



REPUBLIC OF KENYA



**Omar & another v Shariff (Civil Appeal 151 of 2019)  
[2022] KECA 600 (KLR) (6 May 2022) (Judgment)**

Neutral citation: [2022] KECA 600 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL 151 OF 2019  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
MAY 6, 2022**

**BETWEEN**

**ALI ABDALLA SHEIKH OMAR ..... 1<sup>ST</sup> APPELLANT**

**ABDUL SWALEH ALI ALIAS ABDUL GAWA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**HAJI SHARIFF ..... RESPONDENT**

*(An appeal from the ruling/order of the Environment & Land Court at Mombasa  
(Yano, J.) delivered on 17th September 2019 in ELC Case No. 210 of 2018)*

**JUDGMENT**

1. In this appeal, the appellants have challenged a ruling delivered on 17<sup>th</sup> September 2019 in which the Environment and Land Court (ELC) (Yano, J.) dismissed their suit, in limine, on grounds that the ELC lacked jurisdiction to entertain it by virtue of the provisions of the *Landlord & Tenant (Shops, Hotels and Catering Establishments) Act* and on grounds that the suit is barred by the doctrine of res judicata.
2. The appellants were tenants in occupation of premises situated on a property known as Plot No. 53/3/ MN Changamwe, Mainland West, Mombasa until 16<sup>th</sup> July 2018 when they say they were evicted therefrom by their landlord, the respondent, in the guise of distress for rent. On 21<sup>st</sup> September 2018, by a plaint dated 20<sup>th</sup> September 2018, they filed suit before the ELC at Mombasa seeking judgment against the respondent for: a declaration that their dispossession of the premises by the respondent was unlawful, null and void as contravening the Landlord & Tenant (Shops, Hotels and Catering Establishments) Act (hereinafter “the Act”); an order directing the respondent to restore them into the premises together with all goods removed therefrom on 16<sup>th</sup> July 2018; an order restraining the respondent from letting out or parting with possession of the premises to a third party; damages for unlawful eviction and trespass.



3. By an application dated 20<sup>th</sup> September 2018 presented to the ELC under Sections 1A, 3A, 63(e) of the Civil Procedure Act and Order 40 Rule 7 of the *Civil Procedure Rules*, the appellants sought temporary injunctive relief, pending the hearing and determination of their suit, to restrain the respondent from selling or disposing of the appellants' goods/stock in trade removed from the premises on 16<sup>th</sup> July 2018 and from letting out or parting with the possession of the premises to a third party. Also sought was an order to restore the appellants into the premises pending the disposal of the suit.
4. In his statement of defence, as well as in his replying affidavit in opposition to the application, the respondent denied the appellants' claims; asserted that the appellants were ordered to pay rent arrears by the Business Premises Rent Tribunal (BPRT) "before 13<sup>th</sup> July 2018 in default of which" the respondent was at liberty to "evict them from the premises"; that the appellants did not pay the rent arrears as ordered leaving the respondent with no option but to remove the appellants goods from the premises; that the dispute was still active before the BPRT under reference numbers 37 of 2017, 38 of 2017 and 110 of 2017; that the appellants had filed RMCC No. 2064 of 2017 which was dismissed; and that the matter is res judicata.
5. In the statement of defence, the respondent also intimated that he would raise a preliminary objection to the suit that the ELC lacks jurisdiction to hear and determine the matter by reason of Section 15 of the Act. He also filed a notice of preliminary objection dated 19<sup>th</sup> February 2019 contending that the appellants' suit is incurably defective and bad in law; was filed contrary to Section 15 of the Act; and that the suit is res judicata and an abuse of the process of the court.
6. Upon hearing the parties on the application, the learned Judge, in framing the issue for determination in the impugned ruling stated:

"The essence of the plaintiffs' case is that they were unlawfully dispossessed of the suit premises. The plaintiffs want the defendant ordered to render a complete inventory of the goods removed from the suit premises and for their reinstatement into the premises. No doubt, these prayers are in the nature of the mandatory injunction. The law as regards the principles to be applied when considering whether or not to grant interlocutory mandatory injunction is different from the principles set out in the *Giella vs Cassman Brown* case for the standard of approach is higher."
7. The Judge went on to state that it is common ground that the tenancies held by the appellants were controlled tenancies within the meaning of Section 2 of the Act; that prior to filing the suit before the ELC, there were disputes before the BPRT and the subordinate court; and that the appellants "were distressed and dispossessed of the suit premises pursuant to orders made by the tribunal while the case before the subordinate court was dismissed"; that any party to a reference aggrieved by any determination or order of the BPRT may appeal to the ELC; that under Section 12(1)(e) of the Act the BPRT has powers to make orders for recovery of possession and for payment of arrears and that BPRT "had jurisdiction to make the orders sought herein so far as it relates to a controlled tenancy."
8. The Judge expressed that the dispute has been the subject of proceedings before the BPRT in reference numbers 37 of 2017, and 38 of 2017 as well as before the subordinate court in RMCC No. 2064 of 2017; that the parties and issues in those proceedings were the same and that under Section 7 of the *Civil Procedure Act*, the ELC was barred from dealing with the same; that the appellants should have invoked Section 15 of the Act in appealing decision of BPRT. The Judge concluded that by virtue of the provisions of the Act, "this court has no original jurisdiction to entertain the Plaintiffs' suit. In addition, by virtue of the Civil Procedure Act, this suit is barred by the doctrine of res judicata" before pronouncing that the appellant's motion "is without merit and the same is hereby dismissed with



costs” and further that “I am also inclined to dismiss the suit in limine as requested by the defendant. The same is dismissed with costs to the defendant.”

9. Although the appellants have challenged that decision on eleven grounds of appeal as set out in the memorandum of appeal, there are in our view, two main issues for determination. The first is whether the Judge erred in holding that the ELC lacked original jurisdiction to entertain the suit. The second issue is whether the Judge was right in holding that the dispute was *res judicata*.
10. In support of the appeal, learned counsel for the appellants Mr. Mwakisha relied on his written submissions which he orally highlighted. In opposing the appeal, Mr. Iddi, learned counsel, holding brief for Mr. Ototo for the respondent relied entirely on the respondent’s written submissions. We have duly considered the appeal, the submissions and the authorities cited.
11. On jurisdiction, there is no contest, that the subject tenancies fell within the purview of the Landlord and Tenant Act. There is an express plea in that regard in paragraphs 4 and 5 of the appellants’ pleadings. However, the reliefs the appellants sought in the suit, as well as in the motion for interlocutory relief, as already indicated, included prayers for: a declaration that their dispossession of the premises by the respondent was unlawful, null and void as contravening the Act; an order directing the respondent to restore them into the premises together with all goods removed therefrom on 16<sup>th</sup> July 2018; an order restraining the respondent from letting out or parting with possession of the premises to a third party; damages for unlawful eviction and trespass.
12. As already noted, the respondent averred in his defence that based on an order of the BPRT requiring the appellants to pay arrears of rent by 13<sup>th</sup> July 2018, he was at liberty to evict the appellants. Indeed, he deposed in his replying affidavit to the appellants’ motion that the appellants “failed to remit the rent arrears as per the BPRT order of 5<sup>th</sup> July 2018” and that “I took possession of my premises after the appellants failed to pay me the rent arrears as ordered by the Business Premises Rent Tribunal on 5<sup>th</sup> July 2018.”
13. The order of the BPRT of 5<sup>th</sup> July 2018 issued in BPRT Case No. 37 and 38 of 2017 Mombasa between the parties was exhibited and read in relevant part as follows:

“ And upon hearing-It is hereby ordered that:

  1. The landlord is allowed to levy distress and recover all outstanding arrears of rent at the rate of Kshs. 4,000/-from the tenant in BPRT 37/2017 and Kshs. 2,000/- from the tenant in BPRT 38/2017.
  2. The order for levying distress shall be stayed upto 13<sup>th</sup> July 2018.
  3. Parties granted more time to file written submissions.
  4. Mention on 27<sup>th</sup> July 2018 for compliance.
  5. The O.C.S. Changamwe Police Station to enforce compliance and that peace prevails.”
14. On the face of it, that order, on the strength of which the respondent deposed that he took possession of the premises, did not permit him to do so. There is therefore a misdirection by the learned Judge when he stated in the impugned ruling that the appellants “were distressed and dispossessed of the suit premises pursuant to orders made by the tribunal”. While the order permitted levying of distress for rent, it did not order dispossession. *Prima facie*, therefore, the appellants were justified in complaining that they were evicted from the premises in the guise of distress for rent.



15. We are persuaded, as urged by Mr. Mwakisha, that had the learned Judge been properly directed by a careful perusal of the material before him, he would have appreciated that the appellants “had not been dispossessed under the imprimatur of any order lawful or otherwise, sanctioning an eviction.” The order of BPRT of 5<sup>th</sup> July 2018 directing payment of arrears of rent by the 13<sup>th</sup> July 2018 was not an eviction order. But the respondent appears to have deployed it as such.
16. The decision of this Court in *Narshidas & Company Limited v Nyali Air Conditioning and Refrigeration Services Ltd*, Civil Appeal No 205 of 1995 to which counsel referred is authority for the proposition that BPRT has no jurisdiction to issue an injunction or similar remedy against a landlord. In that case, the Court expressed:

“What does a controlled tenant confronted with an illegal threat of forcible eviction do? He cannot go to the Business Premises Rent Tribunal established under the Act as that Tribunal has no jurisdiction to issue an injunction or similar remedy against the landlord. That tribunal has no jurisdiction to do so as was held by High Court in the case of *The Republic v Nairobi Business Premises Rent Tribunal & others, Ex Parte* [1979] K L R 147 and also the case of *Re: Hebtulla Properties Limited* [1979] K.L.R 96.”
17. The BPRT was therefore not the forum to which the appellants could turn for the remedy they were seeking. We conclude therefore that there is merit in the complaint that learned Judge erred in holding that the ELC lacked jurisdiction to entertain the appellants’ suit.
18. As regard the question whether the matter was *res judicata*, counsel for the respondent submitted that the learned Judge was right that the dispute the subject of the suit before the ELC was also the subject of the dispute in BPRT Case No. 37 and 38 of 2017 Mombasa as well as RMCC No. 2064 of 2017. That is however not borne by the record. In paragraph 6(ii) of the plaint before the ELC, it is averred that BPRT Case No. 37 and 38 of 2017 Mombasa were references for rent assessment to the tribunal precipitated by, and challenging the respondent’s notices issued under Section 4 of the Act to increase rent to Kshs. 60,000.00 and 15,000.00 from what the appellants were paying.
19. Based on the plaint in RMCC No. 2064 of 2017, the appellant’s claim was that the respondent purchased the suit premises from the appellant’s previous landlord and purported to unlawfully levy distress pegged on rent unknown or inapplicable to the appellants. That suit was struck out by that court for want of jurisdiction.
20. The appellant’s suit before the ELC on the other hand, was precipitated by events of 2018 whereby the appellants claim to have been illegally evicted from the premises in July 2018. Therefore, and quite apart from the fact that the reliefs sought before the ELC are outside the remit of the BPRT, we think the Judge was in error in expressing that “whatever issue is being raised now could have been raised in the former proceedings.”
21. All in all, we are satisfied that the learned Judge erred in dismissing the appellants’ suit by effectively striking it out on grounds of jurisdiction and on the principle of *res judicata*.
22. The appellants urged us to allow the appeal and reinstate ELC No. 210 of 2018 for trial and also to allow the appellants’ application dated 20<sup>th</sup> September 2018. Whereas we have no difficulty in reinstating the suit for trial, we note that the application dated 20<sup>th</sup> September 2018 was not determined on merits by the ELC.



23. In the result, we allow the appeal and set aside the ruling of the ELC delivered on 17<sup>th</sup> September 2019 in its entirety. The appellants' suit and the interlocutory application dated 20<sup>th</sup> September 2018 are reinstated for hearing before a Judge of the ELC other than Yano, J.

24. The appellants shall have the cost of the appeal.

**DATED AND DELIVERED AT MOMBASA THIS 6<sup>TH</sup> DAY OF MAY 2022.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

