Red Baron Aviatiation Training Institute v Mwangi (Tribunal Case E300 of 2021) [2024] KEBPRT 857 (KLR) (11 June 2024) (Ruling)

Neutral citation: [2024] KEBPRT 857 (KLR)

REPUBLIC OF KENYA

IN THE BUSINESS PREMISES RENT TRIBUNAL

TRIBUNAL CASE E300 OF 2021

GAKUHI CHEGE, CHAIR & J OSODO, MEMBER

JUNE 11, 2024

BETWEEN

RED BARON AVIATIATION TRAINING INSTITUTE ..... TENANT

AND

MICHAEL MWANGI ..... LANDLORD

RULING

1. The instant case was instituted by way of a reference dated 13th July 2021 pursuant to Section 12(4) of Cap. 301, Laws of Kenya through which the Applicant complained that the Respondent had locked the suit premises despite rent having been paid. It therefore sought for an order for reopening of the suit premises.

2. The Applicant simultaneously filed a motion of even date seeking various reliefs among them an order for reopening of the suit premises situate at Wilson Airport, Langata Road, Apron 3, Building 17A within 6 hours failure to which, it be granted liberty to break the padlocks put on the premises under supervision of the police. It further sought that all subsequent monthly rent be deposited with the Tribunal if the Respondent refused to receive the same pending the hearing of the case.

3. Among the documents annexed to the said application is an agreement marked "AWS-1" executed between both parties on 11th November 2019 which provides at clauses 1 & 6 as follows;

> "
>
> "1. TERMS
> Capt. Michael Mwangi has offered the said office to the institution for training purposes with an aim of having a joint venture.
>
> Red Baron aviation Training Institute will continue using the office as they seek for their training approval.

6. PAYMENT

No payment will be issued for the said premises as this agreement is geared towards a joint venture. Once all the approvals have been entered into and all modifications or notices shall be in writing to be valid."

(emphasis added)

4. The application was considered ex-parte and this Tribunal directed the applicant to serve it for hearing inter-partes on 22nd July 2021. On the said date, the Tribunal adjourned the application to 26th July 2021 on being dissatisfied with service thereof.

5. On 26th July 2021, this Tribunal granted prayers 3 & 4 of the application in absence of the Respondent who had been duly served. No other action was taken in the matter until 30th November 2023 when the Applicant filed yet another application for injunction against the Respondent in respect of the suit premises to which it attached the 'JOINT VENTURE AGREEMENT" as annexure "AWS 2".

6. In the supporting affidavit of Alice W. Stephens sworn on 30th November 2023 at paragraph *3*, she deposes as follows;

> " 3. That on 11th November 2019, the Applicant entered into a five years joint venture/tenancy agreement for provision of space to conduct training at APRON 3, BUILDING 17A, WILSON AIRPORT with the Respondent (annexed herewith and marked AWS2 is a copy of the duly signed tenancy agreement)

7. The application was considered ex-parte and the Applicant was directed to serve the same for hearing inter-partes on 5th December 2023. On 6th and 15th December 2023 respectively, the Respondent filed a memorandum of appearance and replying affidavit stating that there was no existing landlord/tenant relationship as what is relied upon by the Applicant is a joint venture agreement.

8. The replying affidavit raises a critical issue of jurisdiction which is a threshold matter that ought to be considered before the merits of the application in line with the decision in the case of Phoenix of E.A Assurance Company Limited Vs S.M Thiga t/a Newspaper Service (2019) eKLR, the Court of appeal had the following to state at paragraph *2* on the issue of jurisdiction: -

> " 2. In common English parlance, 'Jurisdiction' denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae....."

9. Further in the case of The Owners and Master of the Motor vessel "Joey" and The Owners and Masters of the Motor Tugs "Barbara" & "Steve B" (2007) eKLR, the Court of appeal had the following to state on the issue of jurisdiction at page 7/15:

> " That is the underlying principle contained in the two previous decisions of this Court in the cases of THE OWNERS OF THE MOTOR VESSEL "LILIAN S" V. CALTEX OIL (KENYA) LTD [1989] KLR 1, and ROY SHIPPING SA & ALL OTHER PERSONS

INTERESTED IN THE SHIP "MAMA *OTAN" VS. DODOMA FISHING COMPANY LTD, Civil Appeal No. 238 of 1997* (unreported). In the LILIAN S, the Court, consisting of the late Mr. Justice Nyarangi, the late Mr. Justice Masime, and Mr. Justice Kwach, relying on previous decisions of the Courts of the United Kingdom, decisions such as The River Rima [1987] 3 ALL E.R 1, The I Congreso del Partido [1983] 1 AC 244 and such like cases, held that the question of jurisdiction, raised in the circumstances such as those existing in the present appeal, is a thresh-hold issue and must be determined by a judge at the thresh-hold stage, using such evidence as may be placed before him by the parties. Nyarangi, J.A graphically put it thus:-

"..... I think 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. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down (sic) tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. ....."

The learned Judge of Appeal then referred to certain passages in the text "Words & Phrases Legally Defined." – Vol. 3: I – N at pg. 113 and then continued:

"It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. I can see no grounds why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado."

10. Section 2(1) of Cap. 301, 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; or

(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;"

11. It is clear from the documents on record that what the parties herein entered into was a joint venture agreement and not a tenancy agreement. The Applicant came to this Tribunal with a doctored copy of the said agreement in which the words "Joint Venture" were erased in order to mislead the court and thereby obtained ex-parte orders through concealment of material facts.

12. The duty of this Tribunal is to interpret and enforce contracts entered into by the parties and not to make new agreements for them. That is what the Court of appeal held in National Bank Limited Vs Pipeplastic Samkolit (k) Limited & Another (2001) eKLR;

> " A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotes suggestion of coercion, fraud or undue influence in regard to the terms of the charge." (emphasis added)

13. There is no allegation that the joint venture agreement entered into by the two parties herein was vitiated by factors enumerated in the foregoing case. We therefore find and hold that what was entered into between the two parties was not a tenancy agreement but a joint venture agreement and the payment prescribed therein is a service charge and not rent as clearly stipulated under clause 6 thereof. As such, this Tribunal lacked jurisdiction to deal with the case ab initio and all orders issued in favor of the Applicant were issued devoid of jurisdiction and are therefore null and void.

14. In the premises, the following final orders commend to us in this matter;

SUBPARA a.

The Applicant's reference and the applications dated 13th July 2021 and 30th November 2023 are hereby struck out for want of jurisdiction.

b. The interim orders given on 26thJuly 2021 and 29th January 2024 are hereby discharged/set aside.

c. Costs of Kshs 25,000/= are awarded to the Respondent.

It is so ordered.

RULING DATED, SIGNED & VIRTUALLY DELIVERED THIS 11TH DAY OF JUNE 2024.

HON. GAKUHI CHEGE

PANEL CHAIRPERSON

BUSINESS PREMISES RENT TRIBUNAL

HON. JOYCE OSODO

PANEL MEMBER

BUSINESS PREMISES RENT TRIBUNAL

In the absence of parties