



Hassenye t/a Benos General Shop v Okwayo & another (Environment and Land Appeal E050 of 2021) [2024] KEELC 1248 (KLR) (7 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1248 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL E050 OF 2021**

EO OBAGA, J

MARCH 7, 2024

BETWEEN

BENARD OWOUR HASSENYE T/A BENOS GENERAL SHOP APPELLANT

AND

DORCAS OKWAYO 1ST RESPONDENT

DOUGLAS MUNGAI 2ND RESPONDENT

(Being an appeal from the ruling of Hon. E. Kigen dated 14.10.2021 in Eldoret ELC No. E098 of 2021)

JUDGMENT

Background

1. The Appellant was a sub-tenant of the 1st Respondent in a property known as Eldoret Municipality Block 6/70 occupying shop No. 1. The shop was previously held by Peter Oduor Nyadero who was a sub-tenant of the 1st Respondent. The handover from Peter Oduor Nyadero to the Appellant was known to the 1st Respondent who was the main tenant.
2. The Appellant continued to pay rent to the 1st Respondent until 20.12.2020 when he received a notice to vacate from shop No. 1. A reminder was sent on 15.3.2021. He did not vacate as at 31.3.2021 as per the requirements of the notices. On 5.5.2021, the Appellant was forcefully ejected from shop No. 1 and his goods were thrown out. The 1st Respondent then put in the 2nd Respondent in Shop No. 1.
3. On 19.5.2021, the Appellant filed a suit against the Respondents in which he sought the following reliefs: -
 1. An assessment and award of damages for loss and costs of property lost.



2. An award of daily sales income from cell phone accessories @ of Sh. 1000 as from 5/5/2021 until date of judgment or until restoration of possession and sh. 10,000 monthly commission from Mpesa coupled with an award of general damages over the unlawful eviction.
 3. An order of injunction restraining the 2nd Defendant from operating any business on the demised premises known as Shop No. 1 Eldoret Municipality/Block 6/70 coupled with an order to evict the 2nd defendant and restore the plaintiff into occupation of the demised premises known as shop No. 1 situated at Eldoret Municipality/Block 6/70.
 4. Costs and interest.
4. The Appellant contemporaneously filed a notice of motion dated 18.5.2021 in which he sought the following orders:-
1. Spent
 2. That the defendants be restrained from opening up or operating any business in the demised premises known as shop No. 1 situated in the land parcel known as Eldoret Municipality/Block 6/70 pending the hearing and determination of this application in the first instance and thereafter pending the hearing and determination of the suit.
 3. That the defendants do restore possession of the demised premises known as shop No. 1 situated on the land parcel known as Eldoret Municipality/Block 6/70 to the plaintiff and in default, the officer Commanding Eldoret Central Police Station do eject the 2nd Defendant from occupation therein and returns the plaintiff into occupation pending the hearing and determination of this application in the first instance and thereafter pending the hearing and determination of the suit.
 4. That the costs of this application be paid by the defendants.
 5. The Applicant's application was fully heard and it was dismissed with costs on 14.10.2021 on grounds that the court lacked jurisdiction to entertain the same. The trial magistrate held that the suit should have been filed at the Business Premises Rent Tribunal to be heard pursuant to the provisions of section 12 of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act Cap 301 Laws of Kenya. This is what triggered the filing of this appeal.

The Appeal;

6. The Appellant raised the following grounds of appeal;
 1. That the learned magistrate erred in law and fact in finding that the court was devoid of jurisdiction to reinstate a tenant who had been unlawfully ejected from the demised premises.
 2. That the learned magistrate erred in law and fact in finding that the dispute fell within the jurisdiction of the Business Premises Rent Tribunal while the tenant had been dispossessed of occupation of the demised premises.
 3. That the learned magistrate erred in law and fact in failing to allow the appellant's application for interlocutory relief.
7. The parties were directed to file written submissions. The Appellant filed his submissions on 7.12.2023. The Respondent filed their submissions on 21.12.2023.



Appellant's Submissions;

8. The Appellant submitted that he was dispossessed of the demised premises by actions of the 1st Respondent who unlawfully evicted him. He further submitted that the position in law is that once a tenant has been removed from the premises subject of a controlled tenancy, the Business Premises Rent Tribunal is divested of the jurisdiction to deal with the dispute. In support of this contention, the Appellant cited the case of *Re- Hebtulla properties Limited* (1979) eKLR where it was held as follows: -

“The specific powers include (paragraph (e); the power to make an order for the recovery of possession from a tenant or indeed from any person in occupation. Such as order would be an application made on the application of the landlord. No corresponding power is given to make an order on the application of a tenant who has been forcibly disposed by a landlord.”

9. On the issue of reinstatement into the demised premises, the Appellant submitted that as he had been evicted and the Business Premises Rent Tribunal had been divested of jurisdiction, he was at liberty to move to the Environment and Land Court with jurisdiction to grant the reliefs he was seeking with a view to having an order for re-instatement into the demised premises. In support of this contention, he relied on the case of *Gusii Mwalimu Investments Company Limited & 2 others v Mwalimu Hotel kisii Limited* Civil Appeal No. 160 of 1995 where the court stated as follows: -

“The Landlord did all it could to obtain the possession unlawfully and the learned judge was entirely right in making the orders he made, if what the landlord in this case did is allowed to happen, we will reach a situation when the landlord will simply walk into the premises exercising his right of re-entry and obtaining possession extra judicially. A Court of Law cannot allow such state of affairs whereby the law of the jungle takes over. It is trite law, that unless the tenant consents, agrees to give up possession the landlord has to obtain an order for possession.”

10. The Appellant further submitted that the trial magistrate did not give any reasons why she declined to grant the orders prayed for by the Appellant in the impugned ruling. He further submitted that the trial magistrate failed to uphold the position that the 1st Respondent was bound to terminate her relationship with the Appellant in accordance with the provisions of section 4 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* Cap 301.
11. In support of his contention that he had been deprived of his protection under the Act, he relied on the case *Lau v Japee Investments Limited* (1972) EA 512 where it was held as follows:-

“The *Landlord and Tenant (shops, Hotels and Catering establishments) Act*, Cap. 301 is a specifically enacted piece of legislation which creates a privileged class of tenants for the purpose of affording them the protection specified by its provisions against ravages of predatory landlords. Such protection can only be fully enjoyed if the provisions of the Act are observed to the letter otherwise the clearly indicated intention of the legislature would be defeated. In order to be effective in this function, the Act must be construed strictly no matter how harsh the result.”

Respondents Submissions;

12. The Respondents submitted that the trial magistrate had no jurisdiction to entertain the Appellants application as well as the suit itself. The Respondents further submitted that the Appellant could only approach the Environment and Land Court in its Appellate jurisdiction from the decision of



the Tribunal. The Respondent went on to submit that the Appellant had confirmed that he was in occupation of the demised premises hence the trial magistrate had no jurisdiction to entertain the application by the Appellant as well as the suit itself.

Analysis and Determination;

13. I have considered the grounds in the memorandum of appeal as well as the submissions by the parties. There are two issues for determination. The first is whether the trial court had jurisdiction to entertain the Appellant's application as well as the suit itself. The second is whether the prayer for restoration into the premises could be granted.
14. This is a first appeal to this court. This court is under a duty to re-evaluate the evidence before the trial court and reach its own conclusions. See *Selle & another v Associated Motor Boat Co. Ltd & others* (1968) EA 123 in which the court stated:-

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ...is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”
15. There is no contention that the Appellant was a sub-tenant of the 1st Respondent. He was occupying shop No. 1 which he got from Peter Oduor Nyadero with the knowledge of the 1st Respondent. He used to pay rent to the 1st Respondent. On 21.12.2020 the 1st Respondent gave the Appellant notice to vacate shop No. 1 by 31.3.2021. A remainder was given on 15.3.2021. On 5.5.2021, the Appellant was forcefully evicted from shop No. 1.
16. The Appellant filed a suit against the Respondents on 19.5.2021. As at the time of filing the suit, he had already been evicted and the 2nd Respondent had been put in the demised premises. The Business Premises Rent tribunal therefore had no jurisdiction to deal with the matter as the Appellant had already been dispossessed of the demised premises. This was the position in the *Re Hebtulla Properties Ltd case* (Supra).
17. Section 12 1 (e) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* Cap 301 provides as follows: -

“to make orders, upon such terms and conditions as it thinks fit, for the recovery of possession and for the payment of arrears of rent and mesne profits which orders may be applicable to any person, whether or not he is a tenant, being at any material time in occupation of the premises comprised in a controlled tenancy.”
18. Section 12 1(e) *Cap 301* is clear that the Tribunal has jurisdiction to grant vacant possession where at the material time, one is in the premises whether he is a tenant or not. Once one has been ejected from the premises, there is no longer landlord/tenant relationship which can give the Tribunal powers to entertain the matter. I therefore find that the trial magistrate was wrong in holding that she did not have jurisdiction to entertain the Appellant's application.
19. On the second issue, the record shows that the Appellant took possession of the demised premises on 28.6.2017. He was to begin paying rent in July, 2017. The receipts which the Appellant annexed to the application which is the subject of this appeal show that he was still a sub-tenant of the 1st Respondent as at February and March, 2021.



20. Though the notices were issued to the previous sub-tenant, the main tenant who is the 1st Respondent was aware that it is the Appellant who was her sub-tenant. She issued rent receipts to him. She cannot claim that the Appellant was paying rent on behalf of the previous sub-tenant. Even though the notice given was not in the prescribed form contemplated in Section 4 of [Cap 301](#) and could not take effect as no reason for termination had been set therein, the Appellant was under obligation to indicate that he was not going to comply with the notice or file a reference.
21. After the 2010 [Constitution](#), courts are not putting much emphasis on form. As long as there is notice, the Appellant should have taken steps to secure his sub-tenancy. He waited until he was ejected therefrom. The provisions of [Cap 301](#) could not come into his aid as he had already been dispossessed of the suit premises. There is a new sub-tenant that is the 2nd Respondent who was put in possession and he has a full shop which is operational. In the circumstances the Appellant's remedy lies in damages. An order of restoration will not be efficacious in the circumstances.

Disposition;

22. From the above analysis, it is clear that the Appellant's appeal has partially succeeded. The finding of the trial court that it did not have jurisdiction is hereby set aside. A finding that the court had jurisdiction is hereby made in place of the trial court's finding on jurisdiction. The prayer for restoration into the demised premises is hereby declined. This file is remitted back for hearing by a magistrate other than Hon. E. Kigen. Given that the Appellant has partially succeeded in his appeal, I order that each party do bear their own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 7TH DAY OF MARCH, 2024.

E. O. OBAGA

JUDGE

In the virtual presence of;

Mr. Mua Wambua for Mr. Wambua Kigame.

Mr. Warigi for Respondent.

Court Assistant –Akidor

E. O. OBAGA

JUDGE

7TH MARCH, 2024

