



Patel & another v United Engineering Supplies Limited; Patel (Interested Party) (Environment & Land Case E090 of 2023) [2024] KEELC 13276 (KLR) (18 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13276 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E090 OF 2023
MD MWANGI, J
NOVEMBER 18, 2024**

BETWEEN

DINKAR RAMBAHI PATEL 1ST PLAINTIFF

MALINI D PATEL 2ND PLAINTIFF

AND

UNITED ENGINEERING SUPPLIES LIMITED DEFENDANT

AND

PREMILA PATEL INTERESTED PARTY

(In respect to the Defendant's application dated 8th March, 2024 seeking to strike out the Plaintiff's suit under the provisions of Order 2 rule 15 of the Civil Procedure Rules, amongst other provisions of the Law)

RULING

Background

1. The Defendant's application under consideration dated 8th March 2024 seeks to strike out the Plaintiffs' suit for being an abuse of the process of court. It is premised on the grounds on the face of it and on the supporting affidavit of Sanjay Ramesh Patel, sworn at Nairobi on 8th March, 2024.
2. The Defendant/Applicant asserts that the Plaintiffs filed the suit alleging that there was an agreement for lease dated 26th June, 1996 between the 1st Plaintiff and the Defendant but the said lease expired on 30th June, 1998 thereby extinguishing the tenancy relationship between them. Further that the 1st Plaintiff wrote a letter dated 18th February, 2010 confirming that no rent was payable by the Defendant.
3. The Defendant asserts that the Plaintiffs' suit is premised on allegations that there exists an unwritten and unsigned lease with the Defendant for a business premises which would in any event be a controlled



tenancy under the provisions of the Landlord and Tenant (Shops, Hotels, and Catering Establishments Act (Cap 301, Laws of Kenya) falling within the jurisdiction of the Business Premises Tribunal (BPRT). The Defendant therefore alleges that the Plaintiffs failed to comply with the doctrine of exhaustion of statutory remedies in view of premising their suit on the allegation of an unwritten and unsigned lease and failure to file their claim before the Business Premises Rent Tribunal (BPRT) as required by law.

4. The Defendant affirms that it is trite law that where a statute has provided a clear procedure for redress of any particular grievance, that procedure should be strictly followed. In the circumstances the court has no jurisdiction to entertain the suit. The Defendant invites the court to strike out the suit with costs to itself.

Response by the Plaintiffs/Respondents

5. The Plaintiffs responded to the Defendant's application by way of a Replying Affidavit sworn at Nairobi by Dinkar Rambahi Patel (the 1st Plaintiff) on 8th May, 2024 on his own behalf and on behalf of the 2nd Plaintiff. He deposes that he was the original proprietor of the suit property after it was transferred to him in 1978. They however changed the ownership model in 2009 with the deponent and his wife, (the 2nd Plaintiff) retaining 50% stake in the property and his brother Ramesh Rambahi Patel and his wife (the Interested Party) jointly holding the other 50% stake in the suit property. After his brother died in 2010, the Interested Party now singly owns 50% of the suit property.
6. The 1st Plaintiff further deposes that the Interested Party was also appointed as a Director of the Defendant Company, which is a family owned Company in the year 2010. The company operates business from the suit property as a lessee. Pursuant to the lease agreement dated 26th June, 1996 (between the 1st Plaintiff and the Defendant), it was agreed that the Defendant company would pay rent to him at the rate of Kshs. 80,000/- per month for the 1st year with a nominal increase of 10% every other year thereafter.
7. The deponent concedes that the lease agreement expired in 1998 thereby translating into a periodic lease with the Defendant/Applicant remaining in exclusive possession. The Defendant/Applicant however, continued making the monthly rental payments to the 1st Plaintiff as it had done prior to the expiration of the lease.
8. The Deponent insists that there exists a tenancy agreement between the Plaintiffs and the Defendant as lessee and under which, rent is payable. The lease according to the Deponent is for an endless and undefined term and is therefore removed from the ambit of a controlled tenancy. Further that the extent of the prayers sought in the plaint do not all fall within the jurisdiction of the BPRT.
9. The Defendant filed a further affidavit whereas the Interested Party too filed an affidavit in support of the Defendant's application further elaborating and reiterating the Defendant's averments in the application under consideration and in the supporting affidavit.
10. The application was canvassed by way of written submissions. I have had the opportunity to read the submissions filed. I have duly considered them as I write this ruling.

Issues for Determination.

11. Having considered the Defendant's application, the response by the Plaintiffs and the further affidavit by the Defendant, the affidavit in support by the Interested Party, the submissions by the parties as well as the pleadings before the court, the issues for determination are:



- a. Whether the tenancy between the Plaintiffs and the Defendant is a controlled tenancy in accordance with the provisions of the Landlord and Tenant (Shops, Hotels, and Catering Establishments Act (Cap 301, Laws of Kenya).
- b. Whether the Plaintiffs can validly seek orders for termination of the tenancy in common between them and the Interested Party over the title of the suit property while they have only sued the co-tenant as an Interested Party.

Analysis and Determination

A. Whether the tenancy between the Plaintiffs and the Defendant is a controlled tenancy in accordance with the provisions of the Landlord and Tenant (Shops, Hotels, and Catering Establishments Act (Cap 301, Laws of Kenya).

12. On the first issue, whereas the Defendant/Applicant submits that the Tenancy between it and the Plaintiffs is a controlled tenancy, the Plaintiffs argue that it is a periodic tenancy rather than a controlled tenancy. The Plaintiffs seek refuge in the Land Act which defines a periodic Tenancy under Section 57 thereof. They further argue that the Land Act confers jurisdiction on this court (read Section 128), to hear and determine any dispute arising out of any matter provided for under the Land Act.
13. On the interface between the Land Act and the Landlord and Tenant (Shops, Hotels and Catering Establishments Act (Cap. 301, Laws of Kenya), one needs to appreciate that the Land Act was enacted later than the Landlord and Tenant (Shops, Hotels and Catering Establishments Act (Cap. 301, Laws of Kenya).
14. The Land Act did not repeal nor amend the Landlord and Tenant (Shops, Hotels and Catering Establishments Act (Cap. 301, Laws of Kenya). It only repealed the Wayleaves Act (Cap. 292) and the Land Acquisition Act (Cap 295) and amended the Agriculture Act (Cap 318) as provided under Section 163 thereof.
15. Section 161 (2) of the Land Act is of relevance to the argument between the Plaintiffs and the Defendant. It specifically provides that;
 - “(2) All other law relating to land shall be construed with the alterations, adaptations, qualifications and exceptions necessary to give effect to this Act.”
16. The Landlord and Tenant (Shops, Hotels and Catering Establishments Act (Cap. 301, Laws of Kenya) under Section 2 (1), thereof, defines a controlled tenancy to mean;

‘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 a 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:



17. If the intention of the Legislature in enacting the Section 57 of the *Land Act* with respect to a periodic leave was to repeal or amend Section 2 (1) (a) of the Landlord and Tenant (Shops, Hotels and Catering Establishments Act (Cap. 301, Laws of Kenya), nothing would have been easier than for it to say so, as it did with the Agriculture Act.
18. Accordingly, Section 2 (1) (a) of the Landlord and Tenant (Shops, Hotels and Catering Establishments Act (Cap. 301, Laws of Kenya), therefore remains the law governing tenancies for shops, hotels, or catering establishments which have not been reduced into writing. They are controlled tenancies and the jurisdiction to handle any disputes arising out such controlled tenancies is with the BPRT. This court lacks the jurisdiction to handle any dispute arising out of a controlled tenancy.
19. So in respect to the tenancy dispute between the Plaintiffs and the Defendant, the lawful forum for purposes of the hearing and determination such a dispute is the BPRT; not this court.
20. The court in the case of Peter Odour Ngoge -vs- Francis Ole Kaparo & others; SC Petition No. 2 of 2012, (2012) eKLR, emphasized the significance of respecting the hierarchy of the judicial system, as one of the principles guiding the exercise of our jurisdiction under Article 163 (4) (a) of *the Constitution*.
21. I will therefore strike out the Plaintiff's claim against the Defendant, the same being in respect to a controlled tenancy for want of jurisdiction

B. Whether the Plaintiffs can validly seek orders for termination of the tenancy in common between them and the Interested Party over the title of the suit property while they have only sued the co-tenant as an Interested Party.

22. I now turn to the 2nd identified issue for determination.
23. Having struck out the Plaintiff's suit against the Defendant, what then remains of it?
24. The Plaintiffs pray for orders essentially seeking the termination of the common tenancy between them and the Interested Party over the title to the suit property under Section 91 of the *Land Registration Act*. The Plaintiffs and the Interested Party are registered as joint tenants of L.R No. 209/8672 (I.R 30928). This automatically converted into a common tenancy under the provisions of Section 91(8) of the Act, on the effective date (2nd May 2012).
25. The Plaintiffs cannot seek such substantive orders against an Interested Party. The Court of Appeal in the case of Methodist Church of Kenya –vs- Mohamed Fugicha & 3 others (2019) eKLR, tacitly stated that;

“This court is guided further by an excerpt in the holding by the apex court in Francis Karioko Muruatetu & Another V Republic & 5 Others [2016] eKLR the court pronounced itself on the extent to which an Interested Party may participate in the proceedings as follows;

“any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/ principal parties’ before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.



Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An Interested Party may not frame its own fresh issues, or introduce new issues for determination by the Court. One of the principles for admission of an Interested Party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court."

26. The Plaintiffs must understand that the issues to be determined by the Court will always remain the issues as presented by or against the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. The terms, 'Plaintiff', 'Defendant', 'Third Party' or 'Interested Party' are not mere loose expressions of speech when used in pleadings. When the Plaintiffs sued Premila Patel as an Interested Party, they ought to have known that they cannot claim substantive orders as they purport to against her in that capacity.
27. The Plaintiffs' case therefore collapses like a dodo; in its entirety, the moment the court struck out the case against the Defendant- the principal party. The Plaintiffs cannot maintain a case on its own against an Interested Party.
28. I agree with the Defendant's submissions that the additional prayers in the plaint against the Interested Party were meant to hoodwink the court and make the Plaintiffs' appear as it was more of a case of severance of the co-tenancy with an intention to 'confer' jurisdiction on the court. This is what Makhandia J.A referred to in the case of Kibos Distillers Limited & 4 others -vs- Benson Ambuti Adegwa & 3 others (2020) eKLR, as the art and craft of drafting pleadings.
29. The upshot is that the Plaintiffs' suit is hereby struck out with costs to the Defendant.
It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF NOVEMBER, 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Thuo for the Defendant/Applicant & the Interested Party

Ms. Kadima for the Plaintiff/Respondent

Yvette: Court Assistant

M.D. MWANGI

JUDGE

