Gikandi t/a Taifa Hardware & 3 others v Karanja (Environment and Land Appeal E040 of 2023) [2024] KEELC 14041 (KLR) (16 December 2024) (Judgment)

Neutral citation: [2024] KEELC 14041 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL E040 OF 2023

JO MBOYA, J

DECEMBER 16, 2024

BETWEEN

JOSEPH GIKANDI T/A TAIFA HARDWARE ..... 1ST APPELLANT

CATHERINE WANJIKU T/A TUFUGE ANIMAL FEEDS ..... 2ND APPELLANT

JANE NJERI ..... 3RD APPELLANT

CHARLES KAMAU ..... 4TH APPELLANT

AND

VIRGINIA MUTHONI KARANJA ..... RESPONDENT

(Being an Appeal from the Ruling of Hon. J.A. Osodo (Panel Chairperson] and Hon. Gakuhi Chege [Member] of The Business Premises Rent Tribunal Delivered On 6th October, 2023 Sitting in NAIROBI BPRT CASE NO. E229/2023)

JUDGMENT

Introduction and Background:

1. The Respondent herein filed a Reference before the Business Premises Rent Tribunal dated the 27th February 2023. Contemporaneously, the Respondent also filed an application of even date [the 27th of February 2023]; and wherein the Respondent sought for a plethora of orders including liberty to levy distress against the Appellants herein, who were said to [sic] be tenants in the premises known as Plot No. 77/1, Rongai Market Limuru Town.

2. The Application dated the 27th February 2023; was thereafter heard by the Tribunal culminating into a Ruling being rendered by the Tribunal on the 17th April 2023, whereupon the Tribunal granted the orders that were sought by the Respondent.

3. The Appellants herein thereafter filed an application dated the 7th June 2023 and wherein the Appellants sought for various reliefs including an order of stay of the proceedings before the Business Premises Rent Tribunal and in the alternative, an order that the proceedings before the Tribunal be struck out on account of lack/want of jurisdiction. Suffice it to state that the Application dated the 7th June 2023 was heard and disposed of vide Ruling dated the 6th October 2023.

4. It is the said Ruling and the consequential orders issued on the 6th October 2023 which provoked the filing/lodgement of the instant Appeal.

5. Vide the Memorandum of Appeal dated the 2nd November 2023, the Appellants herein have raised and highlighted various grounds of Appeal. The grounds that have been highlighted include inter-alia:

    i. That the Honourable Tribunal erred in both law and in fact in failing to appreciate that there was no tenancy relationship between the appellants and the respondent thus the Tribunal had no jurisdiction to hear and determine the matter since: -

        a. There was no evidence of any payment of rent by the appellants to the respondent and the question of rental arrears could not therefore arise.

        b. There was no evidence of a lease agreement between the appellants and the respondent.

        c. There was no evidence of ownership of the suit property by the respondent.

        d. The respondent is not the sole beneficiary of the deceased registered owner hence she cannot assume ownership of the suit property before the conclusion of the pending succession proceedings and she therefore lacks the capacity to deal as the proprietor thereof.

    ii. That the Honourable Tribunal erred in both law and in fact by considering irrelevant factors thus conferring jurisdiction upon itself on the basis of its earlier decision made on 17th April, 2023 yet jurisdiction is not acquired by making decisions in a matter but must either emanate from law or from statute.

    iii. That the Honourable Tribunal misdirected itself in both law and in fact in failing to appreciate that there were pending proceedings vide Nairobi H.C Succ. No. 1440 of 2000 Estate of the Late Sebastian Karanja Macharia and in which the ownership of the property in issue before the Tribunal was the subject of the said High Court matter.

    iv. That the Honourable Tribunal erred in both law and in fact in failing to appreciate that the registered owner of PLOT NO. 77/1 RONGAI MARKET/LIMURU is deceased and his estate is subject of ongoing succession proceedings in Nairobi H.C Succ. No. 1440 of 2000 Estate of the Late Sebastian Karanja Macharia and that the said estate had not been formally distributed as no confirmed grant has ever been issued.

    v. That the Honourable Tribunal erred in both law and in fact in failing to appreciate that the appellants and the respondents comprise of the family members/beneficiaries of the deceased registered owner and they have been in occupation of the suit property even before the deceased met his demise and they never used to pay him any rent and even after his demise in the year 2000 they have never paid any rent to anyone for the last 23 years and in the circumstances there exists no tenancy relationship between the Appellants and the Respondent.

    vi. That the Honourable Tribunal erred in both law and in fact in arriving at conclusions that had no basis including the contention that the proceedings in Nairobi H.C Succ. No. 1440 of

2000 Estate of the Late Sebastian Karanja Macharia were done/concluded with an intention to defeat the matter before the Tribunal.

vii. That the Honourable Tribunal erred in both law and in fact and therefore arrived at a wrong decision of dismissing the Application dated 7th June, 2023 despite the overwhelming law and facts in support of the same.

6. The Appeal herein came up for Directions on the 29th July 2024, whereupon the advocates for the parties agreed to have the Appeal be canvassed and heard by way of written submissions. Furthermore, the advocates for the parties also agreed to have the appeal canvassed and heard before one Judge of the Environment and Land Court sitting at Nairobi.

7. Arising from the foregoing, the court proceeded to and issued directions pertaining to and concerning the Hearing of the Appeal. In particular, the court directed that the Appeal shall be heard before one judge sitting at Nairobi. In addition, the court also proceeded to and circumscribed the timelines for the filing and exchange of the written submissions.

8. The Appellants filed written submissions dated the 5th August 2024 and supplementary submissions dated the 9th December 2024. On the other hand, the Respondent filed written submissions dated the 13th November 2024. Notably, the three [3] sets of submissions form part of the record of the court.

Parties' Submissions:

a. Appellants' Submissions:

9. The Appellants herein filed two [2] sets of written submissions. The first set of written submissions is dated the 5th August 2024 and the second set of written submissions is dated the 9th December 2024. In respect of the two [2] sets of written submissions, the Appellants herein have isolated, highlighted and canvassed four [4] salient issues for consideration and determination by the court.

10. Firstly, learned counsel for the Appellants has submitted that the property known as plot number 77/1 Rongai Market, Limuru [hereinafter referred to as the suit property] belonged to and was registered in the name of one Sebastian Karanja Macharia, now deceased. Furthermore, it was contended that following the death of Sebastian Karanja Macharia, [the Deceased] the suit property became part of the estate of the deceased and thus same is subject to distribution in accordance with the *Law of Succession Act*, Chapter 160 Laws of Kenya.

11. On the other hand, it was submitted that the Appellants herein and in particular, the 3rd and 4th Appellants, are children of Sebastian Karanja Macharia, now deceased. In this regard, it was contended that by virtue of being the children of the deceased, the 3rd and 4th Appellants are therefore beneficiaries of the estate of the deceased.

12. Other than the foregoing, it was submitted that the 1st and 2nd Appellants have been in occupation of various portions of the suit property albeit on the basis of authority granted by other beneficiaries of the estate of the deceased.

13. Be that as it may, learned counsel for the Appellants has submitted that the occupation, possession and use of various portions of the suit property, commenced way back before the death of Sebastian Karanja Macharia. Additionally, it was posited that the Appellants herein have never paid rents either to Sebastain Karanja Macharia, now deceased or to the Respondent herein.

14. Arising from the foregoing submissions, learned counsel for the Appellants has invited the court to find and hold that there exists no tenancy agreement/relationship between the Appellants and the Respondents herein.

15. Secondly, learned counsel for the Appellants has submitted that in the absence of a tenancy agreement/ relationship between the Appellants and the Respondent herein, the Business Premises Rent Tribunal [hereinafter referred to as the tribunal] had no jurisdiction to entertain and adjudicate upon the Reference that was filed by the Respondent or to grant the impugned orders that were issued on the 11th April 2023.

16. Further and in addition, learned counsel for the Appellants has also submitted that the Tribunal is a creature of statute and that its jurisdiction flows from the parent statute. In this regard, it was submitted that the scope and extent of jurisdiction of the Tribunal is defined and circumscribed by the provisions of the Landlord and Tenants [Shops, Hotels & catering Establishment] Act, and hence the Tribunal cannot arrogate unto itself jurisdiction outside the statute.

17. To buttress the submissions in respect of the question of jurisdiction, learned counsel for the Appellants has cited and referenced the decision in the case of David Cullen v Samuel Kiptalai & 2 Others [2021]eKLR and The Owners of Motor Vessel Lilian S v Caltex Oil Kenya [1989]eKLR, respectively.

18. Thirdly, learned counsel for the Appellants has submitted that the Tribunal proceeded to and exercised its discretion in a manner contrary to the established practice of the law. In this regard, it has been submitted that the attention of the Tribunal was drawn to a pending Application seeking Revocation of the Grant of Probate issued in favour of the Respondent vide Nairobi HCC SUCC No. 240 of 2000 [The Estate of Late Sebastian Karanja Macharia], but the Tribunal ignored and disregarded the pendency of the said Summons for Revocation of the said Grant.

19. Additionally, it has been contended that by ignoring and disregarding the aspect pertaining to the pending Summons for Revocation of Grant, the Tribunal failed to take into account relevant material and factors, which would have impacted upon the exercise of the Tribunal's discretion.

20. Premised on the fact that the Tribunal failed to consider the issue of the pending summons for revocation, it has been contended that the Tribunal therefore breached and violated the provisions of Rule 41[3] of the Probate & Administration Rules, which require that the dispute pertaining to the estate of the deceased be substantially determined before the succession court.

21. Finally, learned counsel for the Appellants has also submitted that the Tribunal also erred in finding and holding that the Respondent was the registered owner of the suit property and thus fell within the legal parameters of a landlord. Nevertheless, it was posited that the finding and holding by the Tribunal under reference was arrived at in the absence of any Certificate of Title, to demonstrate that the Respondent was indeed the registered proprietor/owner of the suit property.

22. Arising from the foregoing, learned counsel for the Appellants has therefore implored the court to find and hold that the impugned Ruling of the Tribunal is wrought with and replete of various errors of principle. In this regard, the court has been invited to impeach and set aside the Ruling and the consequential order arising therefrom.

Respondent's Submissions:

23. The Respondent filed written submissions dated the 13th November 2024 and wherein the Respondent has highlighted and canvassed four [4] salient issues for consideration and determination by the court.

24. First and foremost, learned counsel for the Respondent has submitted that the suit property was bequeathed to the Respondent by Sebastian Karanja Macharia, now deceased vide Will dated the 6th June 1998. Furthermore, it was submitted that upon the death of the deceased, the Respondent herein proceeded to and obtained Grant of probate with the Will annexed thereto.

25. It was the further testimony of the Respondent that upon the issuance of the Grant of Probate, the Respondent herein became the legitimate proprietor of the suit property. In this regard, it has been posited that on the basis of being the owner of the suit property, the Respondent became the landlord/ landlady of the persons occupying and operating businesses on the suit property, the Appellants herein not excepted.

26. Secondly, learned counsel for the Respondent has submitted that where there is no written lease/ agreement, the law implies the existence of a periodic tenancy. In this regard, learned counsel for the Respondent has cited and referenced the provisions of Section 57 of the *Land Act*, 2012 [2016].

27. On the basis of the provisions of Section 57 of the *Land Act*, learned counsel for the Respondent has therefore implored the court to find and hold that there exists a periodic tenancy between the Appellants and the Respondent. In this regard, the court has been invited to find and hold that the Appellants are indeed tenants of the Respondent.

28. Thirdly, learned counsel for the Respondent has submitted that the Tribunal herein was seized and possessed of the requisite jurisdiction to entertain and adjudicate upon the subject dispute. In particular, learned counsel for the Respondent has cited and referenced the provisions of Section 2 of the Landlord-Tenant-Shops-Hotels-Catering-Establishments-Act, which defines the meaning of a controlled tenancy.

29. Lastly learned counsel for the Respondent has submitted that the Complaint by the Appellants that the matter before the Tribunal was not judiciously determined is erroneous and misconceived. In particular, learned counsel for the Respondent has submitted that the Succession cause namely Nairobi HCC No. 1440 of 2000 [The Matter of The Estate of Sebastian Karanja Macharia, deceased] had been heard and concluded. In this case, learned counsel for the Respondent invited the court to take cognizance of the Judgment rendered by Hon. Justice D K Maraga, Judge [as he then was] and the judgment by the Court of Appeal.

30. Arising from the foregoing, learned counsel for the Respondent has submitted that the contention by the Appellants that the Succession proceedings were still pending and ongoing was misleading. To this end, it was posited that the Tribunal was right/correct in finding that the succession matter had been concluded.

31. According to learned counsel for the Respondent, the invocation and reliance on [sic] the proceedings vide Nairobi HCC Succ. Cause No. 1440 of 2000, was mischievous and merely intended to defeat the Respondent's rights and entitlement to the rental income derivable from the suit property.

32. Consequently and in view of the foregoing, learned counsel for the Respondent has invited the court to find and hold that the Appeal beforehand is devoid of merits and thus same [Appeal] ought to be dismissed with costs.

Issues for Determination:

33. Having reviewed the Memorandum of Appeal; the Proceedings before the Tribunal; the Ruling of the Tribunal which is appealed against and upon consideration of the submissions filed on behalf of the respective parties, the following issues do crystalize and are thus worthy of determination:

    i. Whether there existed any tenancy agreement/relationship between the Appellants and the Respondent or at all.

    ii. Whether the Tribunal was seized and/or possessed of the requisite jurisdiction to entertain and adjudicate upon the dispute beforehand.

    iii. Whether the Tribunal exercised its jurisdiction improperly and injudiciously, in dismissing the Application dated the 7th June 2023 or otherwise.

Analysis and Determination

Issue Number 1

Whether there existed any tenancy agreement/relationship between the Appellants and the Respondent or at all.

34. The Appellants herein filed an Application dated the 7th of June 2023 and in respect of which the Appellants sought for various reliefs inter-alia; an order to set aside the Ruling and decision of the Tribunal issued on the 17th April 2023 as well as an order to strike out the Reference filed before the Tribunal. The Appellants contended that there was no tenancy agreement/relationship between the Appellants and the Respondent over the suit property.

35. Suffice it to underscore that the Appellants contended that the suit property belonged to and was registered in the name of Sebastian Karanja Macharia, now deceased. To this end, it was posited that the suit property therefore formed and comprised part of the estate of the deceased.

36. On the other hand, the Appellants contended that same had been in occupation and possession of the suit property long before the death of the deceased. Nevertheless, it was posited that during the entire duration of occupation, the Appellants herein have never paid rents either to the deceased or to the Respondent herein.

37. Furthermore, it was the contention by and on behalf of the Applicants and more particularly, the 3rd and 4th Applicants that same are beneficiaries of the estate of the deceased. In this regard, it was averred that the occupation of the portions of the suit property is not informed by any tenancy relationship or at all.

38. Other than the foregoing, it is not lost on the court that the Appellants contended that the 3rd Appellant herein neither resides nor operates any business in the suit property. To this end, it was contended that the proceedings against the 3rd Appellant were therefore mounted in vacuum.

39. The Respondent on her part contended that even though the suit property is registered in the name of the deceased, the property was bequeathed unto her vide Will dated 6th June 1998. Furthermore, the Respondent submitted that upon the death of the deceased, she procured Grant of Letters of Probate with a Will annexed and thus became the lawful owner of the suit property.

40. It was the further submission of the Respondent that by virtue of being the registered owner/ proprietor of the suit property, same [Respondent] is therefore entitled to exercise lawful rights to and in respect of the suit property.

41. Further and at any rate, learned counsel for the Respondent posited that where there is no written agreement, the provisions of Section 57 of the *Land Act*, 2012, implies the existence of a periodic agreement between the registered owner of the land/property and anyone in occupation/possession thereof. In this regard, learned counsel for the Respondent implored the court to imply the existence of a periodic tenancy between the Appellants and the Respondents herein.

42. Having considered the rival submissions by the parties, it is now apposite to discern/ascertain whether there exists a tenancy agreement/relationship between the Appellants on one hand and the Respondent on the other hand.

43. To start with, there is no gainsaying that it is the Respondent herein who moved the tribunal purporting that the Appellants herein are her tenants and thus obligated to pay rents. Besides, it is the Respondent who contended that the Appellants herein have failed to pay rents and have thus accrued/ accumulated rent arrears.

44. To the extent that it is the Respondent who contended that the Appellants were tenants and had accumulated rent arrears, it was incumbent upon the Respondent to demonstrate that there was indeed a tenancy relationship between herself [Respondent] and the Appellants. For good measure, the provisions of Sections 107, 108 and 109 of the *Evidence Act*, Chapter 80 Laws of Kenya are succinct and apt.

45. At any rate, the fact that the burden of proof of proving the existence of any tenancy agreement/ relationship lies on the Respondent was underscored in the case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR, where the Court of Appeal considered the incidence of burden of proof and on whom same rests.

46. For coherence, the court stated and held thus:

> With respect, that was entirely a wrong approach to this case and the entire practice of civil litigation. Whether or not the appellant had not denied the facts by affidavit or defence, when the 1st respondent came to court, he was bound by law and practice to lay the evidence to support existence of the facts he pleaded. That is what we understand Section 108 of the *Evidence Act* to be demanding of a party like the 1st Respondent that:
>
> > The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side."

47. The incidence of burden of proof and on whom same lies was also elaborated by the Supreme Court in the case of Gwer & 5 others v Kenya Medical Research Institute & 3 others (Petition 12 of 2019) [2020] KESC 66 (KLR) (Civ) (10 January 2020) (Judgment), where the court stated thus:

SUBPARA 49.

Section 108 of the *Evidence Act* provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and section 109 of the Act declares that, "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

50. This Court in Raila Odinga & others *v Independent Electoral & Boundaries Commission & others, Petition No 5 of 2013*, restated the basic rule on the shifting of the evidential burden, in these terms:...a petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...."

51. In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.

48. Premised on the ratio decidendi highlighted in the decision [supra], it is now apposite to revert to the facts of the case and to ascertain whether the Respondent proved the existence of a tenancy relationship between herself and the Appellants. Instructively, the Respondent herein failed to place before the Tribunal any written agreement. Furthermore, the Respondent also failed to tender or produce before the Tribunal any rent book showing rents that have ever been paid by the Appellants unto herself.

49. Other than the foregoing, it is also not lost on the court that the Respondent also neither tendered nor produced any receipt[s] confirming payment of rents by any of the Appellants.

50. To my mind, it was the obligation of the Respondent to tender and produce plausible, cogent and credible material to demonstrate the existence of a tenancy relationship between herself and the Appellants. However, the Respondent herein failed to prove the existence of such tenancy relationship.

51. Having failed to tender and/or produce any evidence to demonstrate the existence of a tenancy relationship, it is my finding and holding that the Tribunal fell in error in finding that there existed a tenancy relationship between the Respondent and the Appellants herein. Quite clearly, the finding by the Tribunal that there existed a tenancy relationship between the Respondent and the Appellants was arrived at in vacuum.

52. Additionally, it is also worthy to point out that even though the Tribunal found and held that the Respondent was the registered owner of the suit property, no evidence was highlighted and/or adverted to. Suffice it to underscore that the contention of one being the registered owner of a property can only be demonstrated/proved by production of a Certificate of Title issued under the relevant legal regime. [See Section 24 and 25 of the *Land Registration Act*, 2012].

53. Finally, it is also important to underscore that the mere fact that one is the registered proprietor/ owner of a property, the suit property not excepted, does not ipso-facto create a tenancy relationship with anyone in occupation/possession of the property. For substance, one may be in occupation of a property on the basis of beneficial rights or claim thereto; or on the basis of adverse possession in the manner adverted to by the provisions of Section 28 of the *Land Registration Act*, 2012.

54. Arising from the foregoing, it was therefore not open for the Tribunal to proceed on the assumption that by virtue of being the registered owner of the suit property, then such registration automatically creates a tenancy relationship. Simply put, such proposition is misconceived and legally untenable.

55. For the foregoing reason[s], my answer to issue number one is threefold. Firstly, the burden of demonstrating and proving the existence of a tenancy relationship between the Respondent and the Applicants laid on the shoulders of the Respondent.

56. Secondly, the Respondent herein neither tendered nor produced any plausible or cogent evidence to underpin the contention that the Appellants were/are her [Respondent's] tenants in the suit property.

57. Thirdly, the ownership of a property, the suit property not excepted, does not ipso facto create and establish a tenancy relationship with the persons in occupation of the suit property. In this regard, the assumption which coloured the impugned Ruling of the Tribunal was erroneous and misconceived.

Issue Number 2

Whether the Tribunal was seized and/or possessed of the requisite jurisdiction to entertain and adjudicate upon the dispute beforehand.

58. The Business Premises Rent Tribunal [BPRT] is created and established by the provisions of the Landlord, Tenant, Shops, Hotels, Catering and Establishments Act. In addition, the Act underscores the extent and scope of the jurisdiction of the Tribunal.

59. Suffice it to underscore that the Tribunal is mandated to entertain and adjudicate upon dispute[s] concerning controlled tenancies in accordance with the provisions of Section 2 of the Landlord-Tenant-Shops-Hotels-Catering-Establishments-Act.

60. Given the importance of Section 2 of the Act [Supra] in resolving the question of jurisdiction, it is imperative that the said Section be reproduced. For ease of appreciation, Section 2 of the Act[supra] are reproduced as hereunder:

> "catering establishment" means any premises on which is carried out the business of supplying food or drink for consumption on such premises, by persons other than those who reside and are boarded on such premises; "controlled tenancy" means a tenancy of a shop, hotel or catering establishment:
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> (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
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> ii. contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or
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> 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;

61. Considering the provisions of Section 2 of the Act [supra], there is no gainsaying that the Tribunal can only assume and exercise jurisdiction in matters where it is demonstrated that there exists a controlled tenancy between the disputing parties. In the absence of a controlled tenancy, the tribunal cannot entertain and/or adjudicate upon any dispute.

62. It therefore means that before the Tribunal assumes and exercises jurisdiction on any matter, it behoves the Tribunal to discern and decipher whether there is a controlled tenancy.

63. Notwithstanding the importance of discerning the existence of a controlled tenancy, the Tribunal beforehand proceeded on the assumption that because a member of the Tribunal had previously

granted orders in the landlord's initial Application dated the 27th February 2023, then it is assumed that the Tribunal has/had jurisdiction.

64. To be able to understand the manner in which the Tribunal interrogated the question of jurisdiction, it suffices to reproduce an aspect of paragraph 14 of the impugned Ruling. Same states as hereunder:

> 14. Therefore, the issue of jurisdiction cannot arise in the instant case as the Tribunal had already given orders in the landlord's initial Application dated the 27th February 2023.

65. What I hear the Tribunal to be saying is to the effect that because a Member of the Tribunal/Tribunal had handled the landlord's Application and thereafter gave orders thereto, the handling of the said Application ipso-facto confers jurisdiction on the Tribunal.

66. In my humble view, the position taken by the Tribunal and which has been adverted to in the preceding paragraph[s] represents a grave misconception of the question of jurisdiction.

67. To start with, it is elementary learning that jurisdiction cannot be conferred on a court and/or tribunal by waiver; or by acquiesce; or consent of the parties. Furthermore, jurisdiction cannot also be conferred on the basis of assumption.

68. To this end, it suffices to reference the holding in the case of Kenya Ports Authority v Modern Holdings [E.A] Limited [2017] eKLR, where the Court of Appeal stated and held thus:

> This Court in Adero & Another V Ulinzi Sacco Society Limited [2002] 1 KLR 577, quite sufficiently summarised the law on jurisdiction as follows;
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> 1 .....
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> 2. The jurisdiction either exists or does not ab initio and the non constitution of the forum created by statute to adjudicate on specified disputes could not of itself have the effect of conferring jurisdiction on another forum which otherwise lacked jurisdiction.
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> 3. Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.
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> 4. Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.
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> 5. Where a cause is filed in court without jurisdiction, there is no power on that court to transfer it to a court of competent jurisdiction.
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> 6. .....
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> 7. ....." (Our emphasis).

69. On the contrary, jurisdiction is derived from *the Constitution* or the parent statute or both. In any event, a court of law/tribunal cannot arrogate unto itself jurisdiction on the basis of assumption, craft or innovation. Further and in addition, it is necessary to add that a court of law cannot also confer jurisdiction on itself by neglect and failure to discern the true intendment of the law.

70. To buttress the foregoing exposition of the law, it is instructive to reference the decision in the case of Macharia & another v Kenya Commercial Bank Limited & 2 others (Application 2 of 2011) [2012] KESC 8 (KLR) (23 October 2012) (Ruling), where the Supreme Court of Kenya held as hereunder:

> 68. 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. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011.
>
> Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

71. The importance of jurisdiction in a matter being entertained and adjudicated upon by a court of law was also elaborated by the Supreme Court in the case of In the Matter of the Interim Independent Electoral Commission (Applicant) (Constitutional Application 2 of 2011) [2011] KESC 1 (KLR) (20 December 2011) (Ruling), where the court held thus:

> 29. Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step."
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> 30. The Lillian 'S' case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by *the Constitution*.

72. With utmost respect, the position that was taken by the Tribunal that because it had previously entertained the Respondent's Application dated 27th February 2023, then it obviously had jurisdiction; is erroneous and absolutely legally untenable.

73. Before departing from the question of jurisdiction, it is apposite to address the submissions by learned counsel for the Respondent that where there is no written agreement between the parties, the Tribunal could infer the existence of a periodic tenancy in terms of Section 57 of the *Land Act*, 2012.

74. In my humble view, the determination of whether or not there exists a periodic tenancy in terms of Section 57 of the *Land Act*, does not fall within the purview of the jurisdiction of the Tribunal.

75. Without belabouring the point, it is instructive to invite the attention of learned counsel for the Respondent to the provisions of Section 150 of the *Land Act*, 2012[2016]. The same states as hereunder:

> 150. The Environment and Land Court established in the *Environment and Land Court Act* is vested with exclusive jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act

76. To my mind, Section 57 of the *Land Act* could not be invoked and relied upon by the Respondent in her endeavour to imply the existence of a controlled tenancy in the manner stipulated under the Landlord-Tenant-Shops-Hotels-Catering-Establishments-Act.

77. Suffice it to posit that the Respondent herein may very well have a cause of action as against the Appellants. However, the cause of action in favour of the Respondent cannot be canvassed and/or ventilated before the Business Premises Rent Tribunal. For good measure, it behoves the Respondent and her legal counsel to internalize various provisions of the law and thereafter to discern the appropriate forum, where necessary.

78. Other than the foregoing, my answer to issue number two [2] is to the effect that the Business Premises Rent Tribunal was devoid and divested of jurisdiction to entertain the dispute between the Appellants and the Respondent herein. In the absence of jurisdiction, the proceedings and the resultant decision by the Tribunal are void ab initio.

Issue Number 3

Whether the tribunal exercised its jurisdiction improperly and injudiciously, in dismission the application dated the 7th June 2023 or otherwise.

79. The Appellants herein intimated to the Tribunal that Summons for Revocation of Grant had been filed by the 3rd and 4th Appellants and wherein the 4th Appellant and another were seeking to impeach the Grant of Probate issued vide Nairobi HCC Succ No. 1440 of 2000. In particular, a copy of the Summons for Revocation of Grant was annexed to the Application dated the 7th June 2023.

80. Arising from the fact that there was a pending Summons for Revocation of Grant of Probate, learned counsel for the Appellants submitted that it was apposite to stay the proceedings before the Tribunal, pending the determination of the Summons for Revocation of Grant.

81. On the other hand, learned counsel for the Respondent contended that the succession proceedings relating to and concerning the estate of Sebastian Karanja Macharia, now deceased, had been concluded.

82. To this end, learned counsel for the Respondent invited the court to take cognizance of the Judgment of the High Court rendered on the 14th November 2011 and the Judgment of the Court of Appeal rendered on the 10th July 2020, respectively.

83. The Tribunal came to the conclusion that the succession cause in respect of the estate of the deceased had been concluded. Furthermore, the Tribunal also found and held that the Summons for Revocation of Grant had been filed barely one month after the issuance of the impugned orders by the Tribunal. In this regard, the Tribunal came to the conclusion that the filing of Summons for Revocation of Grant created an irresistible impression that the Appellants were merely intent on giving life to the prayer for stay of proceedings.

84. Notwithstanding the position taken by the Tribunal, it is crystal clear that the filing of the Summons for Revocation of Grant made the succession proceedings alive. In this regard, the finding that the succession proceedings had been concluded was erroneous.

85. Furthermore, it is not lost on this court that the Summons for Revocation of Grant filed by the 4th Appellant and another, would require to be canvassed before the High Court. As to whether or not the summons for revocation of grant would be allowed or otherwise, depends on the merits thereof to be determined by the High Court.

86. Be that as it may, it was not open for the Tribunal to find and hold that the succession cause had been concluded. For good measure, the pendency of the Summons for Revocation of Grant cannot be gainsaid.

87. To my mind, a court of law, and/or tribunal confronted with the scenario like the one beforehand, would be expected to take into account the likely effects of the summons for revocation of grant on the matter beforehand. In this regard, I have no doubt in my mind, that the Tribunal exercised its discretion improperly and injudiciously.

88. Taking into account the manner in which the Tribunal calibrated on the issue of the pending Summon for Revocation of Grant, I come to the conclusion that the Tribunal failed to take into account material factors and by extension, committed an error of principle. The error of principle beforehand vitiates the decision of the Tribunal and thus renders same manifestly unsafe.

89. In short, I find and hold that sufficient cause and basis has been established to warrant the interference of the exercise of discretion by the Tribunal.

90. In arriving at and coming to the conclusion that the discretion of the Tribunal is vitiated and thus amenable to interference, I have taken cognizance of the holding in the case of Mbogo v Shah (1968) EA 257; in which De Lestang (as he then was) observed at page 94 that:

> "I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.

91. In a nutshell, my answer to issue number three [3] is to the effect that the Tribunal improperly and injudiciously exercised its discretion in the manner that same [tribunal] dealt with the Application dated the 27th February 2023, despite the pendency of Summons for Revocation of Grant filed vide Nairobi HCC Succession Cause 1440 of 2000.

Final Disposition:

92. Flowing from the analysis [details highlighted in the body of the Judgment], it must have become crystal clear that the Tribunal erred in entertaining and adjudicating on a matter [dispute], which clearly is outside its jurisdiction.

93. In the premises, the court finds that the Appeal beforehand is meritorious. In this regard, the final orders that commend themselves to the court are as hereunder:

    i. The Appeal be and is hereby allowed.

ii. The Ruling and consequential Orders of the Tribunal issued on the 6th October 2023 be and are hereby set aside.

iii. The Application dated 7th June 2023 be and is hereby allowed. For the avoidance of doubt, the limb of the Application that has been allowed relates to the prayer for striking out of the Reference and the consequential Proceedings before the Business Premises Rent Tribunal.

iv. For coherence, BPRT Cause No. E229 of 2023; be and is hereby struck out.

v. Each party shall bear own costs of the Appeal and the costs arising from the Proceedings before the Business Premises Rent Tribunal taking into account that the parties are substantially family members.

94. It is so Ordered.

DATED, SIGNED AND DELIVERED ON THE 16TH DAY OF DECEMBER 2024.

OGUTTU MBOYA,

JUDGE.

In the presence of:

Benson – Court Assistant.

Ms. Wambua for the Appellants.

Mr. Kangare G.N for the Respondent.