



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & M'INOTI J.J.A)

CIVIL APPEAL NO. 218 OF 2015

BETWEEN

DHIRAJLAL J. SHAH.....1ST APPELLANT

RAJESH J. SHAH (As administrator of the

Estate of JUTHALAL VIRPAR SHAH).....2ND APPELLANT

AND

VIJAY AMRITLAL SHETHIA.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi,

(Lady Justice L. Gacheru, J.) Dated 17th July, 2015

in

ELC No.683 of 2014 (O.S.)

JUDGMENT OF THE COURT

This is an appeal from a ruling of the High Court (L. Gacheru, J.) dated the 17th day of July, 2015.

The background to the appeal is that, the appellants are the administrators of the estate of **Juthalal Virpar Shah** (the deceased), who was the proprietor of LR. No. 209/138/12 Nairobi Shop. No.1, (the suit property), verbally leased to the respondent for over a period of twenty years.

The appellants in their capacity as such, issued the respondent with a notice of termination of tenancy dated the 31st day of October, 2013, effective 1st January, 2014 (the termination notice), which according to the appellants was never resisted by the respondent and therefore crystallized their rights to vacant possession of the suit property, on the effective date. Accordingly to them, the respondent ought to have voluntarily vacated the suit premises on or before the effective date of 1st January, 2014. He failed to do so, prompting them to take out an originating summons (OS) against him, dated the 29th day of May, 2014, and as amended on the 17th day of March, 2015, seeking voluntary vacant possession, failing which eviction orders to issue.

The respondent resisted the OS by way of grounds of opposition dated the 13th day of April, 2015 and a replying affidavit deposed on the 27th day of November, 2014. In these, he acknowledged that he was a tenant in the suit premises; that the appellants' served him with a termination notice; and that he had resisted the termination notice by filing a BPRT 741/2013, (the reference) before the Business Premises Tribunal (BPRT) on the 12th day of November, 2013, which was still pending determination before the BPRT.

The appellants in what may be termed as a joinder of issue to the respondent's response, put in when they filed grounds of opposition dated the 15th day of April, 2015, and relying on the contents of the letter from the chairman BPRT dated 15th January, 2014, they reiterated that no reference had been filed by the respondent in opposition to their termination notice, which took effect on 1st January, 2014. They were

therefore entitled to vacant possession, failing which eviction orders to issue against the respondent.

After due consideration of the record, the learned Judge made observations thereon as follows.

I have perused the documents annexed to the parties' affidavits. Indeed the plaintiff served the defendant a notice to terminate the tenancy on 31st October, 2013, with effect from 1st January, 2014. The plaintiffs, believing that the defendant had not objected to the notice, filed this Originating Notice of Motion dated 29th May, 2014. The response by the defendant revealed that he had in fact objected to the notice by sending a letter dated 11th November, 2013 to the plaintiffs by way of registered post and filed a reference with the BPRT on 12th November, 2013. The defendant also annexed a letter from the Chairman, BPRT dated 17th November, 2014 Ref.BPRT.741/2013 (Nairobi). Thereunder, the Chairman confirms that the defendant herein did lodge a reference which pends determination.

Then made findings thereon as follows:

From the foregoing, it is evident that there is a dispute as to tenancy between the parties. The Constitution at Article 162(2) and section 13 of the Environment and Land Court Act confers original and unlimited jurisdiction to this Court to hear and determine disputes relating to the environment and the use, occupation of and title to land. This Court's jurisdiction notwithstanding, I am cognizant of the existence of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Cap 301 which makes provision with respect to certain premises, for the protection of tenants of such premises from eviction or from exploitation and for matters connected therewith and incidental thereto. The said Act establishes the Tribunal at section 11 to adjudicate over disputes in respect of controlled tenancies. It is indeed the law under section 6 of the Act, that any dispute as to a tenancy notice is required to be referred to the Tribunal.

In light of the foregoing legal provisions and by virtue of section 6 of the Civil Procedure Rules, I am obliged to stay this suit pending the outcome of the dispute at the BPRT. Consequently, the Court proceeds to stay this matter pending the hearing and determination of the Reference before the BPRT. Costs of the application shall be in the cause. It is so ordered."

The appellants were aggrieved and preferred this appeal citing nine (9) grounds of appeal, which may be paraphrased as follows: The learned Judge erred in law and fact when: she failed to properly appreciate the mandatory requirement under section 6(1) (2) of the Landlord and Tenant (Shops, Hotels & Catering Establishments) Act, Cap 301 Laws of Kenya; she misdirected herself and made a presumption that there was a reference filed in response to the termination notice; she failed to appreciate that the letter from the BPRT dated 15th January, 2014 Ref. BPRT/1/1/2 was sufficient proof that no reference had been filed against the termination; she failed to appreciate that the appellant had complied with section 10 of the Act in serving the Notice to terminate the tenancy; she failed totally to appreciate that under the Act, the BPRT has no jurisdiction to issue eviction orders against a tenant; she made an order staying the suit pending the outcome of the dispute at the BPRT; she totally failed to appreciate that what was in dispute was whether the respondent was subject to an eviction process which the BPRT as established under section 11 of the Act has no mandate to deal with; she failed to appreciate that under sections 83, 84 and 85 of the Law of Succession Act Cap 160 Laws of Kenya, the appellants being the lawful administrators of the late **JUTHALAL VIRPAR SHAH** are the legitimate proprietors of SHOP No. 1 on LR No.209/138/12 Nairobi, and had no existing lease agreement with the respondent, the same having expired on the death of the deceased; she seriously contradicted herself and made a finding that under Article 162(2) and section 13 of the Environment and Land Court Act No. 19 of 2011, the Superior Court had unlimited jurisdiction to hear and determine disputes relating to the environment and the use, occupation and title to land and instead of proceeding to resolve the dispute ordered the matter to proceed before the BPRT which has no jurisdiction on any eviction process.

The appeal was disposed of by way of written submissions as adopted by the respective learned counsel who elected not to highlight them.

In support of the appeal, the appellants in their submissions reiterated the contents of the OS as already highlighted above.

They also contended that the respondent failed to prove that his reference if any was filed, was timeously served upon the appellants as stipulated by law; that the letter from the chairman BPRT dated 17th November, 2014 purporting to suggest that the respondent had timeously filed a reference against the termination notice was suspect, if not a fraud, as it went contrary to the earlier one issued by the same chairman BPRT dated 15th, January, 2014 confirming that no reference had been filed against their termination notice, on the strength of which they took out the OS seeking vacant possession and the eviction of the respondent from the suit premises.

Further that the learned Judges' failure to uphold the OS in the light of what they have asserted above amounted to upholding the perpetuation of the respondents' illegal occupation of the suit premises to the detriment of the appellants who continue to incur losses in terms of rental loss. Alternatively, that by reason of the contradictory contents of the two letters from the chairman BPRT dated the 15th January, 2014 and 17th November, 2014 respectively, referring the matter back to the BPRT for a resolution would be highly prejudicial to the appellants as the chairman is unlikely to be fair in his adjudication over the dispute.

To buttress their submissions, the appellants relied on the provisions of sections 4, 6 and 10 of the Act, and case law referred to in their submissions.

In opposition to the appeal, the respondent submitted that only one issue falls for our determination, namely, whether or not the respondent timeously filed a reference before the BPRT to oppose the termination notice. In urging us to find in the affirmative on the above issue, the respondent submitted that the learned Judge satisfied herself that the respondent had opposed the termination notice by timeously filing a reference before the BPRT, before staying the OS pending the determination of the reference; that the learned Judges' action was informed by the contents of the documents annexed to the replying affidavit in opposition to the OS; which were never controverted.

Turning to the issue of timeous service of the reference upon the appellants, the respondent submitted that he assumed no responsibility for the service of the reference upon the appellant as that responsibility lay with the BPRT in terms of section 6(2) of the Act, vide which the BPRT was obligated to serve the reference upon the appellants within seven days of its receipt; that the failure to comply with the prerequisite on service did not vitiate the validity of the reference filed as the law does not provide for the lapsing of such a reference on account of the failure to serve it on the party issuing the termination notice but only on account of failure to oppose; that the explanation and apology tendered by the chairman BPRT with regard to the BPRTs inadvertence on its failure to timeously serve the appellants with the reference was not only reasonable but also acceptable as being sufficient reason for sustaining the reference for determination on its own merits; and also that the respondent as an innocent party should not be penalized for the wrongs committed by the BPRT in its failure to comply with the law as he had no supervisory role or control over the BPRT in the manner it discharged its functions.

With regard to jurisdiction to issue eviction orders, the respondent contended that it is the BPRT which is vested with the mandate to determinate issues pertaining to a termination of tenancy notice, which jurisdiction flowed directly from the preamble of the Act and as crystallized in section 6(1) of the Act.

From the record, it is evident that the appeal arises from the learned Judge's exercise of discretion in staying the OS pending the determination of the BPRTs' cause number 741/2013, the principles that guide the interference or otherwise with the exercise of judicial discretion were succinctly put in **Mbogo versus Shah [1968] EA 93**. Simply, it is that we can only interfere with the learned Judges exercise of Judicial discretion as above, if satisfied that on the record before us, the learned Judge acted on matters on which she should not have acted, or, because she failed to take into consideration matters which she should have taken into consideration and in failing to do so she arrived at a wrong conclusion, or; that she misdirected herself in some matter and as a result arrived at a wrong decision and as a result there has been a misjustice

See also Madan JA (as he then was) in **United India Insurance Co. Ltd Versus East African Underwriters (Kenya) Ltd [1985] EA 898** wherein he stated thus:-

“The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting as at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of consideration of which he should have taken account of; or fifthly, that his decision albeit a discretionary one is plainly wrong.”

Applying the above principles to the record in totality, and considering them in the light of the rival submission set out above, it is our view, that the following are the issue that fall for our determination:-

(1) whether the learned Judge fell into error when she exercised her discretion to stay the OS pending the determination of the reference which in her view was still pending before the BPRT.

(2) whether the learned Judge had jurisdiction to concussively determine issues touching on the termination notice within the OS.

With regard to issue number 1, it is not disputed that a landlord and Tenant relationship existed between the appellants and the respondent over the suit property; that the said tenancy relationship was verbal and therefore controlled in terms of section 2(1) (a) of the Act. It provides as follows:

“Controlled tenancy means a tenancy of a shop, hotel or catering establishment:

(a) Which has not been reduced into writings.

Being a controlled tenancy, the appellants were obligated to comply with the prerequisites set out in sections 4(1), (2), (4) & (5) of the Act if they desired to terminate the tenancy. These provide:

“4. Termination of and alteration of terms and conditions in, controlled tenancy.

(1) Notwithstanding, the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be terminated, and no term or conditions or right or service enjoyed by the tenant of any such tenancy shall be altered, other than in accordance with the following provisions of this Act.

.....

(2) A landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the tenant, any term or condition in, or right or service enjoyed by the tenant under, such a tenancy, shall give notice in that behalf to the tenant on the prescribed form.

.....”

(4). No tenancy notice shall take effect until such date, not being less than two months after the receipt thereof by the receiving party as shall be specified therein.....

(5) A tenancy notice shall not be effective for any of the purposes of this Act unless it specifies the grounds upon which the requesting party seeks the termination, alteration or reassessment concerned and requires the receiving party to notify the requesting party in writing, within one month after the date of receipt of the notice; whether or not he agrees to comply with the notice.”

From the assessment of the rival pleadings and submissions highlighted above, it is not disputed that the appellants issued a termination notice dated 31st day of October, 2013 and caused it to be served upon the respondent. It is evident from the record that the respondent moved to resist the termination notice and caused his advocate to send the requisite notification to the appellants vide a communication sent by way of registered post under the hand of his advocate dated the 11th day of November, 2013, whose contents read in part as follows:-

RE: NOTICE TO TERMINATE TENANCY BY YOURSELF TO VIJAY AMRTLAL SHETHIA t/a Shethis a wholesalers- shop No.1 on LR. No.209/138/12

We refer to your Notice to terminate the Tenancy of Mr. Vijay A. Shethia dated 31st October, 2013.

We wish to inform you that our client will not agree to comply with the said Notice, and will file Reference at the Business Premises Rent Tribunal in due course.”

The appellants do not deny receipt of the above letter. Their contention has all along been that the respondent failed to comply with section 6 of the Act after issuing the above letter. Section 6 of the Act provides:-

“6. Reference to Tribunal.

(1) A receiving party who wishes to oppose a tenancy notice and who has notified the requesting party under section 4(5) of this Act that he does not agree to comply with the tenancy notice, may, before the date upon which such notice is to take effect refer the matter to a tribunal, where upon such notice shall be of no effect until, and subject to the determination of the reference by the Tribunal:

Provided that a tribunal may, for sufficient reason and on such conditions as it may think fit permit such a reference notwithstanding that the receiving party has not complied with any of the requirement of this section.

(2) A tribunal to which a reference is made shall within seven days after the receipt thereof give notice of such reference to the requesting party concerned.”

To counter the appellants’ assertions of non-compliance, the respondent relied on the documentation he annexed to his replying affidavit deposed on the 17th day of November, 2014, which in his view were never controverted and to which we shall revert to at a later stage in this Judgment.

Section 6(2) of the Act (supra) enjoined the tribunal to effect service of the reference upon the appellants within seven days of its receipt. Apparently, the tribunal did not comply with the prerequisite in section 6(2) above. This is what gave rise to the two BPRTs’ conflicting positions separately conveyed in a letter dated the 15th day of January, 2014 addressed to the appellants informing them that no reference had been filed by the respondent against their termination notice, and which in terms of the said communication had crystallized the appellants rights to vacant possession against the respondent effective 1st January, 2014. As asserted by the appellants and as we have already observed above, this is what prompted the appellants to file the OS against the respondent seeking, voluntary vacant possession, failing which eviction orders to issue.

In contrast with the letter of 15th January, 2014 the one issued in favour of the respondent, dated the 17th day of November, 2014, also addressed to the appellants read in part as follows:-

“RE: Confirmation of Reference Vijay Amrtal Shethia t/a Shethia wholesalers- Tenant.

Your letter dated 9th January, 2014 on the above matter refers.

This tribunal received a letter from the firm of Mutimu Kang’atta & Co. Advocates Ref: VAS/BPRT/2014 dated 14th November, 2014 in which Mr. Kang’atta for the tenant herein informed us that you have filed a case in the High Court seeking eviction of the tenant on the ground that he did not file a reference with the Tribunal. Mr. Kang’atta has confirmed that his client filed a reference BPRT No. 741/2013 on 12th November, 2013. He has attached a copy of the official receipt No. A.0098789 issued for Kshs. 24,100.00 being the filing fees that was paid to the cashier. Upon perusal of our cash office records, we have confirmed that actually the tenant herein filed a Reference on 12th November, 2013 but due to an oversight the same was not entered in the relevant register. This is the omission which led to our confirmation to you that the tenant had not filed a Reference opposing your notice dated 31st October, 2013 and it is highly regretted. Consequently, our letter Ref: BPRT1/1/2 of 15th January, 2014 is hereby amended accordingly. Copies of the Reference BPRT.741/2013 and the official Receipt No.0098789 dated 12th November,

2013 issued by the Tribunal upon filing of the Reference are enclosed for ease of reference. Mbichi chairman Business, Premises Rent Tribunal.”

There is therefore no doubt from the contents of this communication that the BPRT was acknowledging and apologizing for inadvertence on its part for the failure to serve the reference on the appellant after it had timeously been filed by the respondent.

The consequences of non compliance by a tenant of a termination notice are as set out in section 10 of the Act. It provides:-

“10. Effect of Notice where a tenant fails to refer to the tribunal etc:

Where a landlord has served a notice in accordance with section 4 of this Act, on a tenant, and the tenant; fails within the appropriate time to notify the land lord of his unwillingness to comply with such a notice, or to refer the matter to a tribunal, then subject to section 6 of this Act, such notice shall have effect from the date therein as specified to terminate the tenancy, or terminate or alter the terms and conditions thereof or the rights or services enjoyed thereunder.”

The contents of the BPRT’s chairman’s communication of the 27th November, 2014, definitely superceded that issued earlier on of 15th January, 2014. The said contents are a clear demonstration that the respondent did comply with the prerequisites in section 6 of the Act and was not a victim of the consequence stipulated in section 10 of the Act. Upon the respondent filing

Reference number 741/2013, and duly paying for the same as borne out by the contents of the official receipt No. A.0098789 for Kshs.24, 100.00 issued by the BPRT and as confirmed by the chairman of the BPRT in his letter of 17th November, 2014, the law obligated the BPRT to effect service of the said reference on the appellants within seven days. There was no corresponding obligation on the respondent to ensure that the BPRT complied with the time lines set by the law as no supervisory role was vested in him by the same provision. He cannot therefore be faulted for the BPRT’s failure to comply with the requirement of the law.

The issue of the effect of failure to serve would be raised before the Tribunal. We should avoid making a determination. In any event such determination is not necessary to enable us reach our decision.

Turning to jurisdiction, It is now trite that issues touching on the jurisdiction of a court of law to determine any matter before it are fundamental issues of law and may be raised at any stage of the proceedings. Once raised, a determination thereon should be made before a Court can proceed further with the final disposal of any matter before it. Also that where want of jurisdiction is demonstrated in law to exist, the court has no option but to down its tools and proceed no further.

What does or does not amount to want of jurisdiction was expounded upon by Nyarangi, JA in the **Owners of the Motor Vessel ‘Lillian’ (S) versus Caltex Oil (Kenya) Ltd [1989] KLR1**, as follows:

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court had no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

“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.”

In the light of the above principle, it is common ground that the learned Judge who issued the impugned order was presiding over a Land and Environment court. Article 162 (2) (b) of the Constitution 2010, mandates Parliament to establish courts with the status of the High Court to hear and determine disputes relating to among others, the environment, use and occupation of and title to land. It is pursuant to this mandate that Parliament enacted the Environment & Land Court Act No. 19 of 2011. The preamble of the Act reads as follows:-

“An Act of Parliament to give effect to Article 162 (2) (b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to land, and to make provision for its jurisdiction, functions and powers and for connected purposes.”

Section 13 thereof sets out the jurisdiction of the court. It provides in part as follows:-

“The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provision of this Act or any other law applicable in Kenya relating to environment and land.

(2)In exercise of its jurisdiction under Article 162 (2), (b) of the Constitution, the court shall have power to hear and determine disputes.....

(a) Relating to environmental planning, and protection, climate issues, conduct planning, title, tenure, boundaries rate, rents, valuation, mining, mineral, and other natural resources;

(b) Relating to compulsory acquiring of land;

(c) Relating to land administration and management;

(d) Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land.

(e) Any other dispute relating to the environment and land

.....”

We find nothing in the above provision vesting this Court with the Jurisdiction to determine matters arising from termination of tenancy notices. Nothing prevented Parliament from including them in the enumeration of matters that fell within the jurisdiction of the court when created. Exclusion of such disputes from the jurisdiction of the superior court caused only imply that Parliament was satisfied that these were adequately catered for by the relevant Act namely, the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.

The preamble to the said Act, reads as follows:-

“An Act of Parliament to make provision with respect to certain premises for the protection of tenants of such premises from eviction or from exploitation and for matters connected there with and incidental thereto.”

Our construction of the title of this Act together with the content of the preamble (supra) is that, this Act deals specifically with the landlord and tenant relationships in relation to structures standing on the land. The mandate to resolve disputes arising from dealings in relation to such structures is exclusively vested in the BPRT in terms of section 12 of the Act. It is therefore our finding as correctly contended by the respondent, that the moment the Judge came to the conclusion first, that the respondent had timeously filed his reference with the BPRT; and second, that he (the respondent) had no obligation to ensure service of the said reference upon the appellants, within the stipulated time; and, third, also that there was no provision for the lapsing of such a reference on account of lack of timeous service of it upon the landlord; fourth, that matters of termination of tenancy notice was not among items enumerated in Section 13 of the Act as matters falling within the Jurisdiction of the Court, the Judge had no option but to down tools, stay the OS and direct parties to the BPRT for the disposal of the reference which in law was still pending before the BPRT. We therefore find that the appellant has not demonstrated that the Judge took into consideration matters she ought not to have taken into consideration; or that she misapprehended or misdirected herself on any point of law or facts. We therefore find that she exercised her discretion judiciously on the law and facts when she stayed the OS and directed parties to the BPRT for the determination of the pending reference.

Lastly, there was also fear expressed by the appellant that the chairman of the BPRT having expressed himself on the issue as he did in his communications dated the 15th day of January, 2014, and the 17th day of November, 2014 respectively, he may not be an impartial arbiter in the matter and that the appellants are therefore exposed to a disadvantage as they are likely to suffer injustice at the hands of a perceived biased arbiter. Our take on this is that, the best forum for addressing that concern is the BPRT itself. The issue has therefore been raised prematurely before us. We decline to make any pronouncement on it.

The upshot of all the above assessment and reasoning is that we find no merit in this appeal. It is accordingly dismissed with costs to the respondent both on appeal and the court below.

Dated and Delivered at Nairobi this 16th Day of February, 2018.

R.N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

M'INOTI

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JUDGE OF APPEAL

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

Deputy Registrar