



REPUBLIC OF KENYA



**Amito v Odiwuor (Environment and Land Appeal E047 of 2022)
[2024] KEELC 6361 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6361 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E047 OF 2022
GMA ONGONDO, J
SEPTEMBER 30, 2024**

BETWEEN

ERNEST BIN AMITO APPELLANT

AND

ORAKO EVANS ODIWUOR RESPONDENT

(An appeal arising from the ruling in Homa Bay Chief Magistrate’s Court Environment and Land Case number 89 of 2022 by Hon. J. S. Wesonga, PM on 30th September 2022)

JUDGMENT

1. On 30th September 2022, the trial court (Hon. J. S. Wesonga, PM) rendered a ruling in Homa Bay Chief Magistrate’s Court Environment and Land Case number 89 of 2022 (The original suit) declaring that the preliminary objection by the 1st defendant has no merit thereby dismissed the same with costs to the plaintiff.
2. The said ruling attracted the instant appeal originated by way of a memorandum of appeal dated 3rd October 2022 by the appellant through Aluoch Odera and Nyauke Advocates, founded upon four grounds, inter alia;
 - a. The honourable subordinate court failed to appreciate that the matter before her touched on the jurisdiction of the Business Premises Tribunal.
 - b. The honourable subordinate court misapprehended the provisions of CAP 301 Section 12 (a) on determining whether a tenancy is controlled or not.
 - c. The honourable subordinate court failed to appreciate that the relationship between the appellant and the respondent was that of “tenancy” in accordance with CAP 301 of the Laws of Kenya.



- d. The honourable subordinate court failed to appreciate that it did not have jurisdiction over the matter.
3. So, the appellant has prayed for the following orders:
 - a. That the subordinate court does not have jurisdiction over the cause of action before it.
 - b. That the suit at the subordinate court lacks merit on account of jurisdiction and ought to be struck off with costs.
 - c. Costs of this appeal be provided for.
4. The appeal was heard by way of written submissions pursuant to this court's directions issued on 3rd June 2024.
5. The appellants' counsel, Aluoch Odera and Nyauke Advocates, did not file any submissions in respect to the application herein.
6. By the submissions dated 21st September 2023, Quinter Adoyo and Company Advocates, learned counsel for the respondent, identified two issues for determination thus:
 - a. Whether the subordinate court had jurisdiction to hear and determine the case before it in Civil Suit No. 89 of 2022.
 - b. Whether the lease agreement was for a controlled tenancy.
7. Therefore, Learned Counsel submitted that the trial court was seized with jurisdiction to hear and render judgment in the matter since the dispute between the parties was on breach of contract. That the lease agreement is not a controlled tenancy since the rent paid was for lease of the land itself and not for a shop, hotel or catering services. That the suit land is bare and has no buildings erected thereon thus, the issue of a controlled tenancy within the meaning of Section 2 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Chapter 301 Laws of Kenya, does not arise. To reinforce the submissions, reliance was placed on various authoritative pronouncements, including the case of *Republic v Business Premises Rent Tribunal & Anor., ex parte Albert Kigera Karume* [2015] eKLR.
8. Counsel highlighted their respective submissions on 10th July 2024. Thus, Learned Counsel S. Nyauke, for the appellant, relied on the submissions dated 20th November 2023. He urged the court to consider that the relationship between the appellant and the 1st respondent is that of landlord and tenant and is based on a lease agreement signed between the parties. That the said lease is for a period of 5 years. That the same being a controlled tenancy, the right forum where the dispute between the parties ought to be addressed is the Business Rent Tribunal. Thus, counsel urged the court to quash the decision of the trial court, dismiss the suit and allow the instant appeal.
9. On their part, learned counsel for the respondent's counsel relied on their submissions on record in entirety.
10. The present appeal is the first one from the trial court. Therefore, my mandate is to reconsider the evidence on record with caution and reach my own independent conclusions and inferences; see *Kiruga v Kiruga and another* 1988] eKLR.
11. It must be noted that the respondent who was the plaintiff instituted the suit by way of a plaint dated 21st July 2022 seeking the following orders:



- a. A declaration that the proclamation and attachment of the plaintiff's tools of trade on the 19th July 2022 was premature, unlawful, unreasonable, unconscionable and therefore illegal and non-justifiable.
 - b. Orders of injunction barring the 2nd defendant from harassing, publicly embarrassing or in any other way interfering with the plaintiff's business, possession and enjoyment of land parcel number Kanyada/Kotieno Katuma 'A'/2991.
 - c. General damages for loss of earnings as a result of the wrongful proclamation and attachment of the plaintiff's tools of trade and business stock, for the emotional trauma, embarrassment and public ridicule.
 - d. Costs and interest of this suit at court rates from the time of filing until payment in full.
12. Together with the plaint, the respondent filed an application by way of a Notice of Motion of even date, seeking the orders infra:
- a. That this application be certified extremely urgent and service be dispensed with in the first instance.
 - b. That pending the hearing of this application inter partes, interim orders do issue staying the advertisement and sale by public auction of the applicant's tools of trade attached as moveable property on the 19th day of July 2022 comprising acting under the instructions of the 2nd respondent.
 - c. That upon hearing this application inter partes, interim orders do issue staying the advertisement and sale by public auction of the applicant's tools of trade attached as moveable property on the 19th day of July 2022 comprising acting under the instructions of the 2nd respondent, until such a time as the main suit is heard and determined.
 - d. That upon hearing this application inter partes, orders do issue directing the respondents to return all the applicant's movable property that were proclaimed and attached in purported distress for rent, so that the applicant is enabled to continue running his business at Homa Bay Junction Kodoyo and on land parcel number Kanyada/Kotieno Katuma 'A'/2991 until such a time as the main suit is heard and determined on merits.
 - e. Costs
13. The appellant denied the application by way of grounds of opposition dated 24th July 2024, wherein he challenged the jurisdiction of the trial court.
14. In the foregone, the issues for determination herein are as set out on the grounds of appeal which crystallize to whether:
- a. The trial court is seized with jurisdiction to hear and determine the suit, to wit, Civil Suit No. 89 of 2022.
 - b. The instant appeal is meritorious
 - c. Just orders to issue herein.
15. On the first issue, I note that in her ruling dated 30th September 2022, the Honourable trial Magistrate held that the issue in dispute is a land lease. That the Business Premises Rent Tribunal lacks jurisdiction to hear disputes over land leases. That therefore, the suit is properly before court.



16. The appellant contends that the relationship between the appellant and the 1st respondent is that of landlord and tenant and is based on a lease agreement signed between the parties. That the said lease is for a period of 5 years. That the same being a controlled tenancy, the right forum where the dispute between the parties ought to be addressed is the Business Rent Tribunal.
17. In *Re Hebtulla Properties Ltd* [1979] eKLR, the court stated in regard to the Tribunal established under the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Cap. 301:
- “...It must, however be borne in mind that the Tribunal is a creature of statute and has only such jurisdiction as has been specifically conferred upon it by the Statute...”
18. The jurisdiction of the Rent Restriction Tribunals established under Section 4 of the *Rent Restriction Act*, Chapter 296 Laws of Kenya, is defined by the Act. First, the tribunals deal with tenancy disputes only when there are subsisting tenancy relationships. Where there is no subsisting tenancy relationship between the parties to the dispute, the tribunal has no jurisdiction. The proper fora where the dispute should be adjudicated, in such circumstances, are the civil courts.
19. A ‘controlled tenancy’ is defined under Section 2 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* (supra) thus:
- “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:
- Provided that no tenancy to which the Government, the Community or a local authority is a party, whether as landlord or as tenant, shall be a controlled tenancy;”
20. In the present case, I take into account that parties entered into an agreement for lease of land parcel number Kanyada/Kotieno- Katuma ‘A’/2991 vide an agreement dated 25th May 2021. At the time of lease, the subject land had no buildings erected thereon. Therefore, it is my considered opinion that the relationship between the parties does not constitute a controlled tenancy within the meaning of Section 2 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* (supra).
21. In light of the foregoing, it is my considered view that the learned trial magistrate was guided by the evidence on record and applied correct principles of law in reaching the impugned ruling. There is no reason to disturb her reasoned ruling and I affirm the same.
22. To that end, I find that these grounds of appeal are untenable.
23. A fortiori, this appeal is devoid of merit. It is hereby dismissed with costs to the respondent.
24. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 30TH DAY OF SEPTEMBER 2024



G.M.A ONGONDO

JUDGE

Present

1. Mr. S. Nyauke, Learned Counsel for the appellant
2. Mr. Jack Otieno instructed by Q. Adoyo, Learned Counsel for the respondent
3. Luanga, Court Assistant

