



Mbandu v Chohan & another (Environment and Land Case Civil Suit E005 of 2020) [2023] KEELC 17335 (KLR) (11 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17335 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT E005 OF 2020
SO OKONG'O, J
MAY 11, 2023**

BETWEEN

MARTIN ZAKAYO MBANDU PLAINTIFF

AND

TRISHUL VIJAY CHOCHAN 1ST DEFENDANT

KISUMU COUNTY 2ND DEFENDANT

JUDGMENT

Background

1 The Plaintiff is the registered proprietor of all those parcels of land known as Kisumu/Municipality/ Block 4/ 757 and Kisumu/Municipality/ Block 4/ 758 (hereinafter referred to as “the suit property”). On 2nd January 2013, the Plaintiff leased the suit properties to the 1st Defendant for a term of 2 years with effect from 2nd January 2013 on terms and conditions that were set out in the said lease. It was a term of the lease that the 1st Defendant would use the suit property for commercial purposes only. The lease between the Plaintiff and the 1st Defendant was a controlled tenancy pursuant to the provisions of section 2(1) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Chapter 301 Laws of Kenya (hereinafter referred to as “the Act”). A controlled tenancy is defined in the Act as:

“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.”

2 Although the suit property comprised of residential premises, the Plaintiff leased the same to the 1st Defendant for business purposes. The 1st Defendant was using the suit property as a garage for repairing and servicing motor vehicles. The suit property was therefore a shop within the meaning of Section 2(1) of the Act which defines a shop as follows:

“shop” means premises occupied wholly or mainly for the purposes of a retail or wholesale trade or business or for the purpose of rendering services for money or money’s worth;”

3 The fact that the lease between the Plaintiff and the 1st Defendant was a controlled tenancy and as such fell within the jurisdiction of the Business Premises Rent Tribunal (“the Tribunal”) established under section 11 of the Act was accepted by the parties early in the tenancy. The parties had several disputes which they referred to the Tribunal.

4 Sometime in October 2016, the Plaintiff served the 1st Defendant with a notice dated 4th October 2016 under section 4(2) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Chapter 301 Laws of Kenya (the Act) of his intention to terminate the 1st Defendant’s tenancy with effect from 1st January 2017 on the ground that the Plaintiff wished to carry out renovations on the suit property that he could not undertake with the 1st Defendant on the premises. The 1st Defendant objected to the said notice and filed a reference at the Tribunal on 21st November 2016 under section 6 of the Act. The reference was given Kisumu Tribunal Case No. 31 of 2016 (“the Tribunal Case”). The 1st Defendant’s reference dated 17th November 2016 in the Tribunal Case was dismissed on 9th October 2019 for non-attendance by both parties. The 1st Defendant filed an application at the Tribunal on 8th July 2020 seeking to set aside the said dismissal and the reinstatement of the reference. As at the time of the hearing of this suit, the order by the Tribunal made on 9th October 2019 had neither been stayed nor set aside with the consequence that the 1st defendant’s termination notice dated 4th October 2016 served upon the 1st Defendant terminating his tenancy in respect of the suit property on 1st January 2017 took effect.

5 On 1st July 2020, the Plaintiff wrote to the 1st Defendant informing him that his reference against the Plaintiff’s notice terminating his tenancy on the basis of which he had remained in occupation of the suit property was dismissed by the Tribunal for want of prosecution. The Plaintiff asked the 1st Defendant to vacate and hand over possession of the suit property to the Plaintiff by 31st July 2020. The 1st Defendant did not vacate the suit property as demanded by the Plaintiff. Before the Plaintiff’s letter to the 1st Defendant dated 1st July 2020, the 1st Defendant had obtained a permit from the 2nd Defendant on 19th May 2020 to carry out renovations on the suit property. The said permit was revoked by the 2nd Defendant through a letter dated 16th June 2020 following a complaint lodged by the Plaintiff with the 2nd Defendant. The 1st Defendant moved to the Magistrate’s court at Kisumu and obtained an order on 14th April 2021 declaring the revocation of the said permit by the 2nd Defendant illegal and void and the 2nd Defendant was restrained from interfering with the 1st Defendant’s activities on the suit property. Although the said permit was revoked following a complaint by the Plaintiff as the registered owner of the suit property, the Plaintiff was not made a party to the Magistrate’s court suit. The 1st Defendant was also said to have obtained from the 2nd Defendant a change of user of the suit property from residential to commercial without the consent of the Plaintiff.



The present suit:

- 6 The Plaintiff filed this suit against the Defendants on 25th September 2020 by way of a plaint dated 24th September 2020 seeking the following reliefs;
1. An order of eviction of the 1st Defendant from the suit property.
 2. An order of a permanent injunction restraining the 1st Defendant from occupying the suit property.
 3. An order directed at the 2nd Defendant reinstating the use of the suit premises as residential from commercial.
 4. The OCS Kondele Police Station or any other police officer in charge to oversee the execution of prayer number 1 above herein.
 5. Costs and interests of this suit.
 - a. Any such other relief that this Honourable Court may deem fit to grant.
- 7 The Plaintiff averred that he was the owner of the suit property which he leased to the 1st Defendant on 2nd January 2013 for a term of two years. The Plaintiff averred that the said lease expired on 1st January 2015 and the 1st Defendant was under an obligation to surrender the suit property to the Plaintiff. The Plaintiff averred that the 1st Defendant never sought the extension of the lease and that despite the expiry of the said lease the 1st Defendant refused to vacate the suit property and had continued to remain in possession.
- 8 The Plaintiff averred that the 1st Defendant without the consent of the plaintiff applied for a change of user of the suit property from residential use to commercial use. The Plaintiff averred that he made several attempts to have the 1st Defendant vacate the suit property and had several cases with the 1st Defendant at the Tribunal which did not resolve the dispute. The Plaintiff averred that the Tribunal did not have jurisdiction over the suit property since the property was not a shop, hotel or catering establishment. The Plaintiff averred that since the 1st Defendant had refused to vacate the suit property voluntarily, there was a need for the 1st Defendant to be evicted by an order of this court.
- 9 The Plaintiff averred that the 1st Defendant was abusing his occupation of the suit property by putting up structures on the suit property not approved by the Plaintiff. The Plaintiff averred that by putting up the said unauthorised structures on the suit property, the 1st Defendant was putting the property to waste. The Plaintiff averred that it was necessary that the 1st Defendant be evicted forthwith from the property. The Plaintiff averred that the 1st Defendant had resisted all attempts to have the rent for the suit property increased thereby causing the Plaintiff loss of rental income.
- 10 The suit was defended by the 1st Defendant. The 1st Defendant filed a statement of defence dated 15th January 2021 on 18th January 2021. The 1st Defendant averred that his failure to vacate the suit property was due to ongoing cases between him and the Plaintiff at the Tribunal. The 1st Defendant denied that he applied to the 2nd Defendant for a change of user of the suit property from residential to commercial. The 1st Defendant averred that the lease between him and the Plaintiff provided that the suit property would be used for commercial purposes only. The 1st Defendant averred that the structures that he was constructing on the property were being constructed within the terms of the lease agreement between him and the Plaintiff. The 1st Defendant averred that he was not required under the lease agreement between him and the Plaintiff to seek the Plaintiff's consent before putting up temporary structures on the suit property.



- 11 The 1st Defendant averred that his continued occupation of the suit property and payment of rent had made him a periodic tenant by operation of law and as such his tenancy could only be terminated by the giving of a sufficient notice. The 1st Defendant averred that the Plaintiff's suit was incompetent, a non-starter and an abuse of the process of court as this court lacked jurisdiction to hear and determine the same. In addition to his statement of defence, the 1st Defendant filed a notice of Preliminary Objection also dated 15th January 2021 in which he contended that this court lacked jurisdiction to hear the Plaintiff's suit since the same was filed in a wrong forum. The 1st Defendant averred that his tenancy with the Plaintiff was a controlled tenancy and as such the same could only be terminated in accordance with the provisions of section 4 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* (the Act). The 1st Defendant contended that the Plaintiff's suit should be struck out for being incurably defective, incompetent and a non-starter. The 1st Defendant's preliminary objection was dismissed by the court on 16th July 2021.
- 12 The 2nd Defendant entered appearance but did not file a defence. At the trial, the Plaintiff adopted his witness statement dated 24th September 2020 in which he reiterated the contents of the plaint as his evidence in chief. He also produced a lease dated 2nd January 2013 between him and the 1st Defendant, a notice of termination of lease dated 1st July 2020, an e-mail to the 1st Defendant dated 3rd August 2018, a letter to the Officer in charge of Physical Planning, Kisumu County dated 2nd June 2020, an enforcement notice dated 5th June 2020 and revocation of renovation permit dated 16th June 2020 as Plaintiff's exhibits 1, 2, 3, 4, 5 and 6 respectively. On cross-examination, the Plaintiff stated that he was not aware that the tenancy between him and the 1st Defendant was a controlled one.
- 13 In his defence, the 1st Defendant told the court that he was running a business of a garage under the name Auto Extreme on the suit property. He adopted his witness statement filed on 18th January 2021 as his evidence in chief and produced his bundle of documents filed together with the defence as exhibits. The 1st Defendant stated that he was paying rent to the Plaintiff and had not breached any term of the lease with the Plaintiff. On cross-examination, the 1st Defendant admitted that he applied to the 2nd Defendant for a change of user of the suit property from residential to commercial. He stated that he sought the permission of the Plaintiff but the Plaintiff was not cooperative. He admitted further that he did some improvements on the suit property without the Plaintiff's permission. The 1st Defendant stated that what he had put up on the suit property were temporary structures that did not amount to alteration of the premises for which he was required to seek the Plaintiff's permission. He stated that he was not aware that the rates payable to the 2nd Defendant for the suit property had increased as a result of change of user of the suit property from residential to commercial. The 1st Defendant also admitted having received a notice of termination of lease dated 1st July 2020 from the Plaintiff.
- 14 On re-examination, the 1st Defendant stated that the Plaintiff was aware that he was going to undertake a garage business on the suit property and that the Plaintiff did not apply for a change of user of the suit property from residential to commercial. The 1st Defendant stated that what he had put up on the suit property was a temporary steel structure to protect cars and equipment from the rain. He stated that the structure could be moved. The 1st Defendant stated that the renovations that he carried out were approved by the 2nd Defendant and that attempt to revoke the approval was quashed by the Magistrate's court. The 1st Defendant stated that he had not altered the suit property and that the only thing that he had added to the premises was a shed. He stated that he had invested heavily in the suit property and had established a goodwill. He stated that it would not be easy for him to move out of the premises. The 1st Defendant stated that the suit property was leased to him for commercial use and he was using the premises for commercial purposes.



15 After the close of evidence, the court directed the parties to make closing submissions in writing.

The Plaintiff's submissions:

16 The Plaintiff filed his submissions on 10th January 2023. The Plaintiff submitted that the 1st Defendant was a trespasser on the suit property. The Plaintiff submitted that the 1st Defendant had a fixed-term lease that expired and was not renewed. The Plaintiff submitted that he was the owner of the suit property and as such he was entitled to possession of the same. The Plaintiff submitted that the 1st Defendant changed the user of the suit property without consulting him and also carried out renovations without his consent contrary to section 58(4) of the *Physical and Land Use Planning Act, 2019*. The Plaintiff submitted that the change of user and the development approval that was obtained by the 1st Defendant from the 2nd Defendant in respect of the suit property were illegal, null and void. With regard to the Magistrate's Court case, CMCELC NO. 46 of 2022 in which the 1st Defendant obtained an order on 20th November 2022 quashing the revocation of the approval permit that he had obtained for the renovations on the suit property, the Plaintiff submitted that the proceedings were conducted contrary to the provisions of Rule 17 of the Physical and Land Use Planning (Development Control Enforcement) Regulations 2021. The Plaintiff submitted that the 1st Defendant never involved him in the proceedings although he was the complainant to the 2nd Defendant. The Plaintiff submitted that the said order was invalid.

The 1st Defendant's submissions:

17 The 1st Defendant filed his submissions on 19th January 2023 and framed four issues for determination. The 1st Defendant submitted that the Plaintiff's plaint was neither dated nor signed. The 1st Defendant submitted that a suit originated by an unsigned plaint is incompetent. The 1st Defendant relied on Order 2 Rule 16 of the Civil Procedure Rules and several authorities in support of that submission. The 1st Defendant submitted that the suit should be struck out for being incompetent.

18 The 1st Defendant submitted further that the court had no jurisdiction to hear and determine the suit. The 1st Defendant submitted that the tenancy between him and the Plaintiff was a controlled tenancy and as such this suit was brought contrary to the provisions of section 4 of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya (the Act) that sets out the procedure for terminating a controlled tenancy. The 1st Defendant submitted that the fact that the tenancy was a controlled one was not disputed. The 1st Defendant submitted that the fact that the tenancy was controlled was confirmed by the evidence adduced by both parties that showed that the parties had several cases at the Tribunal. The 1st Defendant submitted that the notice of termination that was served upon him by the Plaintiff was not in a prescribed form as required under section 4 of the Act. The 1st Defendant cited two authorities and submitted that this court had no jurisdiction to hear and determine this suit.

19 The 1st Defendant submitted further that he did not in any way breach the tenancy agreement between him and the Plaintiff. The 1st Defendant submitted that the developments carried out on the suit property by him were temporary. The 1st Defendant submitted that no permanent structures were erected on the suit property that would have warranted seeking the consent of the Plaintiff.

20 On the issue of the change of user, the 1st Defendant submitted that the Plaintiff placed no evidence before the court showing the alleged change of user and the fact that the same was made at the instance of the 1st Defendant. The 1st Defendant submitted that the lease agreement stated expressly that the



suit property shall be used for commercial purposes only. The 1st Defendant submitted that he did not breach the terms of the lease by using the suit property for commercial purposes.

- 21 In conclusion, the 1st Defendant submitted that the Plaintiff was not entitled to the reliefs sought in the plaint. The 1st Defendant submitted that the suit was not meritorious and as such the same should be dismissed with costs to the 1st Defendant.

Analysis and Determination:

- 22 I have considered the pleadings, the evidence tendered and the written submissions filed by the parties. I am of the view that the following are the issues arising for determination in the suit;

- a. Whether the plaintiff's suit is competent.
- b. Whether the 1st Defendant is a trespasser on the suit property.
- c. Whether the Plaintiff is entitled to the reliefs sought in the plaint.

- 23 The 1st Defendant attacked the competency of the Plaintiff's suit on two fronts. First, the 1st Defendant contended that the plaint filed by the Plaintiff herein was not dated and signed as required by the Civil Procedure Rules. This issue is not raised in the 1st Defendant's defence. It is not clear at what point the 1st Defendant noted this alleged omission on the part of the Plaintiff. I have looked at the plaint in the court file. The same is properly signed and dated. I therefore find no merit in this objection taken by the 1st Defendant. The other attack on the competency of the suit was based on the jurisdiction of this court. I have stated earlier in this judgment that the tenancy between the Plaintiff and the 1st Defendant was a controlled tenancy. I am therefore in agreement with the 1st Defendant that any variation or termination of the said tenancy ought to have been undertaken in accordance with the provisions of section 4 of the Landlord and Tenants (Shops, Hotels and Catering Establishment) Act (the Act). It follows therefore that the issue whether the 1st Defendant's tenancy should be terminated should have been referred to the Tribunal established under the Act. For that reason, I would have upheld the 1st Defendant's objection to the competency of the suit. I am of the view that the fact that the issue was determined against the 1st Defendant when it was raised as a preliminary objection does not bar the 1st Defendant from raising it again at the conclusion of the case as a substantive point of law. However, looking at the sequence of events leading to the filing of the present suit, I am of the view that this is the forum in which the Plaintiff could obtain the reliefs sought.

- 24 From the evidence before the court, prior to the filing of this suit, the Plaintiff served the 1st Defendant with a notice of intention to terminate the 1st Defendant's tenancy over the suit property with effect from 1st January 2017. The notice was served in a prescribed form under section 4 of the Act. The 1st Defendant objected to the notice and filed a reference to the Tribunal dated 17th November 2016. It is common ground that the Tribunal dismissed the 1st Defendant's said reference on 9th October 2019. It is common ground that the said order by the Tribunal has not been stayed, varied or set aside since it was made 3 years ago. The effect of the dismissal of the 1st Defendant's reference dated 17th November 2016 by the Tribunal was that the Plaintiff's notice dated 4th October 2016 took effect thereby terminating the 1st Defendant's tenancy with effect from 1st January 2017. What was the effect of that termination? Upon the termination of the 1st Defendant's tenancy as aforesaid, there ceased to be any landlord and tenant relationship between the Plaintiff and the 1st Defendant. The controlled tenancy ceased. Since the 1st Defendant refused to vacate the suit property following the dismissal of his reference and a notice to vacate from the Plaintiff dated 1st July 2020, the Plaintiff had a right to come to this court for an eviction order against the 1st Defendant. The Plaintiff could not go to the Tribunal since there was



now no tenancy between him and the 1st Defendant. The 1st Defendant became a trespasser on the suit property and could only be evicted by this court. For the foregoing reasons, it is my finding that the Plaintiff's suit is properly before the court. Things would have been different if the Tribunal had stayed its orders of 9th October 2019. I would have sent the Plaintiff back to the Tribunal. That is however not the case. The effect of dismissal of a reference is the same as failure to file a reference.

- 25 In *Nandlal Jivraj Shah & 2 others (all trading as Jivaco Agencies) v. Kingfisher Properties Limited* [2015] eKLR, the Court of Appeal stated as follows regarding the status of a tenant in a controlled tenancy who failed to file a reference:

“Where a reference is lodged, as in (c) and (d) above, the tenancy notice is suspended from taking effect pending the hearing and determination of the reference by the tribunal. Conversely, where an objection has been served but no reference is filed, time in respect of the notice continues to run and upon the lapse of the stipulated notice period, the changes envisioned in the notice take effect by default. Section 6(1) above makes this abundantly clear. It is only the filing of a reference which suspends time with regard to the tenancy notice. (The only aspect that serves to suspend time with regard to the tenancy notice is the filing of a reference). Any other act short of lodging a reference not even service of an objection has no effect on the running of time stipulated in the notice

- 26 In our opinion, in the absence of a reference, duly lodged in the Tribunal and served by the appellant, the contention that a controlled tenancy continued to exist even upon the lapse of the stipulated notice period is erroneous. Without the reference, the controlled tenancy comes to an end the minute the notice period specified in the notice lapses, whereupon there will be no longer a Landlord/Tenant relationship. In the absence of such relationship, the Tribunal has no jurisdiction to entertain any dispute arising therefrom. As it were, the jurisdiction of the Tribunal is anchored on the existence of a Landlord/Tenant relationship between the parties. Consequently, at the time the respondent moved to the High Court, there was no longer a Landlord/Tenant relationship between the parties...

- 27 In a nutshell, the challenge to the notice to terminate tenancy from whichever angle was not a matter for determination by the High Court. Such a challenge could only have been mounted in the Tribunal. Having failed to do so, it could not be raised in the High Court as triable issues when all that the High Court was being called upon to do was to give vacant possession of the premises to the landlord on the basis that the Landlord/Tenant relationship had ceased to exist and the appellants had thereby become trespassers.”

- 28 After the dismissal of the 1st Defendant's reference, the 1st Defendant's tenancy stood terminated in accordance with the notice dated 4th October 2016 that was served upon the 1st Defendant pursuant to section 4(2) of the Act. The 1st Defendant therefore became a trespasser on the suit property. The 1st Defendant being a trespasser on the suit property, the notice to vacate that was served upon him by the Plaintiff on 1st July 2020 that was not even necessary was sufficient. The 1st Defendant's tenancy having been terminated by operation of law, the Plaintiff needed not to give any reason for asking the 1st Defendant to vacate the suit property. Even if the allegations made herein against the 1st Defendant were to be considered on merit, I would have found for the Plaintiff. The Plaintiff has proved that the 1st Defendant carried out developments on the suit property that altered the character of the property without his consent. I am not in agreement with the 1st Defendant that the developments that he carried out on the suit property were of a temporary nature and as such did not amount to alterations of the suit property. The 1st Defendant would not have sought development approval from the 2nd Defendant if the structures that he was putting up on the suit property were of a temporary nature as he has claimed.



29 I am satisfied that the Plaintiff has proved his case against the 1st Defendant on a balance of probabilities. The Plaintiff is therefore entitled to the reliefs sought against the 1st Defendant in the plaint. The Plaintiff has proved that the 1st Defendant is a trespasser on the suit property. As the owner of the suit property the Plaintiff is entitled to possession thereof from a trespasser. With regard to the claim against the 2nd Defendant, the Plaintiff has not proved that the user of the suit property was changed from residential to commercial. As rightly pointed out by the 1st Defendant, it was the Plaintiff who leased out the suit property for commercial use.

Conclusion:

30 In conclusion, I hereby dismiss the Plaintiff's suit against the 2nd Defendant and enter judgment for the Plaintiff against the 1st Defendant as follows:

1. The 1st Defendant shall vacate and hand over possession of all those parcels of land known as Kisumu/Municipality/ Block 4/ 757 and Kisumu/ Municipality/Block 4/ 758 (“the suit property”) within sixty (60) days from the date hereof in default of which the Plaintiff shall be at liberty to apply for warrants for his forceful eviction from the properties with the assistance of the OCS Kondele Police Station if necessary.
2. The Plaintiff shall have the costs of the suit.

DELIVERED AND DATED AT KISUMU ON THIS 11TH DAY OF MAY 2023

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Wanyanga for the Plaintiff

Ms. Khisa for the 1st Defendant

N/A for the 2nd Defendant

Ms. J. Omondi-Court Assistant

