Ndege v Mutarura & another (Environment and Land Appeal E010 of 2023) [2024] KEELC 6627 (KLR) (24 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6627 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL E010 OF 2023

MD MWANGI, J

SEPTEMBER 24, 2024

BETWEEN

ANDREW MURIMI NDEGE ..... APPELLANT

AND

PETER MUTARURA ..... 1ST RESPONDENT

JULIUS GICHIMU WANJIGI ..... 2ND RESPONDENT

(Appeal against the ruling of the Honourable Andrew Muma (Vice-Chair) of the Business Premises Rent Tribunal (BPRT) delivered on 30{{^th}} September, 2022 in the BPRT case No. E126 of 2022)

JUDGMENT

1. This appeal was initiated by way of the Memorandum of Appeal dated 14th October, 2022. The Appellant has listed 7 grounds of appeal against the ruling of the Honourable Andrew Muma (Vice-Chair) of the Business Premises Rent Tribunal (BPRT) delivered on 30th September, 2022 in the BPRT case No. E126 of 2022 – Andrew Murimi Ndege – vs- Peter Mutarura & Julius Gachimu Wanjigi. The Appellant asserts that he is dissatisfied by part of the ruling of 30th September, 2022 and the consequential orders arising therefrom.

2. The 9 pages ruling of the BPRT delivered on 30th September, 2022 forms part of the record of appeal filed by the Appellant in this appeal. The Tribunal made the following orders: -

    a. That the termination notice issued on 3rd February is illegal, null and void thus the eviction of the Tenant from the premises was illegal as well.

    b. That the Landlord compensates the Tenant for any loss incurred by unlawful termination of the tenancy in respect of improvements carried out by the Tenant and any other losses.

c. That the termination notice being illegal, the Landlord to refund the kshs.830,000/- (less 6 months) rent at Kshs.600,000/- equivalent to Kshs.230,000/-.

d. That each party bears its own costs.

3. The ruling by the BPRT was in respect of the reference filed by the Tenant (Appellant) dated 4th February, 2022 claiming that the Landlord (1st Respondent) and the 2nd Respondent had forcefully and unlawfully entered his premises, physically assaulted him and damaged sections of his renovations in the premises. The Tenant alleged that he had entered into a five (5) year lease agreement with the 1st Respondent/Landlord scheduled to expire on 1st November, 2026, at a monthly rent of Kshs.120,000/- which he had dutifully paid since taking possession of the suit premises.

4. The Tenant pleaded that on 4th February, 2022, the Landlord and the 2nd Respondent visited the suit premises with a gang of street urchins, physically assaulted him, chased away his workers and broke into the premises tearing down sections of the premises he had renovated before locking it entirely and totally denying him access. The Landlord threatened him with more violence if he ever stepped into the premises again. The Landlord locked up the Tenant's goods in the premises after he fenced it off denying him access completely.

5. In response to the Tenant's claim, the Landlord submitted that the Tribunal lacked jurisdiction to handle and entertain the matter since the tenancy with the Tenant/Appellant never crystallized after he failed to pay rent as agreed. He asserted that he therefore terminated the tenancy with the Appellant and brought into the premises, the 2nd Respondent. He too alleged that the Tenant assaulted him when he went to deliver the termination notice.

6. The 2nd Respondent challenged the jurisdiction of the Tribunal to entertain the matter on the basis that there was no Landlord/Tenant relationship in existence between the Appellant and the Landlord. The lease that the Appellant had entered into with the Landlord dated 5th October, 2021 had been terminated vide the notice of termination of lease dated 3rd February, 2022 after the Tenant breached the terms of the lease and frustrated the lease agreement, by failing and or neglecting to pay the rent as and when it fell due. He however denied forcefully evicting the Tenant.

7. The Tribunal in its ruling declared that it had the requisite jurisdiction to determine the dispute between the parties. It ruled that there was no contention that the tenancy between the Applicant and the 1st Respondent was a controlled tenancy. It therefore affirmed that it drew its jurisdiction from Section 12 of the Landlords and Tenants (Shops, Hotels and Catering) Establishments Act, which regulates controlled tenancies.

8. Considering the purported termination notice issued by the Landlord, the Tribunal found that the same did not comply with the provisions of Section 4 of the Landlords and Tenants (Shops, Hotels and Catering) Establishments Act. It was not in the prescribed form and was to take effect 7 days later contrary to the provisions of Section 4(4) of the Act that requires that a notice under Section 4 (2) takes effect after 2 months of receipt by the receiving party. The Tribunal noted that even as the Landlord purported to give notice to the Applicant, on 3rd February, 2022, he had already entered into a lease agreement with the 2nd Respondent on 1st February, 2022, even before terminating the lease with the Applicant.

9. The Tribunal therefore arrived at the conclusion that the termination notice dated 3rd February, 2022 was invalid and the termination was therefore illegal. However, since the premises had already changed hands, a fact that was confirmed by all the parties, the Tribunal awarded compensation to the Tenant/Appellant for breach of the agreement as already stated.

10. The Tenant's appeal is against part of the ruling of the Tribunal as specified in the Memorandum of Appeal. The Appellant first and foremost faults the Tribunal for denying him costs of the reference despite having found that he was illegally evicted.

11. Secondly, the Appellant accuses the Tribunal of denying him the full quantified damages. Further, the Appellant asserts that the Tribunal failed to issue an order that his goods locked up in the suit premises be released to him.

12. Finally, the Appellant faults the Tribunal for deducting 6 months' rent from the amount payable to him yet he had only occupied the suit premises for 1 month only. The initial two months were allegedly used for renovation and the parties had agreed that the same would not be payable.

Court's Direction.

13. The court directed that the appeal be canvassed by way of written submissions. Both sides complied and filed their respective submissions.

Submissions by the parties.

14. In his submissions, the Appellant asserts that the Tribunal in its ruling of 28th September, 2022 agreed with him by upholding that the termination notice issued by the 1st Respondent was illegal, null and void and awarded compensation for loss incurred by the unlawful termination of the tenancy. He however faults the Tribunal for failing to order that his goods that had been locked in the premises be released to him. Further, the Tribunal ordered for a 6 months' deduction of the rent yet the Appellant had only been in the suit premises for 1 month. Finally, the Appellant affirms that the Tribunal failed to award quantified costs for the damage caused on the Appellant's place of work including renovations and improvements done on the premises.

15. The Appellant identified 3 issues for determination namely,

    a. Whether the trial vice-chair erred in fact and in law by failing to rule on issues laid before the court and failing to address the fact that some items belonging to the Tenant were locked up in the suit premises and ought to have been released to them.

    b. Whether the learned trial Chair vice-chair erred in law and in fact by ordering the Landlord to deduct 6 months' rent yet the Tenant only occupied the suit premises for 1 month having agreed that the 1st two months were purely for renovations and not payable.

    c. Whether the learned trial vice-chair erred in law and in fact by failing to take into consideration that the Appellant herein ought to be compensated fully including being paid costs of the suit despite ruling that the Appellant was illegally evicted.

16. On the 1st issue, the Appellant submits that in his pleadings before the Tribunal, particularly at paragraphs 6 and 7 of the supporting affidavit sworn on 7th February 2022, he brought to the attention of the Tribunal the issues of his goods and belongings being locked up in the premises to which he had been denied access. He therefore argues that the learned Vice-chair of the Tribunal should have ordered the Respondent to release the said goods. Leaving the situation as it is will on the one hand only serve to unjustly enrich the Respondents and on the other hand occasion tremendous loss to the Appellant.

17. On the 2nd issue, it is the Appellant's submissions that the lease term between him and the 1st Respondent commenced on 1st November, 2021. The rent payable was Kshs.120,000/- per month and he deposited a security equivalent to 3 months' rent. He submits that both the Landlord and himself acknowledge the fact that the Appellant was not to pay rent for the 1st two months, for reasons

that renovations were being undertaken of the suit premises. The only contention by the Landlord according to the Appellant was that the Appellant had arrears arising from the sale of the equipment's worth Kshs.1,500,000/-. He however agrees to receiving Kshs.830,000/- from the Tenant at the onset of the tenancy.

18. The Appellant contends that the 1st Respondent was silent on the fact that when he was purporting to refund a sum of Kshs.200,000/-, he had deducted the agreed rent for the 3 months' the Appellant was in active occupation and the Kshs.200,000/- was a remainder of the money already paid. At the point when the Landlord was refunding Kshs.200,000/, there were no pending arrears between the parties and the Tenant had effectively paid up all the arrears.

19. The Appellant asserts that the trial Vice-chair of the Tribunal ordered the Landlord to refund Kshs.830,000/- less six months' rent at Kshs.600,000/- when the Appellant had essentially been in occupation for less than 4 months. February was the 4th month and the Tenant had paid the entire 3 months' security deposit as provided in the lease agreement. The Landlord should therefore be ordered to repay the entire deposit amount and Kshs.830,000/- paid to him by the Tenant.

20. On the 3rd issue, the Appellant submits that the 1st Respondent grossly breached the lease agreement which was a binding contract between them, by failing to give a notice as provided for in the agreement.

21. Secondly, the 1st Respondent entered into another lease agreement with the 2nd Respondent, over the same premises during the pendency of the lease with the Appellant; without terminating the first one.

22. The Appellant faults the Tribunal for failing to award him damages and costs of the suit.

The 1st Respondent's Submissions.

23. The 1st Respondent in his submissions explains that he Tribunal in its ruling on the Tenant's application for temporary orders of injunction pending the hearing and determination of the reference issued orders which apparently determined the entire matter before the same was heard. He terms the appeal before the court as lacking in merits and prays for its dismissal with costs.

Issues for Determination

24. Having carefully considered the submissions filed by the parties, two critical issues present themselves for determination i.e.

    i. Whether the Tribunal erred in making a final determination on the matter at the stage of hearing an interlocutory application; and

    ii. Whether the Tribunal had the jurisdiction to entertain the matter between the Appellant ant the Respondents.

    iii. What orders should issue in respect to the costs of this appeal.

Analysis and Determination.

25. Mativo, J (as he then was) in the case of *Mursal & Ano vs Manese (suing as the legal administrator of Dalphine Kanini Manesa) {2022} (Civil Appeal E20 of 2021*) KEHC 282 (KLR)(6 April 2022) (Judgement), addressed the responsibility of the appellate court when considering a first appeal and stated that,

> " A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the

appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand."

26. That was the same position enunciated in the case of Selle & another -vs- Associated Motor Boat Co. Ltd & others (1968) E.A 123, where the court stated that:

> " .... this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court....is by way of a 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."

27. This court will proceed to reconsider the evidence, evaluate it itself and draw its own conclusions.

28. As the 1st Respondent has correctly pointed out, what was before the Tribunal for determination was an interlocutory application; not the main reference filed by the Appellant. In its impugned ruling of 30th September, 2022, delivered by Hon. A. Muma, Vice-chair of the Tribunal, it states at paragraph *4* that,

> " ... The Tenant also filed an application under certificate of urgency seeking orders that pending the hearing and determination of the application, the court be pleased to issue a temporary injunction to restrain the Respondent by themselves or through agents, servants and or employees from seizing, disposing, selling, leasing, alienating, and or in any way interfering with the premises namely plot No.14235/4 comprising Monaco Restaurant situated in Kasarani and other Tenants, goods therein."

29. The Tribunal further noted that the Tenant had also sought that pending hearing and determination of the application inter partes, the Tribunal issues an order of injunction directing the Landlord and 2nd Respondent to re-open the premises.

30. It is not disputed that what was before the Tribunal was the inter partes hearing of the interlocutory application by the tenant. The Tribunal however went ahead to determine the entire matter/reference. The 1st Respondent has rightly observed that the Tribunal went ahead to issue orders that determined the entire matter before the same was heard.

31. From the record of appeal filed in this case, I see nothing to indicate that the Tribunal gave directions on the hearing of the main reference, or even directed the parties to address it and or submit on both the application and the reference.

32. It is trite law that in determining an interlocutory application a court is not called upon to make any conclusive or definitive findings of law or fact. In the case of Nguruman – Vs – Jan Bonde Nielsen & 2 others (2014) eKLR, the Court of Appeal held that the court must not hold a mini trial and examine the merits of the case at the stage of considering an interlocutory application.

33. In purporting to determine the reference summarily and without affording the parties an opportunity to canvass their respective positions, the Tribunal acted in error. The action by the Tribunal amounts to a violation of procedural justice/fairness and the right to a fair hearing.

34. The Supreme Court of Kenya in the case of Githiga & 5 others – vs- Kiru Tea Factory Company Ltd (Petition 15 of 2019) (2023) KESC addressed the import of the provisions of Article 50 92) of *the Constitution* and stated that: -

> "... article 50 (2) of *the Constitution* on the right to a fair trial imposes a duty on the court to guarantee the parties procedural justice. Procedural fairness in the administration of justice involves the fair hearing rule and the rule against bias. The fair hearing rules require a decision maker to inter alia afford a person an opportunity to be heard before making any decision affecting his/her interests. Likewise, procedural fairness in his decision making requires courts not to deprive any person of their right without due process of the law, a fundamental precept that implies that the right of a person affected by any adverse decision or action is present before a Tribunal that pronounces judgment upon the question of life, liberty or property in its most comprehensive sense, to be heard by testimony or otherwise and to have the right of controverting by proof every material fact which bears on the question of right in the matter involved."

35. There is a 2nd fundamental issue on the jurisdiction of the Tribunal. The Tribunal in its ruling acknowledged that the suit premises had already changed hands, 'and all parties agree to that fact.' Earlier on at paragraph *30*, the Tribunal too had noted that,

> "The jurisdiction of this Honorable Tribunal is however limited to issues of the tenancy relationship."

36. Madan, J (as he then was) as early as 1972 in the case of Pritam – vs- Ratilal & Ano (1972) EA 560 held that: -

> "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." (emphasis added)

37. I cannot put it any better. The moment the learned Vice-chair of the Tribunal acknowledged that the suit premises had changed hands, he ought not to have gone any further. The Tribunal lacked the jurisdiction to entertain the matter in view of the fact that the relationship of Landlord and Tenant was no more.

38. A decision made by a court or Tribunal without jurisdiction amounts to a nullity. Consequently, and from the foregoing, this appeal fails in its entirety. The proceedings before the tribunal amount to a mistrial.

39. Lord Denning in the case of Macfoy – vs- United Africa Co. Ltd (1961) 3 ALLER 1169 succinctly held that;

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every

proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

40. The import of the court's finding that the Tribunal lacked the requisite jurisdiction to entertain the matter as it did renders the proceedings before it null and void. This appeal fails. It is hereby dismissed with costs to the 1st Respondent.

41. Consequently, the entire ruling of the Honourable Andrew Muma (Vice-Chair) of the Business Premises Rent Tribunal (BPRT) delivered on 30th September, 2022 in the BPRT case No. E126 of 2022 – Andrew Murimi Ndege – vs- Peter Mutarura & Julius Gachimu Wanjigi is set aside.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF SEPTEMBER, 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Kimani for the 1st Respondent

N/A for the Appellant and the 2nd Respondent

Court Assistant: Yvette

M.D. MWANGI

JUDGE