Chelule & another v Kuria & another (Environment and Land Appeal E001 of 2022) [2024] KEELC 4806 (KLR) (20 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4806 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ENVIRONMENT AND LAND APPEAL E001 OF 2022

CG MBOGO, J

JUNE 20, 2024

BETWEEN

SAMUEL KIPLANGAT CHELULE ..... 1ST APPELLANT

AGNES GACHAGO ..... 2ND APPELLANT

AND

ALICE WANJIRU KURIA ..... 1ST RESPONDENT

SAMUEL KURIA MUREU ..... 2ND RESPONDENT

(Being an appeal from the judgment and decree of the Business Premises Rent Tribunal at Nakuru (Hon. Gakuhi Chege, Vice Chair) delivered on 11th March, 2022 in Nakuru BPRT Case No. 120 of 2019)

JUDGMENT

1. The appellants herein, being aggrieved by the judgment and decree of the Business Premises Rent Tribunal at Nakuru (Hon. Gakuhi Chege, Vice Chair) delivered on 11th March, 2022 in BPRT Case No. 120 of 2019 have appealed against the said judgment vide the memorandum of appeal dated 8th April, 2022 on the following grounds: -

    1. The learned Vice Chair erred in law and in fact by misconstruing the appellants' pleadings, evidence and written submissions and thus arrived at the wrong decision.

    2. The learned Vice Chair erred in law and in fact in failing to take into account the evidence adduced during trial and thus fell into error when he arrived at findings and conclusions unsupported by the record.

    3. The learned Vice Chair erred in law and in fact by holding that the 1st respondent was the legal recognized owner of the suit land despite clear and acknowledged evidence to the effect that the

suit property had been duly transferred and registered by the County Government of Narok from the 1st respondent to Harmony School. This fact is supported by the transfer document dated 16th September, 2008 and the letter of award by the Narok County Government Plots Disputes Committee dated 28th June, 2019.

4. The learned Vice Chair erred in law and in fact by failing to acknowledge that after the said transfer to Harmony School, the suit property plot number changed from being known as Plot No. 9 Block 8 to being known as Plot No. 20 Block 8. This fact is supported by the application for a new allotment dated 20th September, 2010 by Harmony School.

5. The learned Vice Chair erred in law and in fact by on one hand acknowledging that he had no jurisdiction to deal with disputes involving land ownership but on the other hand proceeded to nullify the transfer of the suit property to Harmony School as its registered owner and instead held that the 1st respondent is the allottee and owner of the suit property.

6. The learned Vice Chair erred in law and in fact by arriving at the decision he reached in complete and utter disregard to his observation that although the 1st respondent had contended that the transfer to Harmony School was illegal, she had not made a report to the Criminal Investigation Department (CID), and further that she has not filed any case in court to challenge the said transfer.

7. The learned Vice Chair erred in law and in fact by failing to appreciate that in any event, Harmony School had been in uninterrupted occupation of the suit property since 2001 and the 1st respondent never objected to this occupation.

8. The learned Vice Chair erred in law and in fact by admitted as evidence the contents of the 2nd respondent's affidavit sworn on 28th November, 2019. In doing so, the learned Vice Chair failed to assign an adverse inference to the fact that the 2nd respondent refused to be cross-examined on the contents of the said affidavit.

2. The appellants seek the following orders: -

    1. This appeal be allowed.

    2. The judgment and decree of the Business Premises Rent Tribunal at Nakuru (Hon. Gakuhi Chege, Vice Chair) delivered on 11th March, 2022 be set aside.

    3. Cost of this appeal be provided for.

3. The appeal was canvassed by way of written submissions. The appellants filed their written submissions dated 30th April, 2024 where they raised five issues for determination as listed below: -

    a. What is the duty of this court with respect to this appeal.

    b. The admissibility and/ or probative value of the 2nd respondent's pleadings and documents therein.

    c. Whether the tribunal had jurisdiction to hear and determine a matter where ownership of the premises was in dispute.

    d. Whether the 1st respondent has proved the allegations of fraud.

    e. What orders are as to costs.

4. On the first issue, the appellants submitted that the court must examine the entire record of appeal, analyse the facts and evidence as was presented before the tribunal and arrive at its own conclusion.

5. On the second issue, the appellants submitted that the tribunal and this court ought to disregard the 2nd respondent's replying affidavit dated 28th November, 2019, as he refused to testify and be cross-examined. To buttress on this submission, the appellants relied on the cases of *Moses Wanjala Lukoye versus Bernard Alfred Wekesa Sambu & 3 Others* [2013] eKLR, *Khalifa Salim versus Harun Rashid Khator (as administrator of the Estate of the Rashid Khator Salim, deceased) & 2 Others* [2015] eKLR, and *Trust Bank Limited versus Paramount Universal Bank Limited & 2 Others* Nairobi [2001] eKLR. They submitted that the tribunal unlawfully relied on the 2nd respondent's replying affidavit, and found it as admissible which was an error of law.

6. On the third issue, the appellants while relying on the cases of *Lucy Njeri Njoroge versus Kaiyahe Njoroge* [2015] eKLR, and *Republic versus Business Premises Rent Tribunal & Another, Ex-parte Albert Kigera Karume* [2015] eKLR, submitted that the issue of ownership of the suit properties took centre stage which the tribunal noted that it did not have jurisdiction to deal with issues involving ownership of land. That however, the judgment proceeded to determine the question of ownership in favour of the 1st respondent. The appellants relied on the cases of *Owners of the Motor Vessel "Lillian S" versus Caltex Oil (Kenya) Limited* [1989] eKLR, *Re: In the matter of Interim Independent Electoral Commission* [2011] eKLR, *Samuel Kamau Macharia versus Kenya Commercial Bank Limited & 2 Others* [2012] eKLR, *Republic versus Karisa Chengo & 2 Others* [2017] eKLR, and *Albert Chaurembo Mumba & 7 Others (Sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) versus Maurice Munyao & 148 Others (Suing on their own behalf and on behalf of the plaintiffs and other members/ beneficiaries of the Kenya Ports Authority Pensions Scheme)* [2019] eKLR.

7. The appellants submitted that it is only this court that has power, and is vested with jurisdiction to hear and determine any dispute concerning ownership of any land. Further, they submited that the tribunal has no power to usurp the powers and jurisdiction of this court, and determine the ownership question of the suit property. The appellants relied on the cases of *Republic versus Chairperson-Business Premises Rent Tribunal at Nairobi & Another Ex-Parte Suraj Housing & Properties Limited & 2 Others* [2016] eKLR, *Kenya Co. Registrations versus CKA Realtors Limited & Another* [2021] eKLR, and *Stephen Ronoh versus Harun Cheboi* [2006] eKLR.

8. On the fourth and fifth issues, and while relying on the cases of *Vijay Morjaria versus Nansingh Madhusingh Darbar & Another* [2000] eKLR, *Bruce Joseph Bockle versus Coquerro Limited* [2014] eKLR, *Nancy Kahoya Amadiva versus Expert Credit Limited & Another* [2015] eKLR, *Kinyanjui Kamau versus George Kamau* [2015] eKLR and *Kuria Kiarie & 2 Others versus Sammy Magera* [2018] eKLR, the appellants submitted that the issue of fraud was only raised by the 1st respondent only after the appellants brought the tribunal's attention of the existence of a transfer of the suit premises and the proceedings that had taken place at the lands offices of the Narok County Government. They submitted that the allegations of fraud as propagated by the 1st respondent remain mere allegations that are not supported by any evidence. In conclusion, the appellants submitted that the appeal has merit and should be allowed with costs.

9. The 1st respondent filed her written submissions dated 14th May, 2024 where she raised three issues for determination as follows: -

    a. Whether the honourable tribunal had jurisdiction to hear and determine the dispute.

b. Whether the appeal herein should be struck out for being scandalous, frivolous, vexatious and was otherwise an abuse of the process of the court.

c. Who should bear the costs of this application.

10. On the first issue, the 1st respondent submitted that the relationship between herself and the appellants was one of a landlord and tenant, and that the appellants did not at any point acquire the suit property. The 1st respondent submitted that in the circumstances of this case, the appellants having contended that they were the owners of the suit property, it was upon them to prove, which burden they failed to discharge. She further submitted that in the absence of proof of ownership, the tribunal had no reason to hold that the appellants were owners and not tenants as purported. Reliance was placed in the case of *Herbert L. Martin & 2 Others versus Margaret J Kamar & 5 Others* [2016] eKLR.

11. Further, the 1st respondent submitted that whereas she denied knowledge of the plot transfer application form dated 16th September, 2008, the same was cunningly prepared with the view to wrongfully challenge the 1st respondent's claim for rent.

12. On the second and third issues, the 1st respondent submitted that having established that the appellants were in occupation of the suit property as tenants, and having established that the court had jurisdiction to hear and determine the dispute, there was no basis for filing the appeal and it is an abuse of the court process. The 1st respondent submitted that the appeal ought to be dismissed with costs.

13. The 2nd respondent filed his written submissions dated 6th June, 2024 where he raised three issues for determination as listed below: -

i. Whether this court has jurisdiction to entertain and/or adjudicate upon the subject appeal.

ii. Whether the 2nd respondent's replying affidavit is admissible given that he was not cross-examined.

iii. Who should bear the costs of the application.

14. On the first issue, the 2nd respondent submitted that the tribunal investigated a complaint concerning ownership of land and since the appellants failed to provide evidence of ownership, it was found that no consideration was paid for the purchase of the suit property to the 1st respondent in accordance with Section 12 (4) and Section 15 of the *Land and Tenant (Shops, Hotels and Catering Establishment) Act*. The 2nd respondent relied on the case of *Re Hebatulla Properties Limited* [1979] KLR 96. While relying on the cases of *Silas Yimbo t/a Woodvale Associates versus Eldomart Holdings Limited* [2008] eKLR and *Mike Muli versus Justus Mwandikwa Kilonzo & 4 Others* [2022] eKLR, the 2nd respondent submitted that Section 15 of Cap 301 grants the right of appeal to parties to a reference who are aggrieved by a determination or order arising from a reference, and this court lacks jurisdiction to hear the present appeal, as the issues raised in the memorandum of appeal refer to a complaint addressed by the tribunal.

15. On the second and third issues, the 2nd respondent submitted that at no point did he refuse to testify or be cross-examined regarding his replying affidavit dated 28th November, 2019. He further submitted that the proper procedure would have been for the advocates for the appellant to notify the other party of their intention to move the court to order the deponent's attendance for cross-examination. He relied on the cases of *Mansukhalal Jesang Maru versus Frank Wafula* [2021] eKLR and *Republic versus Kenya Revenue Authority Ex-parte Althaus Management & Consultancy Limited* [2015] eKLR, and submitted that the replying affidavit contested was adequately responded to in the further replying

affidavit hence there was no need for cross-examination. In conclusion, the 2nd respondent submitted that the appeal is incompetently before the court, and ought to be struck out with costs.

16. I have considered the grounds of appeal, the written submissions as well as the authorities cited and, in my view, the issue for determination is whether the appeal has merit. As a first appellate court, my duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. This was stated in *Selle & another versus Associated Motor Boat Co. Ltd. & others* (1968) EA 123 in the following terms:

> "I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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 allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif –vs- Ali Mohamed Sholan* (1955), 22 EACA. 270)"

17. The 1st respondent moved the tribunal vide a reference dated 17th September, 2019 on account of failure of the tenant to pay rent in the tenancy. The complaint was that the tenant has not paid rent for eighteen years since the year 2001 accumulating to Kshs. 18,000,000/-. The reference was preceded by a notice of motion under a certificate of urgency filed by the 1st respondent against the appellants and the 2nd respondent herein. On 2nd July, 2021, the Vice Chair of the tribunal directed that the matter to proceed de novo in open court and that the hearing shall be by way of *viva voce* evidence. On this date, the appellants as well as the 1st respondent were represented by their counsel. The hearing of the matter proceeded on 9th September, 2021. The 1st respondent in examination in chief testified that in 2019, she wanted to pay rates and found that the school changed the plot from her name to its name (Harmony Schools). She testified that she wrote letters to the CEC of Land, Housing, Physical Planning and Urban Development complaining of the alleged transfer vide letters dated 12th April, 2019 and 6th June, 2019. The 1st respondent stated that she has never agreed to sell the suit property and no sale agreement was done and no consideration was paid.

18. During the cross-examination, the 1st respondent testified that Harmony School is her tenant, and that she gave the land to her husband (2nd respondent) to build a school without any agreement. She maintained that she never sat down to agree on the sale of the suit property, and neither has she filed a case against the illegal transfer and neither has she reported the matter to the Directorate of Criminal Investigations. It was her evidence that the school took occupation in the year 2001 and that the rent paid was Kshs. 42,000/= per month, which the tenants paid for two years. She said that they had no written agreement with the school, and no terms were ever agreed upon with the school on the tenancy. On further cross-examination, the 1st respondent maintained that the claim is over rent arrears, and that her husband, the 2nd respondent, intervened whenever she demanded for rent payment.

19. The 1st appellant herein contested that they are not tenants but owners of the suit property which they purchased for a sum of Kshs. 500,000/-. She testified that the 2nd respondent advanced them a loan which they repaid for a period of 6 years, and after completing the said payments, the property was

transferred to the school. The 1st appellant produced receipts of payment of rates dated 20th September, 2010. She testified that they paid for transfer fees of Kshs. 15,000/- which was acknowledged on 16th September, 2008 and the same was paid together with a subletting fee. She testified that there was dispute over ownership when they were called by the CEC Lands on 28th June, 2019 and it was resolved that the Narok County Government had procedurally transferred the land to the school. It was her evidence that they have never been tenants and the issue of rent could not arise.

20. The issue of the jurisdiction of the tribunal to hear and determine the matter was clear in this case, and ought to be the first issue for determination. The appellants disputed any claims of tenancy, and instead maintained that they are owners of the suit plot and that no rent is due to the 1st respondent. The 1st respondent maintained that she is the landlord, and she has never entered into any negotiations of sale of land with the appellants over the suit plot. Both the appellants and the 1st respondent relied on various documents to support their case.

21. The jurisdiction of the tribunal is limited to controlled tenancies as provided for under the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Cap 301 Laws of Kenya.

22. Section 2 of the *Act* defines a controlled tenancy as follows:

> " controlled tenancy" means a tenancy of a shop, hotel or catering establishment—
>
> (a) which has not been reduced into writing; or
>
> (b) which has been reduced into writing and which—
>
> (i) is for a period not exceeding five years; or
>
> (ii) contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or
>
> (iii) relates to premises of a class specified under subsection (2) of this section."

23. In *Republic versus Chairperson - Business Premises Rent Tribunal at Nairobi & another Ex-Parte Suraj Housing & Properties Limited & 2 Others* [2016] eKLR, the court cited with approval the case of *Pritam vs. Ratilal and Another* Nairobi HCCC No. 1499 of 1970 [1972] EA 560 where it was stated as follows:

> " Therefore the existence of the relationship of landlord and tenant is a pre-requisite to the application of the Act and where such relationship does not exist or it has come to or been brought to an end, the provisions of the Act will not apply. The applicability of the Act is a condition precedent to the exercise of jurisdiction by a tribunal; otherwise the tribunal will have no jurisdiction. There must be a controlled tenancy as defined in section 2 to which the provisions of the *Act* can be made to apply. Outside it, the tribunal has no jurisdiction."

24. The tribunal in its judgment delivered on 11th March, 2022 addressed its mind to the issue of ownership. In paragraph 63 of the judgment, the tribunal stated as follows: -

> " I have looked at the documents presented before me and note that the only document of ownership presented is a letter of allotment in the name of the applicant. No corresponding ownership document has been presented by the respondents who rely on a transfer which is disputed by the applicant. No agreement for sale to support such transfer has been presented

before me and I am of the firm view that the applicant has ably demonstrated that she remains the allottee and owner of the suit plot."

25. I am of the view that the tribunal delved into an issue that was not within its purview to determine so. It is now well settled law that a letter of allotment does not confer title to property. In the case of *Stephen Mburu & 4 Others versus Comat Merchants Ltd* [2012] eKLR it was held that: -

> " ...From a legal stand point, a letter of allotment is not a title to property. It is a transient and is often a right or offer to take property".

26. In a scenario such as this where both parties claim ownership of the plot arising out of an allotment letter, it was best that the issue of ownership first be determined by a court seized of that jurisdiction. The tribunal was wrong to rely on an allotment letter issued to the 1st respondent and ignore the documents relied on by the appellants to conclude that the 1st respondent herein is the owner of the suit plot. It would only have been practical for the tribunal to establish whether there existed a landlord and tenant relationship without pronouncing itself on the issue of ownership of land. It is also on the strength of the allotment letter and the absence of a written sale agreement that the tribunal was of the view, that there existed a landlord tenant relationship between the parties.

27. In my humble view, the tribunal lacked jurisdiction to pronounce itself on the issue of ownership of the suit plot, and it follows therefore that the proceedings and judgment were a nullity and must be set aside.

28. From the above, there is need to establish the rightful owner of the suit plot, thereafter, whether or not there is a controlled tenancy, the same can be determined by the tribunal.

29. I find merit in the memorandum of appeal dated 8th April, 2022 in the following terms: -

    i. The appeal is hereby allowed.

    ii. The judgment and decree of the Business Premises Rent Tribunal at Nakuru (Hon. Gakuhi Chege, Vice Chair) delivered on 11th March, 2022 is hereby set aside.

    iii. Costs to the appellants.

    Orders accordingly.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 20TH DAY OF JUNE, 2024.

HON. MBOGO C. G.

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JUDGE

In the presence of:-

Mr. Meyoki Pere – C. A