



Maple Management Limited v Gagi (Suing on behalf of Gagis Investment Ltd) & another (Environment and Land Appeal E018 of 2023) [2024] KEELC 5863 (KLR) (30 August 2024) (Judgment)

Neutral citation: [2024] KEELC 5863 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E018 OF 2023
EK WABWOTO, J
AUGUST 30, 2024**

BETWEEN

MAPLE MANAGEMENT LIMITED APPELLANT

AND

SGEBO TUNDURA GAGI (SUING ON BEHALF OF GAGIS INVESTMENT LTD) 1ST RESPONDENT

JULIANA KIHARA 2ND RESPONDENT

(Being an Appeal from the ruling of the Business Premises and Rent Tribunal delivered by the Hon. Patricia May on 13th February 2023 in Nairobi BPRT Case No. E628 of 2022)

JUDGMENT

1. This judgment is in respect to an appeal filed against the ruling and orders of the Business Premises and Rent Tribunal delivered by Hon. Patricia May on 13th February 2023 in NAIROBI BPRT CASE NO E628 of 2022.
2. The Tribunal in its Ruling allowed the 1st Respondent's application dated 14th July 2022 and allowed the said application and granted the following orders:
 - i. That pending the hearing and determination of this application, a temporary injunction is hereby issued restraining the Respondent/Landlord either by himself, agents, servants and/or personal representatives from interfering and/or disrupting the peaceful running of the health club and swimming pool.
 - ii. A declaration is hereby issued that the action of the Respondents are unlawful, illegal and against requisite law.



- iii. That an order is hereby issued that the said tools of work denied access by the Respondent/Landlord be allowed including the generator.
 - iv. That the OCS Kileleshwa Police Station to enforce the compliance of the orders.
3. The Appellant being aggrieved by the said ruling and orders filed the instant appeal vide a Memorandum of Appeal dated 3rd March 2023. The following grounds were raised in the appeal:
 - i. That the Tribunal erred both in law and fact in finding that there existed a Landlord and Tenant relationship as between the Appellant and the 1st Respondent.
 - ii. That the Tribunal erred both in law and fact in failing to order the striking out of the Appellant's name from the proceedings and further proceeding to issue adverse orders against the Appellant.
 - iii. That the Tribunal erred in failing to wholesomely take into account the Appellant's contentions and arguments and in so doing failing to render a complete determination of the issues raised for determination.
 - iv. That the Tribunal erred in allowing prayers No. 4, 5, 6 and 7 of the 1st Respondent's Application dated 14th July 2022.
4. The Appellant thus sought the following orders:
 - i. The Appeal against the ruling of the Tribunal be and is hereby allowed.
 - ii. That the 1st Respondent's application dated 14th July 2022 be dismissed with costs by the Appellant.
 - iii. That costs of the Appeal be awarded to the Appellant.
5. The appeal was canvassed through written submissions. The Appellant filed written submissions dated 5th January 2024 while the 1st Respondent filed written submissions dated 22nd February 2024. No written submissions were filed by the 2nd Respondent.
6. The Appellant submitted that the Tribunal lacked jurisdiction to determine any alleged dispute as against the Appellant and Respondents since the Appellant did not have a landlord and Tenant relationship with either of them but is merely a Management Company. It was argued that the Appellant is a Management company duly incorporated and charged with the management of all those apartments and common areas erected on all that land known as LR No 1870/VI/85 situate in Westlands, Nairobi and known as Connaught Apartments and did not have any lease and/or rental agreement with the 1st Respondent at all and neither did the Appellant lease any property to the 1st Respondent to warrant the 1st Respondent filing a reference against it supposedly as a Landlord .
7. It was also submitted that without the approval of the Appellant the Management company, the 2nd Respondent alleging to be the lawful owner had left out the premises swimming pool and health club facilities to the 1st Respondent to use the same for carrying on commercial activities which were open to the general public and which caused substantial nuisance to the premises' other home owners. It was further argued that the use of the swimming pool area and health club facilities for commercial purposes was for all intents and purposes unlawful and as such the Appellant could not allow the same.
8. The Appellant submitted that it had filed a suit in the Environment and Land Court at Mililani being Mililani ELC E265 of 2022 –Maple Management vs. Juliana Jambi Kihara seeking a determination on the basis upon which the 2nd Respondent alleges to own the premises and further upon which she



- had leased out the same to the 1st Respondent as well as the basis upon which the 1st Respondent was carrying out a commercial activity thereon when the same is strictly prohibited yet there had not been a change of user on the property.
9. It was also submitted that despite the Tribunal lacking jurisdiction, it declined to allow the Appellant's name from being struck out of the Tribunal proceedings, declined to stay the Tribunal proceedings pending determination of the ELC matter and summarily went on to hold that the Appellant was a landlord and made orders against it.
 10. The Appellant concluded its submissions by urging this Court to find its appeal merited and allow the same in its entirety.
 11. The 1st Respondent filed its written submissions dated 22nd February 2024. Counsel submitted on the following issues:
 - i. Whether the Appellant participated in the lower Court proceedings to conclusion;
 - ii. Whether this appeal is res judicata and;
 - iii. Whether the lower Court ruling was merited;
 12. It was argued that the Appellant did not move the trial court for its removal from the proceedings and therefore the appeal is an afterthought and should be dismissed with costs.
 13. It was submitted that the appeal is also res judicata since the appellant filed an application in ELC E265 of 2022, Maple Management Company vs. Juliana Kiara & Segbo Tundura Gagi which was dismissed by Lady Justice Omollo.
 14. It was further submitted that the Tribunal had jurisdiction to entertain the matter and the appeal herein is not merited. Reliance was placed on the cases of Nancy Mwangi T/A Worthin Marketers v Airtel Networks (K) Ltd & 2 Others [2014] eKLR and Al- Riaz International Limited vs. Ganjoni Properties Limited [2015] eKLR and Section 2 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* Cap 301 Laws of Kenya.
 15. The Court was urged to dismiss the appeal with costs.
 16. The Court has considered the entire record of appeal together with the written submissions filed by the parties herein. The Court is of the view that the singular and silent issue for determination herein is whether the appeal is merited and if so what the appropriate reliefs that ought to be granted.
 17. In determining the issues raised in the Appeal this court is cognizant of its duty on a first appeal as set out in the case of *Selle & Another –Vs- Associated Motor Boat Co. Ltd & others* (1968) EA 123 cited with approval in *China Z Hogxing Construction Company Ltd –Vs- Ann Akeru Sophia* (2020) eKLR.
 18. As has also been restated in the case of *United India Insurance Co. Ltd V East African Underwriters (Kenya) Ltd* (1985) E.A a court sitting on Appeal will not interfere with a discretionary decision appealed from simply on the ground that the court, if sitting at first instance, would or might have given different weight to that given by the court to the various factors in the case. This court sitting on Appeal is only entitled to interfere if one or more of the following matters are established; first, that the court misdirected himself in law; secondly, that the court misapprehended the facts; thirdly, that the court took account of considerations of which he should not have taken account; fourthly, that the court failed to take account of considerations of which he should have taken account, or fifthly, that the court's decision, albeit a discretionary one, is plainly wrong.



19. All the grounds of the Memorandum of Appeal as raised by the Appellant were to the effect that the Tribunal erred in finding that it had jurisdiction over the matter as there existed a Landlord and Tenant relationship as between the Appellant and the 1st Respondent.
20. The centrality of jurisdiction in any proceedings need not be re-stated. Nyarangi J.A succinctly captured this in *Owners of Motor Vessel ‘Lillian S’ vs Caltex Oil (Kenya) Limited* [1989] KLR 1 thus:
- “Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...”
21. Similarly, the Court of Appeal in the case of *Kakuta Maimai Hamisi vs Peris Pesi Tobiko & 2 Others* [2013] eKLR stated as follows:
- “So central and determinative is the jurisdiction that it is at once fundamental and overarching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.”
22. Speaking to the source of the Court’s jurisdiction, the Apex Court of Kenya in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 Others* [2012]eKLR stated as follows:
- “A court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”
23. The Business Premises Rent Tribunal was enacted as a quasi-judicial organ. Section 11 of the Landlord and Tenant (Shops, Hotel and Catering Establishments) Act Cap 301 establishes the BPRT. Further. The Act mandates the BPRT to hear and determine disputes arising out of a controlled tenancy or simply put a tenancy relationship between a landlord and a tenant of a business premises. Section 12 of the Act enunciates the powers of the BPRT in handling complaints arising from a controlled tenancy relationship. Section 2(1) (a) Cap 301 defines a controlled tenancy as follows:
- a. Which has not been reduced into writing; or
 - b. Which has been reduced to writing and which- is for a period not exceeding five years; or
 - c. contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or
 - d. Relates to premises of a class specified under subsection (2) of this section.
24. The Appellant contended that it is a management company duly incorporated and charged with the management of the apartment and common areas on LR No, 1870/VI/85 known as Connaught Apartments and did not have any lease and or rental agreement with the 1st Respondent. It was also contended that the ELC Court in ELC E265 of 2022 delivered a ruling on 27th April 2023 and found that the Plaintiff (Maple Management Limited) has tenancy relationship with the 2nd Defendant (Sgebo Tundura Gagi) as the tenancy agreement exhibited between the defendants.



25. The 1st Respondent submitting on the issue of jurisdiction argued that the lease agreement was for 5 years commencing on 6th September 2021 and as such the Tribunal was clothed with jurisdiction. It was also submitted that the issues raised by the Appellant were an afterthought since they were not raised by the Appellant before the Tribunal.
26. From the record of Appeal and the evidence that was presented before the Tribunal, the lease agreement dated 6th September 2021 was executed between the 1st Respondent and the 2nd Respondent. The Appellant was not a party and as such while the Tribunal has jurisdiction to hear the dispute as between the 1st and 2nd Respondents, the same could not have extended to the Appellant who was not a party to the said agreement. The Appellant has no tenancy relationship with the Respondents.
27. In view of the foregoing, it is the finding of this Court that the Tribunal erred both in law and in fact in finding that there existed a Landlord and Tenant relationship as between the Appellant and the 1st Respondent.
28. Having found that the Tribunal erred in finding that there existed a Landlord and Tenant relationship between the Appellant and the 1st Respondent this Court must now proceed to grant the appropriate reliefs. The Appellant sought for several reliefs in its appeal including inter alia that the Appeal against the ruling of the Tribunal delivered on 13th February 2023 in NAIROBI BPRT Case No. E628 of 2022 be allowed and the 1st Respondent's application dated 14th July 2022 filed before the Honorable Tribunal be dismissed together with costs of the Appeal.
29. The Court has considered the fact that while there existed no tenancy relationship between the Appellant and the 1st Respondent, the 1st Respondent's application before the Tribunal had sought for some reliefs against both the Appellant and the 2nd Respondent and further there is a dispute that is still pending before the Tribunal in respect to the Tenancy agreement and as such the Tribunal is still obligated to determine the pending dispute.
30. While considering the entire scope of Section 78 of the [Civil Procedure Act](#), an appellant court has the powers to inter alia determine a case in finality and can also perform the same powers and duties as are conferred and imposed on the court of original jurisdiction when the suit was filed.
31. In view of the foregoing, the following reliefs are hereby issued in respect to this appeal:
 - i. The Appellant herein (Maple Management Limited) is hereby struck out from the proceedings in NAIROBI BPRT Case No. E628 of 2022.
 - ii. Each party to bear own costs of the Appeal.

Judgment accordingly.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH AUGUST 2024.

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Kinuthia for the Appellant.

Mr. Momanyi for the 1st Respondent.

Ms. Wambui Kiama for the 2nd Respondent.

Court Assistant; Judy.

