



REPUBLIC OF KENYA



**Kahora v Mbariah & 3 others (Environment and Land Appeal  
13 of 2020) [2024] KEELC 3391 (KLR) (22 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3391 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL 13 OF 2020**

**OA ANGOTE, J**

**APRIL 22, 2024**

**BETWEEN**

**NAOMI WANJIRU KAHORA ..... APPELLANT**

**AND**

**BENSON IRUNGU MBARIAH ..... 1<sup>ST</sup> RESPONDENT**

**PROPERTY & BUSINESS OUTLOOK LTD ..... 2<sup>ND</sup> RESPONDENT**

**EPHANTUS MAINGI ..... 3<sup>RD</sup> RESPONDENT**

**TERESIA WAMBUI IRUNGU ..... 4<sup>TH</sup> RESPONDENT**

*(Appeal from the Judgement of by Hon. Chairman of the Business Rent Tribunal Court at Nairobi delivered on 13<sup>th</sup> March 2020 in Tribunal Case No. 125 of 2019 as consolidated with Tribunal Case No. 1069 of 2019 and Tribunal Case No. 1225 of 2019)*

**JUDGMENT**

1. Through a Memorandum of Appeal dated 16<sup>th</sup> March 2020, the Appellant has appealed against the ruling of the Chairman of the Business Premises and Rent Tribunal delivered on 13<sup>th</sup> March 2020 on the following grounds:
  - a. That the Honourable Chairman erred in law and in facts by determining that the Appellant do hand over possession of the premises to Teresia Wambui Irungu with effect from 14<sup>th</sup> March 2020 in the presence of the OCS Buruburu Police Station.
  - b. That the Honourable Chairman erred in law and in facts by determining that the only amount entitled to the Appellant as compensation for general renovation was Kshs. 20,000/-.



- c. That the Honourable Chairman erred in law and in fact that the Landlord do refund the Appellants deposit while he did not question various orders that the Landlord had breached.
- d. That the Honourable Chairman erred in law and in facts by determining that the Appellant was not the aggrieved person and handing over possession to a trespasser who had entered into agreement with the landlord while stay orders existed.

### **Appellant's Submissions**

2. The Appellant's Counsel submitted that the Honourable Chairman erred in determining that the Appellant do handover the possession of the premises without considering that the Tribunal Order issued on 21<sup>st</sup> November 2019 had been disobeyed by the Landlord and that the Tenant remained out of business despite the fact that orders had earlier been issued and had not been complied with by the Landlord.
3. Counsel submitted that the learned Chairman erred in finding that the Tenant was entitled to Kshs. 20,000/- as compensation for renovation; that the Tribunal arrived at the figure without a report from the Rent Inspectors or submissions on the cost from the Tenant and that it arrived at an erroneous assessment that the Appellant had used over Kshs. 250,000 in renovating the salon.
4. Counsel submitted that the Chairman erred in law and in fact when he ordered for the refund of the Tenant's deposit without questioning the compliance of the orders earlier issued, yet compliance of court orders are not an option. Counsel relied on [\*Econet Wireless Kenya Ltd v Minister for Information and Communication of Kenya and another\*](#) [2005] eKLR.
5. Counsel submitted that the Tribunal erred in allowing a trespasser possession using the agreement made during the subsistence of injunction orders/stay orders which have not been obeyed to date and that the Tribunal perpetuated injustice where the Appellant lost her livelihood during the Covid 19 pandemic.

### **The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' Submissions**

6. Counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that the Appellant was a Tenant of the 1<sup>st</sup> Respondent in Shop No. 1, "Magic B" Building at Innercore Umoja; that the 2<sup>nd</sup> Respondent was the agent appointed by the landlord to run the premises and that the 3<sup>rd</sup> Respondent was the caretaker at the suit premises.
7. It was submitted that the 4<sup>th</sup> Respondent was also a tenant to whom the 1<sup>st</sup> Respondent rented the premises after the Appellant was removed via a distress for rent process, which process was ordered and authorized by the BPRT.
8. They submitted that the dispute between the Appellant and the Respondents was the subject of three matters before the BPRT, which were consolidated by an order of the Tribunal dated 17<sup>th</sup> January 2020 and that these matters were NBI BPRT Case No. 125 of 2019 Naomi Wanjiru Kahora v Benson Irungu Mbaria, Property & Business Outlook Limited and Ephantus Maingi; NBI BPRT Case No. 1069 of 2019 Benson Irungu Mbaria v Naomi Wanjiku Kahora and NBI BPRT Case No. 1225 of 2019 [\*Teresia Wambui Irungu and Property & Business Outlook Limited v Naomi Wanjiku Kibara\*](#).
9. It was submitted that by the same orders, the Tribunal ordered that the suit premises be closed down and an inspection report by its officers be filed; that on 13<sup>th</sup> March 2020, the BPRT gave what amounted



to a consent order by the parties; that it is this order that this appeal was filed against and that the Record of Appeal is fatally incomplete and defective.

10. It was submitted by counsel that the Appellant has failed to include in the Record of Appeal the Respondents' responses to the applications dated 7<sup>th</sup> February 2019, 1<sup>st</sup> November 2019 and 20<sup>th</sup> December 2019; that while the Appellant filed her own application in BPRT 1069/2019, she failed to include the primary pleadings initially filed by the 1<sup>st</sup> Respondent in that matter and that while the Appellant has filed the 2<sup>nd</sup> Respondent's Reply to her application dated 27<sup>th</sup> May 2019 in BPRT 125/2019, the Appellant's application is omitted from the record.
11. Counsel relied on Order 42 Rule 13(4) of the *Civil Procedure Rules* which sets out the documents which must be included in the Record Appeal and submitted that the incomplete Record of Appeal will cause miscarriage of justice and irreparable harm to the Respondents.
12. The Respondent's Counsel asserted that the Appellant ought to have filed all the rival pleadings from which those orders arose in the three suits before the BPRT. They relied on the case of *United Finance Limited v Joel Mutbui Kyambu* [2000] eKLR and the Supreme Court case of *Kenya Revenue Authority v Mount Kenya Bottlers Ltd & 4 others* [2021] eKLR.
13. The Respondents submitted that they are strangers to BPRT Case No. 988 of 2018; that there was no Judgement rendered at the BPRT and no judgement has been exhibited in the Record of Appeal as would be required for an appeal against a judgement of a tribunal and that what was given on 13<sup>th</sup> March 2020 was an order in three consolidated suits, which is still alive at the Tribunal.
14. The Respondent further asserted that the order of 13<sup>th</sup> March 2020 amounted to a Consent order and was given after the Tribunal closed the premises in view of the multiplicity of conflicting orders issued in the three matters over time.
15. They submitted that the independent inspection ordered by the Tribunal established that the Appellant had been removed from the premises via distress for rent by Rhemat Auctioneers vide the BPRT's Order issued on 30<sup>th</sup> October 2019 and that it was for this reason that the Tribunal ceded the premises to the 4<sup>th</sup> Respondent, Teresia Wambui Irungu to whom the premises had already been rented out and ordered that the Appellant be compensated for the renovations she had done in the premises and her deposit be refunded.
16. The Respondents' counsel also argued that the Appellant did not disclose that she has never been in occupation of the premises since 14<sup>th</sup> March 2020 when the premises were handed over to the 4<sup>th</sup> Respondent by the Tribunal as per the Order appealed from.
17. Counsel for the Respondent finally drew this court's attention to the ruling issued by Hon. Justice Okong'o in this matter. In its ruling, the court found that the Appellant had deliberately misled the Court that she was in possession of the premises which was untrue.

### **Analysis and Determination**

18. The duty of a first appellate court, as is in this case, is to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, bearing in mind that it did not have a firsthand account of the testimony of witnesses. This was aptly stated by the Court of Appeal in *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR, in which the Court stated as follows:

“An appeal to this Court from a trial by the High 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 allowances in this respect.”

19. The appeal herein is with respect to the consolidated cases of Tribunal Case Nos 125 of 2019, 1069 of 2019 and 1225 of 2019. The Appellant/Tenant filed BPRT Reference No. 125 of 2019 Naomi Wanjiku Kahora v Benson Irungu Mbaria, Property & Business Outlook Limited and Ephantus Maingi, against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents on 8<sup>th</sup> February 2019.
20. In the said suit, the Appellant complained that the Respondents had locked her business premises, increased her rent and disconnected electricity and threatened to evict her contrary to Cap 301 of the laws of Kenya.
21. The 1<sup>st</sup> Respondent filed BPRT Reference Case No. 1069 of 2019 Benson Irungu Mbaria v Naomi Wanjiku Kahora, against the Appellant herein on 30<sup>th</sup> October 2019. The 1<sup>st</sup> Respondent’s claim was that the Appellant had closed and deserted the premises for 5 months contrary to the provisions of Cap 301 of the Laws of Kenya.
22. The 2<sup>nd</sup> and 4<sup>th</sup> Respondents filed BPRT Case No. 1225 of 2019 Teresia Wambui Irungu and Property & Business Outlook Limited v Naomi Wanjiku Kahora on 2<sup>nd</sup> December 2019 against the Appellant Tenant on grounds that she had unlawfully locked the shop, occasioning losses to the 4<sup>th</sup> Respondent.
23. Mr. Samuel Ngomi, an Agent of the Landlord, deponed that the 4<sup>th</sup> Respondent and the Landlord had entered into a tenancy relationship with respect to the suit property at the rate of KShs.21,200. He averred that the Appellant herein had however locked the shop, subjecting the 4<sup>th</sup> Respondent to mental anguish.
24. Having considered the appeal and pleadings filed by the parties, the issue for the determination by this court, is whether the Tribunal properly issued the orders dated 13<sup>th</sup> March 2023.
25. The Appellant herein has filed an appeal against the decision of the Business Premises and Rent Tribunal dated 13<sup>th</sup> March 2020. These orders are that:
  - a. The Landlord shall instruct the Auctioneers to release all the properties of Naomi Wanjiku Kahora (Tenant) unconditionally and not later than 5.00pm on 16<sup>th</sup> March 2020.
  - b. The Landlord shall also refund the said Tenant deposit of Kshs. 15,200/-.
  - c. The Landlord shall pay to the Tenant a further sum of Kshs. 20,000/- for general renovations.
  - d. Teresia Wambui Irungu shall with effect from 14<sup>th</sup> March 2020 take possession of the suit premises and she is hereby allowed to remove padlocks in the premises in the presence of OCS Buruburu Police Station.
26. These orders were purportedly issued following an application by the 4<sup>th</sup> Respondent dated 2<sup>nd</sup> March 2020. A review of this application and the record of the lower court however indicates that there is a disconnect between the said orders and the 4<sup>th</sup> Respondent’s application.
27. The 4<sup>th</sup> Respondent’s application arose against the background that the Tribunal was scheduled to conduct an inspection of the premises on 11<sup>th</sup> February 2020. The inspection was not undertaken on



this date as 11<sup>th</sup> February 2020 was declared to be a national holiday. The Appellant thereafter obtained a mention date of 8<sup>th</sup> April 2020.

28. The 4<sup>th</sup> Respondent consequently filed the application dated 2<sup>nd</sup> March 2020, seeking that the Tribunal give an earlier date for inspection of the premises and further directions within the 1<sup>st</sup> week of March 2020, regarding its order of closure of premises made on 17<sup>th</sup> January 2020.
29. When the application came up for hearing on 13<sup>th</sup> March 2020, there is no indication that the parties addressed the court on the application. The Tribunal's record is silent as to whether a hearing took place. It is only indicated that the court issued the subject orders upon preliminary investigation. It is therefore not clear on which basis the Tribunal purported to issue the orders of 13<sup>th</sup> March 2020.
30. This court takes notice that the consolidated Tribunal cases concerned the Appellant's tenancy over the suit premises. It also notes that the suits before the Tribunal are yet to be heard on merits as the parties are yet to adduce evidence to support their claims.
31. Having found that the suits and applications before the Tribunal stood unheard, the impugned orders of the court were irregular as the tenor of the orders was final in nature. The orders addressed the core subject matter of the dispute, being the validity of the Appellant's tenancy. These orders effectively disposed of the substance of the consolidated suits.
32. It is clear from the above events that the Tribunal, in issuing the orders of 13<sup>th</sup> March 2020, dealt with extraneous matters that were not before it at the time. In similar circumstances, the Court of Appeal in Independent *Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others* [2014] eKLR stated that a court is bound by the pleadings filed by parties:-

“As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score.”

33. The Court of Appeal in the above decision relied on the *dicta* of the Supreme Court of Malawi in *Malawi Railways Limited v Nyasulu* [1998] MWSC 3, which stated as follows on the importance of pleadings:

“... The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...”[emphasis added].”



34. The Supreme Court of Kenya in the case of *Raila Amolo Odinga & Another v IEBC & 2 Others* (2017) eKLR found and held as follows: -

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings...”

35. In this case, the Tribunal infringed upon the Appellant’s right to fair hearing under Article 47 and 50 of the *Constitution* by issuing the impugned orders without giving her an opportunity to be heard.

36. Additionally, the Tribunal issued the impugned orders without conducting an inspection of the suit premises. This is apparent from the sequence of events as well as the failure to include a report of the inspection.

37. In the absence of an inspection report to ascertain the state of the suit premises and the extent of renovations as claimed by the 1<sup>st</sup> and 4<sup>th</sup> Respondents, how did the Tribunal arrive at the estimated costs due to the Appellant? The estimated costs were not only speculative, but were arrived at by the Tribunal before hearing the parties which in itself is a serious error of law.

38. This court has found that the orders of the court issued on 13<sup>th</sup> March 2020 are unjust as they denied the Appellant the right to fair hearing. The Appellant’s appeal therefore succeeds and the following orders are hereby issued:

- a. The orders of the Hon. Chairman of the Business Rent Tribunal Court at Nairobi delivered on 13<sup>th</sup> March 2020 in Tribunal Case No. 125 of 2019 as consolidated with Tribunal Case No. 1069 of 2019 and Tribunal Case No. 1225 of 2019 are hereby set aside.
- b. Tribunal Cases No. 125 of 2019 as consolidated with Tribunal Case No. 1069 of 2019 and Tribunal Case No. 1225 of 2019 are referred back to the Business Premises and Rent Tribunal for hearing and final determination
- c. The Respondents shall bear the costs of the Appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 22<sup>ND</sup> DAY OF APRIL, 2024.**

**O. A. ANGOTE**

**JUDGE**

**In the presence of;**

Ms. Muturi holding brief Muhatia for Appellants

Mr. Gatheru for Kimani for 1<sup>st</sup> – 3<sup>rd</sup> Respondent

Court Assistant - Tracy

