



Alduchira Investment Company Limited v Borabu Trading Company Limited (Environment and Land Appeal 2 & E002 of 2023 (Consolidated)) [2025] KEELC 852 (KLR) (25 February 2025) (Judgment)

Neutral citation: [2025] KEELC 852 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND APPEAL 2 & E002 OF 2023 (CONSOLIDATED)
M SILA, J
FEBRUARY 25, 2025

BETWEEN
ALDUCHIRA INVESTMENT COMPANY LIMITED APPELLANT
AND
BORABU TRADING COMPANY LIMITED RESPONDENT
AS CONSOLIDATED WITH
ENVIRONMENT AND LAND APPEAL E002 OF 2023

BETWEEN
ALDUCHIRA INVESTMENT COMPANY LIMITED APPELLANT
AND
BORABU TRADING COMPANY LIMITED RESPONDENT

(Being an appeal from the decision dated 20 December 2022 of Hon. A. Muma, Vice Chairman, Business Premises Rent Tribunal, in the suits Kisii BPRT No. E028 of 2022 and Kisii BPRT No. E041 of 2022)

JUDGMENT

1. This is a consolidated judgment on two appeals both filed by Alduchira Investment Company Limited, an occupant in the premises known as Plot No. 66 Keroka, which is owned by the respondent. The appellant contends that she has a landlord - tenant relationship with respondent. Through a notice dated 20 May 2022 the respondent issued a notice to terminate the tenancy with effect from 1 August



2022 on the basis that the landlord intended “to demolish and reconstruct the premises and cannot do so without obtaining vacant possession of such premises.”

2. The appellant resisted the termination notice by filing a reference dated 2 June 2022 to the Business Premises Rent Tribunal (BPRT or the tribunal) which was assigned the case number Kisii BPRT No. E028 of 2022, through the law firm of M/s J.O Soire & Company Advocates. I have not seen an appearance filed by the landlord in this suit. The case first went before Hon. Mugambi, Chairman, on 5 December 2022 and the parties were absent. The next appearance was on 24 June 2022 where again it appears that the parties were absent. The next date given was 27 July 2022 when Mr. Nyamagi appeared for Mr. Soire for the applicant and there was no appearance on the part of the respondent. The court directed parties to comply with Order 11 of the *Civil Procedure Act* within 30 days and appear on 8 September 2022. On 8 September 2022, Mr. Soire was present for the applicant/tenant but there was no appearance on the part of the respondent/landlord. Hon. Mugambi directed the reference to be heard on 2 November 2022 and a hearing notice be served. On 2 November 2022, Mr. Soire was present for the applicant/tenant and Mr. Oduor was present for the landlord. Mr. Oduor submitted that there was a similar matter before Hon. Muma, being BPRT Case No. 41 of 2022, coming up on 14 November 2022 for submissions. Mr. Soire stated that he was not aware of that matter. Hon. Mugambi directed that the suit No. E028 of 2022 be mentioned on 14 November 2022 before Hon. Muma together with the suit No. E041 of 2022.
3. Let me now turn to the suit BPRT No. E041 of 2022. This was another reference by tenant, dated 4 August 2022, but now through the law firm of M/s Julius Nyakiangana & Company Advocates. The complaint was that the landlord was interfering with the tenancy by attempting to unlawfully evict the tenant. Together with the reference was filed an application of even date under certificate of urgency, seeking orders of injunction to restrain the landlord from evicting the tenant pending hearing and determination of the complaint. Within that application, it was mentioned that the tenant had filed the reference BPRT No. 28 of 2022 which was pending and that it was due for mention for compliance on 8 September 2022. It was contended that the landlord had commenced eviction before the said case can be heard. The application went before Hon. Muma on 12 August 2022 and interim orders were granted with further directions being that the application be heard on 3 October 2022.
4. The landlord filed an undated replying affidavit to oppose the motion and also filed her own application dated 22 September 2022. In that application the landlord asked for orders that the interim ex parte orders be set aside; that the tenant be directed to vacate the premises so as to allow renovations to proceed; and the tenant not to tamper with the status of the premises.
5. On 3 October 2022, directions were taken that the two applications be heard together on 14 November 2022.
6. On 14 November 2022, the matter went before Hon. Muma. It is not recorded whether counsel were present and if so who was present and who was not. The proceedings of that day are as follows :
14/11/22
Before Hon. A. Muma – V/C
S/Akinyi – C/A
Ct : Ruling 19/12/2022 together with No. E028/2022.
Signed.



7. I have no record of the matter going before the tribunal on 19 December 2022 as the next entry is for 20 December 2022. Mr. Nyakiangana was present for the tenant and Mr. Oduor was present for the landlord and ruling was delivered. It is that ruling which has provoked this appeal.
8. The heading of the ruling is that it is in respect of both tribunal case numbers E028 and E041 of 2022. In the ruling the honourable Vice Chairman found that the landlord had issued a notice to terminate and the tenant filed the suit No. E028 of 2022. He also found that there was a subsequent reference No. E041 of 2022 and the application for injunction, and the second application from the landlord. He framed one issue being whether the termination of the tenancy by the landlord was valid. He held that it was a good notice since it provided for a period that was more than 60 days, making reference to the provisions of Section 4 (4) of the Landlord and Tenant (Shops, Hotels, and Catering Establishments) Act, (Cap 301) Laws of Kenya, that requires a minimum two month notice. He also found that the reason given, i.e that the landlord wished to renovate the premises, was a valid reason as they had annexed inspection reports from the Kisii County Department of Health. He found that the tenant should therefore hand over the premises. He proceeded to dismiss the references dated 2 June 2022 and 4 August 2022 , and the application dated 4 August 2022, filed by the tenant. He allowed the landlord's application dated 22 September 2022 and declared valid the Landlord's notice of 20 May 2022. He ordered the tenant to give vacant possession within 30 days and awarded costs of Kshs. 40,000/= to the landlord.
9. Aggrieved by the ruling, the tenant filed two appeals. Through a Memorandum of Appeal dated 4 January 2023 filed by M/s Julius Nyakiangana & Company Advocates, the tenant filed the appeal No. ELCA E001 of 2023 in the Environment and Land Court at Nairobi. On 9 January 2023, the appeal was ordered transferred to Kisii. It was re-registered in Kisii as Kisii ELCA E002 of 2023. Through M/s J.O Soire & Company Advocates, the tenant filed another appeal registered as Kisii ELCA No. 2 of 2023 through a Memorandum of Appeal dated 11 January 2023.
10. In the Memorandum of Appeal filed by M/s J.O Soire & Company, the tenant argues that the Vice Chairman of the tribunal erred by issuing a substantive ruling yet the case BPRT No. E028 of 2022 had not been heard. It is averred that the Vice Chairman erred in making final orders without evidence, and without first giving the parties an opportunity to be heard.
11. In the Memorandum of Appeal filed by M/s Julius Nyakiangana & Company Advocates, it is raised that the Vice Chairman erred by delivering one ruling for two distinct cases which had not been consolidated. It is urged further that the Vice Chairman erred by issuing final orders without hearing the parties and without making an inquiry under Section 9 of Cap 301.
12. Both appeals were in respect of the ruling of 20 December 2022 and I directed that they be consolidated. The appeal was argued by way of written submissions and I have taken into account the submissions filed.
13. Before I go to the substance of the appeal, I must first castigate the appellant for filing two suits over the same matter. The appellant did not need to file a new reference, i.e BPRT No. E041 of 2022. She had already filed the reference No. E028 of 2022 which was pending. If there was a threat of eviction, and the appellant needed to apply for an order of injunction, what she ought to have done was file the application for injunction within the already existing suit BPRT No. E028 of 2022. She did not need to file a new reference in order to apply for an order of injunction as he already had a matter that was pending before the tribunal. It was an abuse of the process of court to file a new suit and in fact all that it ended up doing was to confuse matters. Even for the appeals herein, there was no need to file two appeals. In fact the issues raised in the two appeals are no different. It serves no purpose for the same aggrieved party to file two appeals over the same ruling.



14. It will be seen that while one bench of the tribunal was dealing with BPRT No. E028 of 2022 another bench was dealing with BPRT No. E041 of 2022. The Chairman who was handling BPRT No. E028 of 2022 did not even know that there was BPRT No. E041 of 2022 and was keen on giving the dispute a hearing date. This cannot however be said of the Vice Chairman who was dealing with BPRT No. E041 of 2022. When the application for injunction was filed, it was mentioned that there was already a pending reference No. E028 of 2022. My view is that he ought to straight away have struck out the suit BPRT No. E041 of 2022 and directed the appellant to file his application within the case BPRT No. E028 of 2022. This ought to have been the most prudent thing to do in order to avoid a multiplicity of suits, and in any event, the second suit was clearly *res judicata*. He however did not do this. It will be observed that when the Chairman got wind of the existence of the other matter before the Vice Chairman, he directed that the suit BPRT No. E028 of 2022, which had a hearing date, be placed before the Vice Chairman for directions. The Vice Chairman of course had the two applications dated 28 August 2022 and 22 September 2022 before him. One was an application for injunction and the other more or less an application for mandatory orders and for setting aside the interim orders. He chose to hear the two applications in order to finalize the two matters and proceeded to hold for the landlord.
15. I am convinced that the Vice Chairman erred in giving the mandatory orders in favour of the landlord without first hearing the tenant on merits. I am persuaded that this was not a case which was fit for mandatory final orders to be given upon an application and without hearing the parties. What the Vice Chairman did was to render otiose the suit BPRT No. E028 of 2022 which was filed earlier without giving the tenant the opportunity to ventilate his case. The tenant had raised in her reference pertinent issues and it was only fair that she be given the opportunity to present her case in full. In his reference, she raised issue that there was no resolution made to reconstruct the premises, no approved plans, that the premises was in good shape and did not need reconstruction, and that the landlord had not displayed financial capacity to undertake the reconstruction. It was only fair that she be heard on merits on her reference. I have already stated that what the Vice Chairman ought to have done at the outset was to strike out the second suit, BPRT No. E041 of 2022, but if he thought it could co-exist with the suit No. E028 of 2022, then he ought first to have made an order of consolidation before proceeding to make a consolidated ruling on the two suits. I am also convinced that on the application for injunction and the other application for mandatory orders, the prudent order to have made was for status quo to be maintained pending hearing of the suit.
16. Given the foregoing, I order as follows :
 1. That the suit Kisii BPRT Case No. E041 of 2022 is hereby struck out for being *res judicata* the suit Kisii BPRT Case No. E028 of 2022. The costs of the struck out suit will be to the landlord.
 2. That the suit Kisii BPRT Case No. E028 of 2022 to proceed for hearing on merits before another Member of the tribunal other than Hon. A. Muma, Vice Chairman.
 3. That pending hearing and conclusion of the suit Kisii BPRT Case No. E028 of 2022, the status quo prevailing in the suit premises be maintained and the tenant to continue paying the prevailing rent.
17. The last issue is costs of the appeals herein. In as much as the tenant has succeeded, I am not persuaded to award him costs for reason that I am convinced that he engaged in an abuse of the court process. I reiterate that it was wrong for him to file two suits before the tribunal. It was also not necessary to file two appeals before me on the same ruling. For that reason, I decline to give costs to the appellant/tenant. Each party to bear his/her own costs of the two appeals.



18. Judgment accordingly.

DATED AND DELIVERED THIS 25 DAY OF FEBRUARY 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Soire and Mr. Nyakiangana for the appellant

No Appearance on part of M/s S.M Onyango & Associates Advocates for the respondent

Court Assistant : Michael Oyuko

