**James Mwaura Karobia t/a Daylight General Canteen v Julius Mwangi Kuria t/a Nationwide Distributors; Postal Corporation of Kenya (Interested Party) (Environment and Land Appeal E029 of 2021) [2023] KEELC 16833 (KLR) (12 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16833 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ENVIRONMENT AND LAND APPEAL E029 OF 2021**

**BM EBOSO, J**

**APRIL 12, 2023**

**BETWEEN**

**JAMES MWAURA KAROBIA T/A DAYLIGHT GENERAL CANTEEN ..... APPELLANT**

**AND**

**JULIUS MWANGI KURIA T/A NATIONWIDE DISTRIBUTORS ..... RESPONDENT**

**AND**

**POSTAL CORPORATION OF KENYA ..... INTERESTED PARTY**

***(Being an Appeal against the Ruling and Order of Hon Mbichi Mboroki, Chairperson, Business Premises Rent Tribunal, in BPRT No 73 of 2016 (Kiambu)***

**JUDGMENT**

## Background

1. This appeal challenges the ruling rendered on 12/6/2020 by the Chairman of the Business Premises Rent Tribunal (hereinafter referred to as "the Tribunal"), Hon Mbichi Mboroki, in BPRT Case No 73 of 2016 [Kiambu]. Julius Mwangi Kuria trading as Nationwide Distributors [the respondent in this appeal] initiated the said case as a Reference, in the capacity of a tenant, and designated himself as such. He named and designated the Post Master General of Postal Corporation of Kenya as the landlord in the said Reference. On 26/10/2018, the Tribunal granted him leave to amend the Reference to substitute the Post Master General with the Postal Corporation of Kenya.

2. The application which culminated in the impugned ruling was a notice of motion dated 29/3/2019, filed by James Mwaura Karobia trading as Daylight General Canteen [the appellant in this appeal].

The appellant sought the following three key orders in the application: (i) an order joining him as an interested party in the Reference; (ii) an order maintaining status quo pending the hearing and determination of the Reference; and (iii) an interlocutory injunctive order restraining the respondent against levying distress for rent against him.

3. The dispute in the Reference related to an undeveloped space within land title number Thika Municipality Block 2/840 [the suit property]. The Corporation had leased to the respondent space measuring 100x120 metres within the said land. The respondent had in turn sublet part of the space to the appellant. Before I dispose the issues that fall for determination in the appeal, I will outline a brief contextual background to the appeal.

4. Through a letter of offer dated 13/7/2012, Postal Corporation of Kenya, through its Post Master General [hereinafter referred to as "the Corporation"] and Julius Mwangi Kuria t/a Nationwide Distributors [hereinafter referred to as "the respondent"] entered into a licence pursuant to which the Corporation leased to the respondent space measuring 100 metres x120 metres within the suit property. The licence was for a term of 5 years and 3 months, commencing on 1/8/2012. Among other salient terms, Clause 10 of the licence provided that either party to the licence would be at liberty to terminate the licence upon expiry of three months' notice.

5. Vide a letter dated 3/1/2016, the Corporation served upon the respondent a three months' notice terminating the licence under Clause 10. It does emerge from the materials presented to the Tribunal that subsequently, the Corporation proceeded to enter into a direct tenancy agreement with the appellant who at the time was a sub-tenant of the respondent.

6. The above events triggered the Reference by the respondent, in which the respondent complained that the Corporation had: (i) purported to illegally terminate the tenancy; (ii) threatened to illegally attach his properties; and (iii) leased the same property twice and was collecting double rent. Together with the Reference, the respondent filed an application dated 4/11/2016, seeking an interim order restraining the Corporation against attaching his properties or evicting him from the suit property.

7. On 4/11/2016, the Corporation granted the respondent an interim order restraining the Corporation against attaching his properties or evicting him from the demised premises. On 1/2/2017, the Tribunal confirmed the above order as against the Corporation and the Auctioneer and at the same time listed the application dated 4/11/2016 for hearing on 28/2/2017 as against the appellant. On 28/2/2017, the Tribunal, for the second time, confirmed the above order as against the auctioneer and at the same time ordered the auctioneer to pay costs of the application assessed at Kshs 25,000.

8. On 26/9/2018, the Corporation filed in the Tribunal an application dated 25/9/2018 seeking, among other reliefs: (i) an injunctive order restraining the respondent [Julius Mwangi Kuria] against occupying, entering, trespassing on or in any way dealing with the suit property; (ii) an order vacating the orders that the Tribunal had issued in favour of the respondent on 31/8/2018 restraining the Corporation against interfering with the respondent's occupation of the suit property and compelling the Corporation to reconnect water and electricity to the suit property.

9. Against the above background, the appellant filed an application dated 29/3/2017, seeking an order of joinder to the Reference; an order of status quo; and an injunction against the respondent [Julius Mwangi Kuria]. His case was that he had entered into a direct lease with the Corporation in relation to the suit property and that the respondent had illegally instructed an auctioneer to levy distress against him to recover Kshs 2,370,000 despite the fact that there was no rent arrears owed to him and that the Corporation had terminated its lease with the respondent and had subsequently granted him [the appellant] a direct lease.

10. The respondent opposed the application through a replying affidavit sworn on 4/6/2019 in which he deposed that the appellant was already a party to the Reference; and that the validity of the purported lease between the Corporation and the appellant was one of the issues that fell for determination in the Reference. He urged the Tribunal to dismiss the application.

11. Upon hearing the appellant's application dated 29/3/2019, the Tribunal rendered the impugned ruling on 12/6/2020 in which it made the following findings; (i) the tenancy between the respondent and the Corporation was a controlled tenancy and there was no evidence that the said tenancy had been terminated as provided under Section 4(2) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*; (ii) the appellant was a sub-tenant of the respondent and the sub-tenancy was controlled within the meaning of Section 2 of the Act; (iii) there was no evidence to show that the appellant had terminated his sub-tenancy with the respondent; (iv) the Corporation had no capacity to enter into a tenancy agreement with the appellant without first terminating the tenancy of the respondent; (v) the tenancy agreement between the Corporation and the appellant was a product of conspiracy between the two; (iv) the Corporation could not demand rent from both the respondent and the appellant; (vii) the appellant was a subtenant of the respondent and the respondent was entitled to levy distress for rent against the appellant; and (viii) that the appellant had always been a party to the Reference "as early as 28th February 2017."

12. Ultimately the Tribunal issued the following disposal orders:

    i. the appellant's application dated 29/3/2019 was dismissed with costs to the respondent.

    ii. costs were to be recovered by way of distress as part of arrears of rent if not paid within 14 days.

    iii. for avoidance of doubt, the appellant was a subtenant of the respondent and the Corporation was restrained from collecting rent from him and all payments made by the appellant to the Corporation were to be credited into the rent account of the respondent

**Appeal**

13. Aggrieved by the above findings and disposal orders, the appellant brought this appeal advancing the following five verbatim grounds of appeal:

> 1. That the Chairperson erred in law and in fact in paragraph 3 of the ruling in finding that there is no proof that the interested party herein and the respondent terminated the tenancy despite the fact that the Tribunal had been furnished with a notice of termination follow-up dated 5th January 2016 from the interested party to the respondent herein, Nationwide Distributors.
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> 2. That the Chairperson erred in law and in fact in finding that the relationship between the respondent and the interested party was a controlled tenancy and that the appellant herein was a sub-tenant of the respondent.
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> 3. That the Chairperson erred in law and in fact by finding that the interested party herein had no capacity to enter into a tenancy agreement with the appellant herein despite the fact that a notice of termination had already been issued and the two parties proceeded to enter into a lease agreement dated 8th September 2016 and registered on 2nd November 2017.
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> 4. That the Chairperson erred in fact by finding that the interested party herein sought for rent from both the respondent and the appellant at the same time

despite the fact that the appellant herein had paid ALL RENT from both premises on the suit property from July 2016 todate.

5. That the Chairperson erred in law and in fact by finding that the respondent had a right to distress for rent from the appellant herein despite the fact that there was no landlord-tenant relationship between the appellant and the respondent. Any existing relationship between the respondent and the interested party ended in May 2016 when the latter terminated its tenancy with the respondent and entered into a lease with the appellant herein. The applicant has been paying rent since. [sic]

**Submissions**

14. The appeal was canvassed through written submissions dated 29/9/2022, filed by M/s Orende & Associates. Counsel for the appellant identified the following as the four issues that fell for determination in the appeal: (i) Whether the Tribunal was justified in finding that there was no evidence on record to show that the landlord terminated the tenancy in accordance with the provisions of Section 4(2) of Cap 301; (ii) Whether the Chairperson erred in law and in fact by finding that the respondent had a right to distress for rent from the appellant herein despite the fact that there was no landlord-tenant relationship between the appellant and the respondent; (iii) Whether the Chairperson erred in law and in fact in finding that the relationship between the respondent and the interested party was a controlled tenancy and the appellant herein was a sub-tenant of the respondent; and (iv) Whether the Chairperson erred in law and in fact by finding that the interested party herein had no capacity to enter into a tenancy agreement with the appellant herein despite the fact that notice of termination had already been issued and the two parties proceeded to entered into a lease agreement dated 8th September 2016 and registered on 2nd November 2017.

15. On whether the Tribunal was justified in finding that there was no evidence on record to prove that the Corporation terminated its tenancy with the respondent in accordance with Section 4(2) of Cap 301, counsel submitted that there was evidence that the Corporation issued to the respondent a termination notice dated 5/1/2016. Counsel argued that the notice dated 5/1/2016 fulfilled the requirements of Section 4(2) of Cap 301. Counsel added that the Corporation had demonstrated that the respondent had defaulted in paying rent and as at 16/11/2015 he owed the Corporation rent arrears totaling Kshs 2,199,440. Counsel argued that the appellant had tendered evidence before the Tribunal to demonstrate that the tenancy "between the respondent and the interested party" had been terminated.

16. On whether the Tribunal erred in law and in fact by finding that the respondent had a right to distress for rent from the appellant, counsel argued that there was no tenancy relationship between the appellant and the respondent after 2016. Counsel added that the appellant had paid all the rent that was due to the respondent during the subsistence of the sub-tenancy.

17. On whether the Tribunal erred in law and in fact in finding that the relationship between the respondent and the Corporation was a controlled tenancy and that the appellant was a subtenant of the respondent, counsel submitted that the licence between the Corporation and the respondent was for a period of 5 years and 3 months effective from 1/8/2012. Counsel contended that the period of the licence lapsed on 31/10/2017 and there was no evidence of renewal of the licence. Counsel added that the appellant presented to the Tribunal evidence demonstrating that on 8/9/2016, he entered into a lease with the Corporation after the lapse of the termination notice which the Corporation had served on the respondent. Counsel contended that, in the circumstances, the appellant was not a subtenant of the respondent.

18. On whether the Tribunal erred in law and in fact by finding that the Corporation had capacity to enter into a tenancy agreement with the appellant, counsel argued that the first error the Tribunal made was the finding that there was no evidence that the Corporation terminated its tenancy with the respondent. Counsel argued that there was evidence of termination of the tenancy between the Corporation and the respondent. Counsel urged the court to allow the appeal.

19. The Corporation filed written submissions dated 11/11/2022 through M/s Kiragu Wathuta & Company Advocates. Counsel for the Corporation identified the following as the three issues that fell for determination in the appeal: (i) Whether there was no evidence on record to show that the Corporation terminated the tenancy it had with the respondent; (ii) Whether the Corporation had no capacity to enter into a tenancy agreement with the appellant; (iii) Who should bear the costs of "this suit".

20. On whether there was no evidence or record to show that the Corporation terminated the respondent's tenancy, counsel for the Corporation submitted that the licence giving rise to the tenancy was for a period of 5 years and 3 months and the said period lapsed on 31/10/2017. Counsel added that during the subsistence of the licence, the respondent fell into rent arrears totaling Kshs 1,199,440 as at 16/11/2015. Counsel contended that the licence was subsequently terminated on 5/1/2016 due to the respondent's failure to pay the rent arrears. Counsel argued that the letter terminating the licence was tendered as evidence before the Tribunal hence the Tribunal erred in finding that there was no evidence of termination of tenancy.

21. On whether the Corporation had no capacity to enter into a tenancy agreement with the appellant, counsel submitted that the tenancy relationship between the Corporation and the respondent having ended, the Corporation had capacity to enter into a tenancy relationship with the appellant in relation to the suit property. Counsel contended that the Tribunal ignored the fact that the Corporation terminated the licence it had with the respondent.

22. The respondent opposed the appeal through written submissions dated 7/11/2022, filed by M/s Dola Magani & Co Advocates. Counsel for the respondent invited the court to note that the Corporation did not challenge the impugned ruling. Counsel added that the Tribunal did not err in finding that the notice dated 5/1/2016 did not comply with the law. Counsel added that the Tribunal relied on evidence tendered before it and did not therefore err in its findings. Counsel urged the court to dismiss the appeal.

**Analysis and Determination**

23. I have read the original record of the Tribunal together with the record filed in this appeal. I have considered the grounds of appeal, the parties' respective submissions, the relevant legal frameworks, and the prevailing jurisprudence on the key issues that fall for determination in the appeal.

24. Taking into account the grounds of appeal and the parties' respective submissions, the following are the four key issues that fall for determination in this appeal: (i) Whether the Tribunal erred in finding that there was no evidence on record to show that the Corporation terminated its tenancy relationship with the respondent in accordance with the provisions of Section 4(2) of the Landlord and Tenant [Shops, Hotels and Catering Establishments] Act; (ii) Whether the Tribunal erred in finding that the Corporation had no capacity to enter into a tenancy relationship with the appellant in relation to the suit property without first terminating the tenancy of the respondent; (iii) Whether the Tribunal erred in finding that there was no evidence on record to show that the appellant terminated his sub-tenancy relationship with the respondent; and (iv) What order should be made in relation to costs of this appeal.

I will dispose the four issues sequentially in the above order. Before I dispose them, I will briefly outline the principle that guides this court when exercising appellate jurisdiction.

25. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of the first appellate court was summarized by the Court of Appeal in the case of Susan Munyi v Keshar Shiani (2013) eKLR as follows:-

> " As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions."

26. The above principle was similarly outlined in Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] eKLR as follows:

> " This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way."

27. The first issue is whether the Tribunal erred in finding that there was no evidence on record to show that the Corporation terminated its tenancy relationship with the respondent in accordance with the provisions of Section 4(2) of the Act. During proceedings in the Tribunal, none of the parties to this appeal contested the fact that the relationship which ensued out of the letter of offer dated 13/7/2012 was a tenancy relationship. Indeed, the consideration contemplated in the letter of offer was rent. Secondly, whereas the period contemplated in the letter of offer was 5 years and 3 months, Clause 10 provided for termination of the relationship through notice in the following terms:

> " 10. Termination
>
> Either party may terminate this licence for whatever reason effective upon expiry of three (3) months' notice in writing given to the either party of its intention to do so" (sic).

28. The above clause is, without doubt, what effectively put the tenancy relationship within the purview of Section 2(b)(ii) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* and made the relationship a controlled tenancy. Termination of a controlled tenancy was, and is still, governed by the statutory strictures contained in Section 4 of the Act. Suffice it to state that, under Section 4(1) of the Act, the tenancy relationship between the Corporation and the respondent could not be terminated or altered except in accordance with the provision of the Act. Section 4 (2) of the Act provided, and still provides, as follows:

> " (2) A landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the tenant, any term or condition in, or right or service enjoyed by the tenant under, such a tenancy, shall give notice in that behalf to the tenant in the prescribed form."

29. Section 4(5) of the Act provided, and still provides, as follows:-

> " (5) A tenancy notice shall not be effective for any of the purposes of this Act unless it specifies the grounds upon which the requesting party seeks the termination,

alteration or reassessment concerned and requires the receiving party to notify the requesting party in writing, within one month after the date of receipt of the notice, whether or not he agrees to comply with the notice."

30. Both the appellant and the Corporation contend that the respondent's tenancy was terminated through the letter dated 5/1/2016. The respondent contends that the letter dated 5/1/2016 was not a termination notice within the framework of Section 4 of the Act. Did the said letter meet the requirements of Section 4 of the Act?

31. My answer to the above question is in the negative. First, Section 4(2) of the Act required the Corporation to serve a termination notice prepared in the prescribed form. The form is prescribed as FORM A in the Schedule under the Landlord and Tenant (Shops, Hotels and Catering Establishments (Tribunal Forms and Procedure) Regulations, 1966. A key feature of the prescribed statutory form is that it has provision for itemizing the grounds upon which the landlord may seek to terminate a controlled tenancy. Another key feature of the prescribed statutory form is that it contains a notice in terms of the requirements of Section 4(5) of the Act, requiring the tenant to notify the landlord within one month whether or not he agrees to comply with the notice of termination. Section 4(5) of the Act is categorical that where a notice does not comply with the above requirements, the notice does not take effect.

32. I have examined the letter dated 5/1/2016. It is not the statutory notice that was prescribed by the Act and enacted through subsidiary legislation. Secondly, it did contain a notice inviting the tenant to express his position on the notice of termination. Consequently, it was ineffective by dint of the clear provisions of Section 4(5) of the Act. The result was that the controlled tenancy that subsisted between the Corporation and the respondent was never terminated in accordance with the requirements of Section 4 of the Act.

33. For the above reasons, it is the finding of this court that the Tribunal did not err in finding that there was no evidence on record to show that the Corporation terminated its tenancy relationship with the respondent in accordance with the provisions of Section 4 (2) of the Act.

34. The second key issue in this appeal is whether the Tribunal erred in finding that the Corporation had no capacity to enter into a tenancy relationship with the appellant in relation to the suit property without first terminating the tenancy of the respondent. The appellant was a subtenant of the respondent. I have made a finding to the effect that the Corporation failed to serve a termination notice as prescribed by the law and that it failed to terminate the controlled tenancy relationship that subsisted between it and the respondent. Consequently, it follows that it had no capacity to enter into a subsequent direct tenancy relationship with the appellant in respect of the suit property which was still rented to the respondent. That is my finding on the second issue.

35. The third issue is whether the Tribunal erred in finding that there was no evidence on record to show that the appellant terminated his subtenancy relationship with the respondent. It does emerge from the evidence that was placed before the Tribunal that the appellant was at all material times a subtenant of the respondent. While still occupying the suit property as a subtenant of the respondent, he purported to enter into a direct lease with the Corporation in relation to the same property that he occupied as a subtenant of the respondent. There was no evidence placed before the Tribunal to demonstrate that the appellant vacated the property and surrendered the demised premises to the respondent who was his landlord (head tenant).

36. The Tribunal made a finding to the effect that the tenancy agreement between the Corporation and the appellant was entered into as a result of a conspiracy between two and the same was null, void and

of no consequence in law. That, regrettably, is the totality of the evidence that was placed before the Tribunal. It is therefore my finding that the Tribunal did not err in finding that there was no evidence to show that the subtenancy between the appellant and the respondent had been terminated.

37. On costs, it does emerge that the Corporation, the respondent, and the appellant, through their actions and omissions, all contributed to the creation of the dispute that led to this appeal. In the circumstances, they will bear their respective costs of this appeal.

38. Before I issue disposal orders, I will briefly comment on the issue of rent arrears because counsel for the appellant submitted on it. The Tribunal did not make a pronouncement relating to the exact rent arrears that were owed to either the Corporation or the respondent. As an appellate court, I will not make any pronouncement regarding any exact figure of rent arrears. Any party that desires to have accounts taken in relation to the rents paid or owed is at liberty to engage the respective landlord or tenant and in default of an amicable resolution, move the Tribunal appropriately.

**Disposal Orders**

39. In the end, this appeal fails for lack of merit. The appeal is dismissed. Parties shall bear their respective costs of the appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 12TH DAY OF APRIL 2023**

**B M EBOSO**

**JUDGE**

Mr Orende for the Appellant

Ms Irungu for the Interested Party

Court Assistant: Hinga