines "controlled tenancy" to mean a tenancy of a shop, hotel or catering establishment –

    a. which has not been reduced into writing.

    b. which has been reduced into wring 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.

20. In the case of Khalif Jele Mohamed & Another vs. R & Another [2019] eKLR, the only issue for determination was whether a tenancy agreement in respect of a shop for a term of 6 years, which contains a provision for termination of the tenancy by either party giving three months' notice, without limiting the application of such provision within 5 years of the term of the tenancy, is a controlled tenancy within the meaning of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Chapter 301 of the Laws of Kenya (the Act). This Court held as follows:

> " As reproduced above, section 2(1)(b)(ii) of the Act stipulates that if a tenancy agreement has provision for termination, otherwise than for breach of covenant, within 5 years from the commencement of the term, it is a controlled tenancy, in other words, if such a tenancy has provision for termination, which can be invoked at any time during the term, it is in our view a controlled tenancy." (emphasis added)

21. Clause 9 of the tenancy agreement between the parties allowed termination of the tenancy for whatever reason, not necessarily due to breach of the said agreement by three months' notice, which, in our view, brings the tenancy under the purview of controlled tenancy. Critical for consideration is not only the tenancy period as stipulated in section 2(1)(b)(i) but also the provision of section 2(1)(b)(ii) of the Act, which the High Court overlooked, that is, whether the lease contained a provision for termination other than for breach of covenant within 5 years from the date of commencement, which Clause 9 of the tenancy agreement provided for.

22. Bearing in mind our finding in paragraph *21* above, the question that comes to mind is whether this matter was properly before the Chief Magistrate's Court. Did it have jurisdiction to handle the matter? Clause 9 of the lease brings the matter under section 2(1)(b)(ii) of the Act; the tenancy between the parties being a controlled tenancy it follows that their dispute should have been referred to the tribunal in the first instance. The first appellate court erred by failing to take into account section 2(1)(b)(ii) of the Act. It is trite that where a court has no mandate it has no business handling a matter. The classical case of Owners of Motor Vessel "Lilian" (S) vs. Caltex Oil (Kenya) Ltd [1989] KLR1 succinctly addressed the issue of jurisdiction. Nyarangi, JA had this to say:

> "Jurisdiction is everything. Without it, a court has no power to make one more step. Where the court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.
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> By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the

kind and nature of the actions and matters of which the particular court had cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristic. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given." (emphasis added)

23. Having found that the chief magistrate had no jurisdiction in the first place to have adjudicated on the matter, we need not go further as that alone vitiates the entire judgment of that court.

24. As a result, the appeal succeeds. We set aside the judgment of the High Court and, consequently, the judgment of the chief magistrate.

25. We order that each party meet their own costs.

DATED AND DELIVERED AT NYERI THIS 6TH DAY OF FEBRUARY, 2025.

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL ALI-ARONI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR