



**Arege v Michira (Environment and Land Appeal E011 of 2022)
[2024] KEELC 13772 (KLR) (10 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13772 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND APPEAL E011 OF 2022**

M SILA, J

DECEMBER 10, 2024

BETWEEN

DANIEL BOIT AREGE APPELLANT

AND

ALFRED MOFFAT OMUNDI MICHIRA RESPONDENT

(Being an appeal against the judgment of Hon. P.K Mutai, Senior Resident Magistrate, delivered on 27 April 2022 in the suit Kisii CMCC/ELC No. 45 of 2019)

JUDGMENT

1. Through a plaint filed on 25 May 2017 in the ELC at Kisii, the appellant sued the respondent and pleaded that he was at all material times a controlled tenant of the respondent in the premises known as Kisii Municipality/Block III/194 where he operated a hotel business. He pleaded that on 13 May 2017, the respondent proceeded to the premises, closed it and carted away his stock and tools of trade, allegedly for non payment of rent, and started renovating the premises. He contended to have lost Kshs. 398,400/= being the value of the attached goods. In the plaint he sought orders for the following :
 - a. declaration that the closure of his business was wrongful and illegal and void ab initio;
 - b. payment of Kshs. 398,400/=;
 - c. a permanent injunction to restrain the respondent from levying distress, attaching or interfering with his occupation and tenancy;
 - d. a mandatory injunction to have the respondent restore and/or maintain him in the premises;
 - e. interest at 14%;
 - f. any other relief deemed fit.



2. Together with the plaint, the appellant filed an application dated 23 May 2017, seeking orders of injunction to restrain the respondent from interfering with his occupation of the premises and restoration into the premises pending hearing of the suit. He averred that he first entered into a lease on 9 January 2012 for a period of one year at the rent of Kshs. 20,000/=; that on expiry of that lease, there was extension for a further 4 years up to 29 February 2017 (sic); that after this lease expired the respondent sent him to his advocate to sign a new lease but he had not instructed his advocate on the rent; that he tried to reach out to the respondent who insisted that he should bank money into his account; that he heard from friends that the respondent intended to evict him and he filed suit before the Business Premises Rent Tribunal (BPRT) being Case No. 29 of 2017; that the BPRT granted him orders restraining the respondent from evicting him; that on 13 May 2015, the respondent came to the premises with thugs who closed the hotel and started renovating the premises without caring about the Tribunal orders; that he was thus constrained to move to this court for purposes of protecting his business.
3. The application went before Mutungi J on 29 May 2017. He certified it urgent but did not grant interim orders. Subsequently on 3 August 2027, parties mentioned that they wanted to settle the matter and they have reached a consent which they wished to record. The consent was as follows :

By consent of the parties the Regional Rent Inspector to visit and inspect the subject premises with a view of determining the applicable rent. Once the applicable rent is determined the parties shall sign a lease agreement for a term of 5 years and 3 months within 30 days of the rent being determined.
4. A rent assessment was made for Kshs. 76,000/= which the appellant did not agree with and he returned his own assessment for Kshs. 21,000/= per month. Since the parties could not settle their consent the judge (Mutungi J) had to make a ruling on the application dated 23 May 2017 and ruling was delivered on 29 June 2018. It is important that I set out part of what he held in that ruling. He stated as follows :

“As per the consent order, the lease renewal was only subject to the new rent being determined and probably agreed. The rent payable was determined in terms of the consent order but the plaintiff does not agree with the rent as determined. If the parties cannot agree on the rent for the renewed lease, it means the lease cannot take effect.

The plaintiff concedes that the defendant closed the business premises and commenced making renovations meaning the plaintiff was effectively evicted from the premises. There is no basis upon which the court can order the plaintiff to be restored in the demised premises as it is clear from the consent order that the parties intended to enter into a new lease upon the determination of the rent as the per the consent order. The lease they intended to enter into was one for a term of 5 years and 3 months which would fall outside the jurisdiction of the Business Premises Rent Tribunal established under the Landlord and Tenant Act, Cap 301 Laws of Kenya.

In the premises therefore, the orders of injunction sought by the plaintiff/applicant in the Notice of Motion dated 23rd May 2017 cannot be granted. The consent order more or less superceded the application. By consent the parties agreed on how to resolve their dispute in regard to the tenancy. However, the consent did not address the issue of damages pleaded in the plaint and that would remain an issue for determination at the trial if the parties cannot reach agreement.



For the foregoing reasons, I decline to grant any injunction in the terms sought by the plaintiff and order the Notice of Motion dated 23rd May 2017 dismissed. The costs of the application shall be in the cause.

Orders accordingly.”

5. In a nutshell, the learned Judge found that the appellant was already out of the premises and there was no basis upon which he could restore him back, as restoration was to be on the basis of a new lease as agreed by consent, but which the parties could not agree on the rent payable. He held that the issue of damages was pleaded in the plaint and would remain an issue for determination at trial.
6. It is useful to mention that prior to filing this suit, the appellant had filed a reference at the BPRT being BPRT Case No. 29 of 2017. He filed the reference on 21 April 2017 to contest a landlord’s notice issued on 27 February 2017. On 28 April 2017, he obtained, from the Chairman of the Tribunal, an order to restrain the landlord from evicting him or increasing rent. It would appear that despite the interim orders in his favour, the respondent proceeded to evict him. This made the appellant go back to the Tribunal with an application dated 23 May 2017 seeking to have the respondent punished for contempt. The matter came up before the Chairman on 20 July 2017 when counsel for the appellant sought leave to amend this application dated 23 May 2017 which leave was granted. The matter then came up on 8 February 2018 when it was mentioned that the appellant has already been evicted from the premises. The matter was mentioned a couple more times and last came before the Chairman on 21 February 2019. On that day, the Chairman held that the Tribunal no longer had jurisdiction in the matter, ostensibly on the basis that the tenant had already been evicted, and directed that any other pending dispute be dealt with by a civil court of competent jurisdiction. That was the end of the matter before the BPRT.
7. After Mutungi J delivered his ruling on 29 June 2018, declining the application for injunction, the parties applied to transfer the case to the Magistrates’ Court which the court obliged. The case was re-registered as Kisii CMCC No. 45 of 2019. On 25 October 2019, the appellant filed an amended plaint. In it, he pleaded that on 13 May 2017, the respondent proceeded to the premises and closed it without giving the appellant any notice of termination of the lease, and carted away his goods. He amended the claim for damages to read Kshs 828,160/= as the value of the goods attached. His prayers remained as contained in the original plaint save for amendment to prayer (b) to read Kshs. 828,160/= in place of Kshs. 398,400/=.
8. Hearing commenced on 1 December 2021 when the appellant testified. He mentioned that they had a lease agreement dated 9 January 2012 for one year which he exhibited. He also informed court that he had filed the reference at the tribunal. His position on the lease was that it had room for renewal but the respondent wanted him to pay rent of Kshs. 35,000/= which was more than an increment of 10%.
9. The respondent testified on 14 February 2022. He testified that he followed due process in removing the appellant from the premises. He advised court that he had been sued at the BPRT which case was dismissed. He claimed to have served a termination notice upon the appellant but the appellant did not respond. He acknowledged that the appellant was seeking Kshs. 828,160/= and further affirmed that the goods of the appellant were no longer in the premises. He claimed to have been an unpaid landlord claiming over Kshs. 200,000/= in unpaid rent.
10. With the above evidence the hearing closed.
11. In a pithy judgment delivered on 27 April 2022, the trial Magistrate held that he had no jurisdiction as the issue at hand related to a controlled tenancy. He found that both parties had mentioned the case before the BPRT and according to him it was not clear on the final orders issued. In his view, the



matters he was being called upon to determine fell within the jurisdiction of the BPRT. For that reason he held that he had no jurisdiction and downed his tools. He signed off by striking out the suit for want of jurisdiction but with no orders as to costs.

12. Aggrieved, the appellant has filed this appeal. Eight grounds are cited but really at the end of the day the complaint is on the holding that the court did not have jurisdiction. The appellant seeks to have the appeal allowed and the judgment be substituted with a holding allowing the prayers in the plaint. The appeal was argued by way of written submissions.
13. In his submissions, Mr. Nyatundo, learned counsel for the respondent, submitted inter alia that the Tribunal had held that it had no jurisdiction and no appeal was filed against that decision. He submitted that this court ought not to interfere with the exercise of discretion. On his part, Mr. Gichaba, learned counsel for the appellant, urged that since the tenant was evicted, there was no longer a landlord/tenant relationship and therefore the BPRT ceased to have jurisdiction and jurisdiction was with the court. He relied on the case of Michael Gachie Mwarangu vs Peter Gichuru Maina & 2 Others (2016) eKLR. He further submitted that the appellant had proved that he was illegally evicted and was entitled to the damages sought.
14. I have considered the matter. It is apparent that when this case was filed the appellant also sought orders to restrain his removal from the premises. He was nevertheless removed. The parties then entered into a consent to have the rent assessed so that they can engage in a new lease for 5 years and 3 months. I am of the view that what led the parties to enter into this consent was an acknowledgment and appreciation that they no longer had a landlord/tenant relationship. Their relationship could only be renewed upon a new lease being agreed. Thus, at the time that the amended plaint was being filed on 25 October 2019, there was no lease between the parties and there was no landlord/tenant relationship. Indeed the appellant had been out of the premises for at least two years.
15. In his ruling, Mutungi J was clear that with the consent of the parties, re-entry into the premises as tenant was now subject to the parties agreeing on a new lease, and they never agreed. He pointed out that if there was no agreement then there could be no sustainable prayer for the appellant to be reinstated into the premises and the only thing that could be left for determination was the question of damages payable. I am at a loss as to why the appellant, when he was amending the plaint in October 2019, did not follow the cue of the judge. There was no purpose in the amended plaint maintaining the prayers for reinstatement in the premises for they could not be granted without the parties agreeing to a new lease. The only issue that could be determined was damages in terms of prayers (b) of the plaint, and prayer (a) which sought a declaration that the closure of the business was illegal.
16. It follows that the parties had no tenancy when the case proceeded for hearing and they did not have a landlord/tenant relationship. That being the case, it was erroneous for the trial court to contend that it had no jurisdiction because the parties had a controlled tenancy. The fact of the matter is that there was no tenancy, as I have explained, and there was no landlord/tenant relationship, and therefore, it could not be said that the subject was a controlled tenancy which ought to have been heard before the BPRT. The parties had already changed their positions when they entered into the consent to agree on new terms of rent and when they could not agree their relationship ended. It is therefore my view that the court had jurisdiction to assess damages as claimed.
17. Section 78 of the *Civil Procedure Act*, Cap 21, Laws of Kenya, outlines the powers of an appellate court. It provides as follows :
 1. Subject to such conditions and limitations as may be prescribed, an appellate court shall have power –



- a. To determine a case finally;
 - b. To remand a case;
 - c. To frame issues and refer them for trial;
 - d. To take additional evidence or to require the evidence to be taken;
 - e. To order a new trial.
2. Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.
18. From the foregoing, it will be seen that an appellate court is vested with jurisdiction to proceed and determine a case finally, and that is exactly what I will proceed to do.
19. The appellant did state that on 13 May 2017 the respondent came with some people and closed his hotel. He stated that the respondent did not take inventory of the attached goods. In his statement, the respondent did not address this contention by the appellant at all. He in fact admitted that he took over the premises as he needed to renovate it and also on account of unpaid rent. It follows therefore that the contention of the appellant that his goods were locked in the premises and attached was not controverted. The respondent had no justification to seize the goods of the appellant. Indeed at the time that he took over the premises, there was an order from the tribunal stopping him from making entry therein. He acted with impunity. The appellant is thus entitled to a declaration that the seizure of the premises by the respondent was illegal. I am also persuaded that he is entitled to damages for illegal eviction. In the case of *Munaver N Alibhai t/a Diani Gallery v South Coast Holdings Limited* [2020] eKLR, P.J Otieno J, awarded Kshs. 2,000,000/= as general damages for illegal termination of lease.
20. In the case of *Benjamin Gichana Mayieko & Another vs Cosmas Magembe & 2 Others*, Kisii ELCA No. E004 of 2022, I held as follows on the aspect of damages for illegal eviction of a controlled tenant :
- “I would think that before arriving at a decision on the amount of general damages to be awarded, the court needs to consider the rent payable, the chances of getting alternative premises for conducting business, the term left in the lease, the conduct of both landlord and tenant, other damages awarded to the tenant such as loss of business, and any other important surrounding circumstances. I am further of the opinion, that the award ought not to be so high compared to the rent payable, so as to constitute an unjust windfall on the part of the tenant, but it should also not be too low so that landlords do not have an incentive to illegally evict tenants. It should be sufficient to be both compensatory and a deterrence at the same time.”
21. In the above case, I awarded one year’s rent as damages.
22. In our case, the last rent payable was Kshs. 20,000/= per month. I will award the appellant Kshs. 240,000/= being one year’s rent as damages for illegal eviction.
23. There is the other claim for Kshs. 828,160/= for attachment of the goods. I have agonized over this. In the initial plaint, the appellant claimed that the goods seized were of Kshs. 398,400/=. How the goods changed to Kshs. 828,160/= was not explained. I acknowledge that he produced some receipts but I think in the circumstances of the case, more evidence was needed to really buttress the position that there were actually goods worth Kshs. 828,160/= in the premises. Even some of those receipts do not have the name of the beneficiary. The nitty gritty of the business operation was never elaborated



by the appellant for one to appreciate that it was a business having a particular amount of goods and equipment. What I will appreciate is that there must have been some goods in the premises. There was a catering establishment that was being operated therein. There must have been goods and equipment that one would require to operate a catering establishment. I will do the best I can and give an estimate of Kshs. 200,000/= for lost goods. The respondent cannot be heard to complain as he never brought any inventory of what he retained in the premises and never offered any evidence to say what he did to those goods.

24. In essence I will enter judgment for the appellant against the respondent in the sum of Kshs. 440,000/= being damages for illegal eviction and damages for retained goods. The award to attract interest at court rates from the time the amended plaint was filed until satisfaction in full.
25. The appellant also deserves the costs in the lower court and the costs of this appeal together with interest from the date of assessment/taxation till settlement in full.
26. Judgment accordingly.

DATED AND DELIVERED THIS 10 DAY OF DECEMBER 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Gichaba for the appellant;

Mr. Nyatundo for the respondent;

Court Assistant – David Ochieng’

