Gilgil Treatment Industries Limited v Gilgil Total Investors Self Help Group & another (Environment and Land Appeal 25 of 2024) [2025] KEELC 588 (KLR) (Environment and Land) (13 February 2025) (Judgment)

Neutral citation: [2025] KEELC 588 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA

ENVIRONMENT AND LAND

ENVIRONMENT AND LAND APPEAL 25 OF 2024

MC OUNDO, J

FEBRUARY 13, 2025

(FORMERLY NAKURU ELC APPEAL 13 OF 2023)

BETWEEN

GILGIL TREATMENT INDUSTRIES LIMITED ..... APPELLANT

AND

GILGIL TOTAL INVESTORS SELF HELP GROUP ..... 1ST RESPONDENT

EQUIP AGENCIES LIMITED ..... 2ND RESPONDENT

(Being an Appeal from the Ruling and Orders issued in Nakuru Business Premises and Rent Tribunal Case Number E035 of 2021 by Hon. Cyprian Mugambi Nguthari delivered on the 28th day of July, 2023)

JUDGMENT

1. Before me for determination on Appeal is a matter which was heard and determined by Hon. Cyprian Mugambi, the Chairman of the Business Premises Rent Tribunal in Nakuru Business Premises Rent Tribunal Case No. E035 of 2012, wherein upon considering the evidence of both parties, vide his Ruling dated 28th July, 2023, the Hon. Chairperson had held that the Tribunal had no jurisdiction to hear and determine the instant reference wherein he had proceeded to dismiss the same together with the Applications filed therein and then discharged all interlocutory orders that had been issued. The trial Tribunal had also ordered that the Applicant/Appellant to bear the costs of the Reference/ Complaint.

2. The Appellant, being dissatisfied with the Ruling and Orders of the Tribunal's Chairman, has now filed the present Appeal based on the following grounds in its Memorandum of Appeal:

i. That the Learned Trial Chairman erred in law and in fact in failing to take into consideration the Appellant's pleadings and evidence and thereby arriving at a decision that is at variance with evidence and pleadings contrary to the law.

ii. That the Learned Chairman erred in law and in fact by ruling that the Tribunal did not have jurisdiction to entertain the Tenant's application.

iii. That the Learned Chairman erred in fact and in law by holding that the Applicant is not a protected tenant and failing to afford the protection granted in law to all controlled tenancies in accordance with the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* Cap 301.

iv. That the Learned Chairman erred in fact and in law in failing to address the fact that the 1st Respondent were obligated to issue the appellant a notice in accordance with Section 142E of the *Land Act*.

v. That the Learned Chairman erred in fact and in law in holding that, the Tenancy terminated automatically upon the transfer of the suit property contrary to established case law to wit; Caledonia Supermarket Ltd v Kenya National Examination Council (2000) 2 EA 351 as well as South C Fruit Shop v Housing Finance Limited [2013] eKLR.

3. The Appellant thus sought that the ruling of the Honourable Chairman of the Tribunal delivered on 28th day of July, 2023 and the subsequent order of the Tribunal be set aside with costs to the Appellant. It also sought that the costs of the present Appeal be to the Appellant.

4. The Appeal was admitted on 17th September, 2024 and directions taken that the same to be disposed of by way of written submissions wherein only the Appellant and the 1st Respondent complied and filed their submissions which I shall summarize as herein under:

Appellant's submission

5. The Appellant, vide its undated submissions submitted on the first ground of the Memorandum of Appeal that the issue of ownership of the property had been raised but was not adequately evaluated. That the Tribunal's failure to evaluate crucial aspects of the Appellant's submissions had violated the principle of judicial fairness, which mandated that each party's case be heard and assessed on its merits.

6. On the second ground of Appeal, the Appellant submitted that the statute had clearly vested the Tribunal with the jurisdiction over disputes involving landlord-tenant relationships. That subsequently, the Tribunal had been obliged to resolve the issues that had been raised within its authority, including adjudicating on the Appellant's tenancy rights under the Landlord and Tenant (Shops, Hotels, and Catering Establishments) Act, Cap 301 hence the Learned Chairman had erred in holding that he had no jurisdiction to address the dispute.

7. The Appellant on its third ground of Appeal submitted that whereas the Tribunal had incorrectly held that it was not a protected tenant under Cap 301, the tenancy qualified as a controlled tenancy thus his ruling failed to afford the statutory protections granted to such tenancies Reliance was placed on the decision in the case of Caledonia Supermarket Ltd v Kenya National Examination Council (2000) 2 EA 351.

8. As to whether the Learned Chairman had failed to address the 1st Respondent's non-compliance with the *Land Act* with regards to the issuance of a Notice, the Appellant's submission was that the 1st Respondent's failure to issue proper notice had invalidated the purported termination of the tenancy.

Its reliance was placed on the provisions of Section 96 of the *Land Act* as read together with Sections 152E and 152G of the said Act which mandated service upon the Appellant with a notice. The absence thereof the notice had rendered the 1st Respondent's alleged rights unaccrued. It was thus its submission that the Tribunal, had failed to recognize that statutory provisions for tenancy termination must be strictly adhered to, and any deviations rendered any termination unlawful.

9. On the fifth ground of Appeal, as to whether the Learned Chairman had misinterpreted the law on automatic termination of tenancy, the Appellant submitted that the Learned Chairman's holding that the tenancy had automatically terminated upon the transfer of the suit property had contradicted the established legal precedent, particularly the decided cases of Caledonia Supermarket Ltd v Kenya National Examination Council (2000) 2 EA 351 and South C Fruit Shop v Housing Finance Limited [2013] eKLR.

10. In conclusion, the Appellant prayed that the Court sets aside the Ruling and Orders of the Nakuru Business Premises and Rent Tribunal that had been issued on 28th July, 2023 and declare that the Appellant was entitled to protection accorded to controlled tenants under Cap 301. It also prayed that the Court orders the Respondents to comply with the *Land Act* and issue a proper termination.

1st Respondent's Submissions.

11. In response to the Appellant's Appeal and in opposition thereto, the 1st Respondent vide its written submissions dated 28th October 2024, summarized the factual background of the matter before placing reliance in the decided case of Republic v Business Premises Rent Tribunal & Another; Exparte Davies Motor Corporation Limited [2013] eKLR where the court had held that the BPRT had no jurisdiction to grant an injunction.

12. That indeed, the Appellant had filed Naivasha ELC No. 89 of 2024 even after the ruling of the BPRT, the subject of the Appeal herein wherein upon the court evaluating all the evidence, it had struck out the Appellant's suit for being res judicata. That the instant Appeal was yet another attempt by the same party to litigate on matters that had essentially been settled hence an abuse of the process of the court. The 1st Respondent thus submitted that the entire Appeal was without merit and should be dismissed with costs to the 1st Respondent.

Summary of the proceedings at the Business Premises Rent Tribunal sitting in Nakuru.

13. I have considered the record of Appeal, the holding by the learned Tribunal's Chairman, the written submissions by learned Counsel and the applicable law. Conscious of my duty as the first Appellate Court in this matter, I have to reconsider the decision Appealed against, assess it and make my own conclusions. See the case in Selle vs. Associated Motor Boat Co. Ltd. [1968] EA 123.

14. According to the proceedings herein, the Appellant filed an Application against the Respondents in Nakuru Business Premises Rent Tribunal Case No. E035 of 2012 vide a Notice of Motion dated 18th October, 2021, brought under the provisions of Section 4 (1), (2), (5) and (12) of the Landlord and Tenant (Shop, Hotels and Catering Establishments) Act and all enabling provisions of law wherein it had sought for the following Orders;

    i. Spent.

    ii. That the Tribunal be pleased to issue an order of injunction, restraining the Respondents whether personally or through agents and servants from interfering with the Applicant's quiet business premises on the property known as Gilgil Township Block 2/210 pending hearing and determination of the Application.

iii. That the Honourable Tribunal be pleased to find that the eviction notice served on the 12th day of October, 2021 by the 1st Respondent is ineffective and void ab initio.

iv. That an order directing the Sub-County Commander Gilgil to ensure compliance of Order (ii).

v. That this Honourable court be pleased to issue any other orders it may deem necessary.

vi. That costs be provided for.

15. The said Application was supported by the grounds therein as well as the Supporting Affidavit of equal dated sworn by James Njuguna Burugu, the Applicant/Appellant's General Manager who had deponed that on or about the 1st February, 2016 the Applicant had entered into a tenancy agreement with the 2nd Respondent which was renewable every two years. That the Applicant had dutifully paid rent to the 2nd Respondent up to the end of the year but had since been served with a notice to vacate the premises by the 1st Respondent who have claimed ownership of the suit property having allegedly purchased the same at an auction.

16. He explained that the Applicant was operating a state-of-the-art wood treatment plant wherein it had employed thousands of people in the Gilgil locality. That further, it had invested over Kshs. 400,000,000/= on the state of art facility wherein it had been supplying wood poles to a number of companies including Kenya Power and Lighting Company Limited, M/S Zen East Africa Limited and the Wattle Company Limited JV among others. That given the nature of the said equipment on the suit property, it would take time for it to be dismantled and moved thus the 14 days was too short of a notice for the Applicant to move its entire operations. That further, due to the nature of the Applicant's operations, it would require time to find an alternative place suitable for its needs.

17. That whereas the Applicant had been a bonafide tenant, it was entitled to full protection of the law and was now anxious that the 1st Respondent would attempt to evict it and permanently dispossess it of its equipment worth hundreds of millions. He explained that the suit property had been sold along with chattels that did not form part of the charge hence the Applicant stood to be completely dispossessed of its property because of a series of events not of its own making.

18. That subsequently, the Applicant may suffer huge losses as a result of the sale and was currently running the risk of being exposed to legal liabilities as a result of not being able to fulfill its contractual obligations that it had entered into with third parties to supply treated wood poles.

19. In response and in opposition of the Applicant's Application, the 1st Respondent vide its Replying Affidavit dated 28th March, 2022 sworn by Daniel Njuguna Gitau, the 1st Respondent's Chairperson deponed that the 1st Respondent was the registered leasehold proprietor of all that parcel of land known as Title No. Gilgil/Township Block 2/210 (suit property) having purchased the same on 24th January, 2019 through a public auction sale wherein it had been issued with a certificate of lease on 21st February, 2020 hence acquiring a leasehold interest term of 99 years from 1st January 1955.

20. He deponed that prior to the purchase of the said property, the same had been owned by the 2nd Respondent herein. That however, after the purchase and payment of full valuable consideration to the 2nd Respondent's charge (I&M Bank Limited), it had requested the Applicant to deliver vacant possession of the suit property but the Applicant had ignored the said request. He explained that the 2nd Respondent's title to the suit property had been extinguished once the auction hammer had fallen on 24th January 2019 and all tenancies hitherto granted determined.

21. That subsequently, the Applicant's actions of occupation of the suit property had been in breach of the law thus the Applicant was committing an illegality by continuous trespass onto the suit property without the consent of the 1st Respondent. That the Applicant had had enough time to look for alternative site for its industries but was not keen to move from their site.

22. That the 1st Respondent had been very keen to take possession of the suit property and commence income generating activities but had been hampered by the Applicant's occupation of the suit property hence it had continued to incur huge losses. That any loss that the Applicant may suffer could be quantified and which loss was payable by the 2nd Respondent. He thus deponed that the Application dated 18th October, 2021 was without merit and the same ought to be dismissed with costs.

23. Vide a further Affidavit sworn on the 20th January, 2023, the 1st Respondent's Chairperson deponed that the parties herein had been litigating in the High Court in a plethora of suits including Milimani HCCC No. 87 of 2019. That by a deed of settlement dated 10th June, 2022, the parties had agreed to settle all the matters under clause 6 and further that clauses 7 and 8 of the said Deed of Settlement had expressly recognized that the 1st Respondent had been the owner of the suit property.

24. That however, the 2nd Respondent had defaulted after partly complying with the deed of settlement leading to the filing of an application dated 7th June, 2022 where the High Court had held that the suit herein had been wholly settled in terms of the Deed of Settlement dated 10th June, 2021. He thus deponed that the issues that had been raised in the High Court matter had been substantially in issue in the present cause since the net effect of the High Court's Ruling had been that the Deed of Settlement dated 10th June, 2021 would be converted into a decree of the court.

25. That the Applicant had anchored its reference herein on the alleged lease between itself and the 2nd Respondent thus the present claim had no leg to stand on, the Deed of Settlement having been adopted as the judgement of the High Court.

26. The 2nd Respondent vide its Replying Affidavit sworn on 19th August, 2022 by its Managing Director Divyesh Patel, confirmed that during the period it had owned the suit property, the Applicant had been their tenant from the year 2016 and had been renewing the tenancy after every 2 years wherein it had paid its rent religiously having invested heavily in a wood supply facility hence they had a good tenant-landlord relationship.

27. That subsequently the suit land had been auctioned in the year 2018 at an under value wherein they had filed suit challenging the same at the Nairobi HCCC No. 87 of 2019 which case was yet to be concluded. That subsequently, he had been shocked when the Applicant had informed him that they had been served with an eviction notice by the 1st Respondent.

28. That the Applicant herein having invested heavily on modern equipment that could not be simply disassembled by unqualified people, any attempt to do so would expose the 2nd Respondent to unnecessary litigation for breach of contract. He thus deponed that the Applicant/tenant ought to be protected from any form of eviction by the 1st Respondent.

Determination.

29. Having summarized what transpired during the hearing at the Business Premises Rent Tribunal sitting in Nakuru, I find one issue arising herein for determination as follows:-

    i. Whether the Applicant herein has a meritorious appeal before this court.

30. It is not disputed that previously the suit property Title No. Gilgil/Township Block 2/210 was once owned by the 2nd Respondent wherein the Applicant had been their tenant who renewed its tenancy after every 2 years.

31. It is also not in dispute that subsequently the suit property had been auctioned wherein the 1st Respondent bought it, and was issued with a certificate of lease thereby acquiring ownership.

32. The Business Premises Rent Tribunal (BPRT) is a quasi-judicial body established under the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* (Cap 301). This means it has some judicial powers to resolve disputes related to controlled tenancies. While the BPRT's primary function is to handle rent disputes and related matters, it also has the power to issue orders, including injunctions, to ensure its decisions are enforced and to protect the rights of both landlords and tenants in controlled tenancies. The purpose of injunctions can be used in various situations, such as preventing unlawful eviction, restraining distress for rent, and/or preserving the status quo. Indeed in the persuasive case of Republic v Business Premises Rent Tribunal & another Ex parte Albert Kigera Karume [2015] eKLR Justice G V ODUNGA (as he then was) held as follows;

> ''The Court under section 2 of the said Act is expressed to mean "the High Court or a subordinate court, acting in the exercise of its civil jurisdiction. These provisions when read together clearly supports the view that under the current Constitutional dispensation in the absence of express limitation of the jurisdiction of the Tribunal, the Business Rent Tribunal is clothed with the jurisdiction to grant temporary injunctions.

I therefore associate myself with the decision of the Court of Appeal in John Mugo Ngunga vs. Margaret M. Murangi (supra) that:

> On the jurisdiction of the Tribunal to issue an order of injunction, it is clear the Judge was right, the jurisdiction is provided for by the Act and that was further fortified by the aforesaid decision of this Court."

33. The Jurisdiction of the Business Premises Rent Tribunal is conferred by Section 2(1) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, which 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"

34. In effect thereof, a tenant can be a protected tenant even if there's no formal written agreement between them and the landlord, under specific circumstances for example through implied tenancy where a tenant occupies a shop, hotel, or catering establishment and pays rent to the landlord, who accepts that rent signifying that there exists a landlord-tenant relationship and therefore the action that matters more than words is the fact that rent is paid and accepted even if nothing is written down.

35. However the protection offered in the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* is not absolute and Landlords still have rights, but they are more regulated when

it comes to controlled tenancies like for example, arbitrarily increase of rent or eviction of the tenant without following specific procedures.

36. Having said that, and having considered what transpired at the tribunal, can it be said that there exists a landlord-tenant relationship in the instant matter? Indeed in his finding, the Hon Chairman of the of the Business Premises Rent Tribunal at paragraph 10 of his ruling had found that no such relationship existed, that the 1st Respondent did not recognize the Applicant as its tenant there having been no agreement between the two parties whether implied or otherwise and there having been no payment of rent made by the Applicant to the 1st Respondent. That whereas the Applicant had admitted to having been a tenant to the 2nd Respondent, the said 2nd Respondent had no proprietary interest in the suit land.

37. Having established that a landlord-tenant relationship is typically established through a lease agreement whether written or oral, where a property owner (landlord) allows another person (tenant) to occupy the property in exchange for rent, where this relationship is missing like the present case, the Act will not apply and its provisions are not relevant.

38. Madan, J (as he then was) in Pritam vs. Ratilal and Another Nairobi HCCC No. 1499 of 1970 [1972] EA 560 expressed himself as hereunder:

> "As stated in the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* itself, it is an Act of Parliament to make provision with respect to certain premises for the protection of tenants of such premises from eviction or from exploitation and for matters connected therewith and incidental thereto. The scheme of this special legislation is to provide extra and special protection for tenants. A special class of tenants is created. 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."

39. In Republic v Chairperson - Business Premises Rent Tribunal at Nairobi & Rosemary Wangari Chege Ex-Parte Suraj Housing & Properties Limited, Suraj Plaza Limited & Suraj Plaza Management Limited [2016] KEHC 4525 (KLR) G V Odunga J (as he then was) in agreement with the Pritam vs. Ratilal (supra) held as follows;

> ''.....In my view, what the learned Judge was saying is that where a dispute is brought under the said Act, there must be in existence the relationship of landlord and tenant. The Judge did not say that in any other case where a dispute arises the same relationship must be in existence.''

40. Lastly, in Almumin Advertising Limited v Kinuthia & another [2023] KEBPRT 711 (KLR) it had been held as follows;

> ''It is therefore common ground that the landlord/tenant relationship between the two parties came to an end on or about 30th April 2023. This matter was filed on or about 11th April 2023 which translates to about 20 days before the said termination. As a result of the said termination, the jurisdiction of this tribunal ceased and in line with the decision in the

case of Owners of Motor Vessel "Lillian S" – vs- Caltex Oil (Kenya) Ltd (1989) eKLR, the Tribunal has to down its tools.

As the matter cannot proceed to determination on the merits on the issues in dispute between the parties who ought to file it in the appropriate forum....."

41. I think I have said enough, I have no reason to interfere with the holding of the Nakuru Business Premises and Rent Tribunal which held that it had no jurisdiction to hear and determine the matter there having been no relationship between the Applicant and the owner of the premises, the 1st Respondent herein. The Appeal lacks merit, and the same is dismissed with costs.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT NAIVASHA THIS 13TH DAY OF FEBRUARY 2025.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

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