



Monica Gathoni Ndungu t/a the Accra Restaurant v Mwangi & another (Suing as Legal Representatives to the Estate of John Mwangi - Deceased) (Environment and Land Appeal E039 of 2023) [2024] KEELC 5568 (KLR) (29 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5568 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E039 OF 2023**

**AA OMOLLO, J
JULY 29, 2024**

BETWEEN

**MONICA GATHONI NDUNGU T/A THE ACCRA
RESTAURANT APPELLANT**

AND

SUSAN NYOKABI MWANGI 1ST RESPONDENT

SOLOMON IRUNGU MWANGI 2ND RESPONDENT

**SUING AS LEGAL REPRESENTATIVES TO THE ESTATE OF JOHN MWANGI -
DECEASED**

(Being an Appeal from the Ruling and orders of the Honourable Chege Kakubi, the Vice Chair of the Business Premises Rent Tribunal delivered on 3rd February 2023 at Nairobi in Tribunal case Number E928 of 2022)

JUDGMENT

Background of the appeal:

1. This Appeal finds its basis in the Ruling rendered on 3rd February 2023 by Honourable Mr Gakuhi Chege; the Vice Chair of the Business Premises Rent Tribunal (BPRT); that one, the Tenant deliver vacant possession of the suit property [in the order dated 03/02/2023 the suit property is listed as L. R. Number 209/1413/28 Accra House] forthwith and in default be evicted from there by a licenced auctioneer accompanied by the OCS Central Police Station. Two, that the Tenant pay mesne profits in the sum of Ksh 3,600,000/- for the period 1st September 2021 to date at the rate of Ksh 200,000/- per month and continue paying the rate until she delivers vacant possession. Three, that the Tenant pay costs of Ksh 50,000/- for the suit and lastly, that the Ruling apply to Nairobi BPRT E1006/2022



between Monicah Gathoni versus Zaweria Wangari Mwangi & Alex Kimani Mwangi whose facts are similar to this case.

2. The Respondents; then the Landlords; had sued the Appellant; the Tenant then; by a Motion dated 13th October 2022 filed under Certificate of Urgency and supported by an Affidavit sworn by Solomon Irungu Mwangi; one of the Landlords. The discord over the suit property L.R. NUMBER 209/1314/28 Accra House; concerned a Landlord/Tenancy formalisation versus an eviction and payment of mesne profits.
3. The deponent swore that after obtaining legitimacy as landlords; [in Nairobi BPRT E599/2021], they started collecting rent of the suit property. Around 2020, one Zaweria Wangari Mwangi illegally assumed the role of landlord without any lawful order. She gave vacant occupation of the suit property to the Tenant around August 2019; who never paid rent while she was there. The attester stated that the Tenant still occupied the premises and her options were to formalise the tenancy or vacate the premises and pay mesne profits for the duration of her stay in the suit property until the determination of the suit.
4. The Advocates for the Tenant filed a Notice of Preliminary Objection dated 25th November 2022 that the Tribunal did not have jurisdiction to hear and determine the dispute in accordance with section 2 of the *Landlord and Tenant (shops, hotels and catering establishments) Act* [Chapter 301] Revised 2015 (hereinafter referred to as 'the Act') and that the matter ought to be heard in the ELC. The Notice of Preliminary Objection and application dated 13th October 2022 were disposed of by written submissions.
5. The Landlord filed submissions dated 15th December 2022, taking the position that the tribunal had jurisdiction to adjudicate on recovery of possession, payment of arrears of rent and mesne profits applicable to any person whether or not they are a tenant. He submitted that the Tenant had acknowledged that she was paying utility bills to Alex Mwangi who was an agent of the Landlord. Because the Tenant remained on the premises without payment, the Tribunal had jurisdiction on the matter. The Landlord sided with Justice Odunga J (as he then was) in *Republic versus Chairperson Nairobi BPRT & another ex parte Suraj Housing & Properties Limited and 2 others* [2016] eKLR where the judge stated that the Tribunal had to restrict itself to its powers highlighted in section 12 of the Act. The Landlords' submissions highlighted that the Application dated 13th October 2022 was merited. His response was based on the submissions segment on jurisdiction. According to the Landlords, they had a prima facies case with high possibility of success.
6. The Tenant filed two paged submissions and submitted that jurisdiction was an issue of pure law and the Tribunal had no jurisdiction over tenancies that were not controlled. According to the Tenant, the issue ought to be heard before the ELC. Because the matter is presently in the ELC, the Tenant thought it necessary for the proceedings in the BPRT court be stayed. She also tendered that as this was a trespass suit, it would be within the jurisdiction of the ELC. The Tenant stated that the Landlords were acting contrary to section 12 (4) of the Act. The real issue; among the tenants is a succession issue before the beneficiaries and the BPRT could not step into such a zone.
7. The Tribunal in its Ruling recalled the judgment it gave in Nairobi BPRT E599 of 2021 that the Landlords were exclusively entitled to the rental income accruing from the suit property and that any tenancy with any other Landlord was against the Tribunal's orders. Therefore, the Tenant claiming she had a tenancy agreement with a person outside the Landlords in this case was a breach of the Tribunal's orders and was void.



8. The Tribunal cited the case of Heptulla versus Noor Mohamed [1984] eKLR where the Court of Appeal invoked the doctrine of *ex turpi causa non oritur actio* citing the case of *Ministry Amar Singh versus Kulubya* [1963] EA 408 at page 414. The doctrine is loosely defined as ‘a doctrine that a person will not be able to pursue a cause of action if it arises from his own illegal act.’
9. In this case, the Tenant entering into agreement with people who had no authority to lease the suit property or collect rent. According to the Vice Chair, even if the Tenant lodged a complaint based on section 12 (4) of the Act, she was still held that the determination in case E599/2021 supersedes all other orders. That no issue had been brought up concerning succession thereby the Tribunal would not consider it.
10. Because of the Tenant’s actions, she became a trespasser liable to be evicted under section 12 (1) of the Act.

Memo of Appeal to this court:

11. The Appellant filed a Memorandum of Appeal dated 23rd April 2023 where she raised four grounds of appeal that can be condensed into two main issues as below:
 - i. That the Honourable Vice Chair erred in law and in fact in failing to observe that there was no tenancy relationships between the Landlords and the Tenant so that the parties would have audience in the BPRT
 - ii. The Honourable Tribunal failed to observe that the Landlord’s claim before it was on a question of trespass hence a matter for the ELC jurisdiction rather than the Honourable Tribunal. In addition, the Tribunal gave orders beyond its jurisdiction.
12. The Appellant prayed:
 - a. That the Ruling and Orders issued by the Honourable Mr Chege; Vice Chair of the Nairobi BPRT Case Number E928 of 2022; principally the Ruling dated 3rd February 2023 be quashed;
 - b. That the costs of this appeal as well as the BPRT case number E928 of 2022 be borne by the Respondents; and
 - c. Any other order or relief which this Honourable court might deem fit to grant.

Determination:

13. This appeal raises only one issue for determination to wit; whether or not the Business Premises Tribunal had jurisdiction to entertain the claim filed before it. In holding that it had jurisdiction, the honourable chair referred to the provisions of section 12(1) (e) of the Act. The parties herein have also referred to the provisions of the said section in submitting that for the Appellant that the Tribunal lacked jurisdiction and for the Respondent that it did/had.
14. The background of the case as highlighted in the record show that the suit premises is a commercial premise. This is expressed in paragraph 35 of the impugned ruling which also quoted a determination in BPRT E599 of 2021 which held that the Respondents were exclusively entitled to the rental income accruing from the commercial building erected on L.R. NO. 209/1413/208 otherwise known as Accra Hotel or Accra Road Nairobi. The Appellant entered into the suit premises vide a lease executed between it and the persons who were sued in E599 of 2021.
15. Once the Respondents were declared to be the ones authorised to collect rent from the suit premises, it appears that they tried to formalise a tenancy relationship between them and the appellant to no avail.



The failure led to the filing of the suit the subject matter of this appeal. The Appellant has urged that the Tribunal did not have jurisdiction to hear and determine the matter and the orders issued thereof were made out of jurisdiction.

16. Section 12(1)(e) of CAP 301 states thus;

“ 1. A Tribunal shall, in relation to its area of jurisdiction have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in addition to and without prejudice to the generality of the foregoing shall have power –

(e) to make orders, upon such terms and conditions as it thinks fit, for the recovery of possession and for the payment of arrears of rent and mesne profits, which orders may be applicable to any person, whether or not he is a tenant, being at any material time in occupation of the premises comprised in a controlled tenancy.”

17. A plain reading of this section does indicate that the Tribunal has jurisdiction to grant vacant possession where at the material time one is in the premises whether as tenant or not. The same position was taken in the case referred to by the Hon Vice-Chair in the impugned ruling of *Re- Hebatulla properties Limited* (1979) eKLR where it was held as follows: -

“ The specific powers include (paragraph (e); the power to make an order for the recovery of possession from a tenant or indeed from any person in occupation. Such as order would be an application made on the application of the landlord. No corresponding power is given to make an order on the application of a tenant who has been forcibly disposed by a landlord.”

18. The Appellant argued that the Respondent had raised the issue of trespass which is an issue that can only be determined before the Environment and Land Court. The application filed by the Respondent stated on its face that it invoked the jurisdiction of the Tribunal under section 12(1) (e) of CAP 301 and sections 1A & B and 3 of the *Civil Procedure Act*. None of the grounds listed on the face of the application cited trespass. Thus, the Appellant was made aware on what was being sought and not an action for trespass as she alleges.

19. The Appellant also submitted that the Hon vice Chair found on the issue of trespass under paragraph 45 of the Ruling and so it confirms her argument on lack of jurisdiction. Paragraph 45 read in part thus;

“ the Respondent entered into the suit premises pursuant to an illegal lease agreement and denies being tenant of the applicants who were declared to be legally entitled to the rental income accruing from the suit premises. She therefore became a trespasser by operation of law and liable to be evicted under section 12(1) (e) of Cap 301. Hence the application dated 13.10.2022 is well founded in law and fact and is for allowing”

20. The Appellant is reading that this constituted a cause of action in trespass. However, it is my considered view and I so hold that the Hon Vice Chair was explaining that although the Appellant got into the premises pursuant to a lease, the Appellant was a lessee to persons who were declared to not have locus to receive rent. As such, she became a trespasser pursuant to the judgement in BPRT E599 of 2021 and the Chair qualified the trespass that she was liable to be evicted under section 12(1) (e). The Tribunal did go outside of what was pleaded.



21. In light of the provisions of the law cited, I find that the Appellant was a person who was in occupation at the material time. She does not deny that she was not paying rent to the Respondents to form a basis for challenging the amounts awarded as mesne profits. In concluding, i hold that the Tribunal had jurisdiction to grant the orders it did and find no fault to set aside the orders that were granted on 3rd February, 2023. The result is I find no merit in the appeal and hereby dismiss it with cost.

DATED, SIGNED & DELIVERED AT NAIROBI THIS 29TH JULY, 2024

A. OMOLLO

JUDGE

