



REPUBLIC OF KENYA



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Ngunjiri (Administrator of the Estate of Muraya Chege (Deceased) v Muhia (Environment and Land Appeal E016 of 2022) [2023] KEELC 18269 (KLR) (15 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18269 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E016 OF 2022**

**LA OMOLLO, J
JUNE 15, 2023**

BETWEEN

**JOHN MUTHEE NGUNJIRI (ADMINISTRATOR OF THE ESTATE OF
MURAYA CHEGE (DECEASED) APPELLANT**

AND

ISAAC KURIA MUHIA RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated 10th May, 2022 the Appellants appeals against the whole decision of the Business Premises Rent Tribunal by Hon. Patricia May-Vice Chair in BPRT Case No. E026 of 2021 Nakuru.
2. The grounds of appeal are:
 1. The Learned Vice-Chairperson erred in law and fact in entertaining a matter the tribunal lacked jurisdiction as the Landlord – Tenant relationship between the parties had expired.
 2. The Learned Vice-Chairperson erred in law and fact in assuming jurisdiction in a matter where reference was filed out-of time under operation of Section 10 as read together with Section 6 of Cap. 301 and without application for leave by the Respondent.
 3. The Learned Vice-Chairperson erred in Law and fact in allowing the Respondent to regain possession of the premises in a lease that had expired and without due regard to the rights of the Appellants-Landlord as regards rent arrears for the period the Respondent was illegally in possession under the order of the court.
 4. The Learned Vice-Chairperson erred in law and fact for awarding the Respondent costs of Kshs. 25,000/= in a reference matter that was still pending for hearing and determination.



3. The Appellants prays that the ruling and orders of 19/4/2022 be set aside and that this court issues an order striking out the reference pending before the tribunal for the reason that it is incompetent.

Factual Background

4. The Respondent herein (Tenant) filed a Notice of Motion dated 21st September, 2021 at the Business Premises Rent Tribunal (BPRT) against the Appellants (Landlord) wherein he sought the following orders:
 - a. Restraining the Landlord/Administrators of the Appellants from issuing illegal and defective notice.
 - b. Restraining the Landlords, their servant or agents from evicting, harassing, intimidating or interfering with his peaceful occupation of the suit property.
5. The Appellants in opposition to the Application filed a Replying Affidavit dated 5th October, 2021 sworn by one John Muthee Ngujiri. He averred that the Respondent was not deserving of the said orders as he failed to file a reference to the notice of termination dated 5th August, 2019.
6. He further averred that the Respondent should be ordered to vacate the suit property and pay rent for his unlawful occupation for the month of October, 2021.
7. The Vice Chair of the BPRT delivered her ruling on 19th April, 2022 and allowed the Tenant's (Respondent herein) application by issuing orders declaring that the notice of termination of tenancy was illegal and defective and also granted an order of injunction against the Landlord (Appellants herein) restraining them from evicting the Tenant. The tribunal also awarded the tenant (Respondent herein) costs of the application which was assessed at Kshs. 25,000 and ordered that the same be deducted from the rent payable.
8. The Landlord being aggrieved by the said ruling approached this court by way of appeal through a memorandum of appeal and seeks that the said ruling be set aside. He also seeks for an order striking out the reference pending before the tribunal.
9. On 14th July, 2022, the court directed that the appeal be disposed by way of written submissions.

Issues For Determination

10. The Appellants and Respondent both filed their submissions on 22nd November, 2022 and 13th December, 2022 respectively.
11. The Appellants Identified three issues for determination:
 - a. Whether the tribunal had jurisdiction to arbitrate in a matter between the Landlord/Tenant whose lease had expired.
 - b. Violation of the Appellants' rights to be paid rent
 - c. Issue as to costs
12. On the first issue, the Appellants submits that it is not in dispute that the lease was for a period of two years from 5th August, 2019 to 5th September, 2021. He further submits that the lease provided that for renewal to occur, a 6 months' notice was to be issued to the landlord for consideration.



13. He submits that the lease expired on 5th September, 2021 and that the Respondent never gave notice to renew the lease. He relied on Section 6 of Cap 301 and the Court of Appeal decision No. 267 of 1996 that relies on the decision in *Prahant Sampant V Fatuma Abgao Mohammed & Anor* [2014] eKLR.
14. He submits that at the time the Respondent moved the Tribunal on 21st September, 2021 there was no Landlord-Tenant relationship and the Tribunal did not grant an order allowing the reference out of time. He argues that the Tribunal therefore lacked the requisite jurisdiction to entertain the tenant's reference that had been filed out of time.
15. On the second issue, he submits that the Tribunal erred in law by allowing prayers 3 and 4 of the notice. He submits that there was no suit or competent reference pending before the tribunal. He adds that by restraining the Appellants from exercising its right to issue further notice amounts to suppressing the statutory rights of the Landlord as provided for under Section 4 of the *Landlord and Tenants (shops, Hotels & Catering Establishment)* and Article 50 of the *Constitution*.
16. He submits that by granting unconditional injunctive orders amounts to shielding the Respondent (tenant) from their legal obligation to pay rent and rent arrears imposed under Section 60 & 66 of the *Land Act*, 2012.
17. On the final issue for determination, the Appellants submit that the Appeal is merited and the court should allow the same with costs for the reference and the instant Appeal.
18. The Respondent on the other hand gave a brief background of the case and identified one main issue for determination i.e.

Whether the tribunal erred in finding that notices issued on 5th August, 2019 and that of 16th September, 2021 to be illegal.

19. The Respondent relied on the decision in *Housing Finance Co. of Kenya Ltd V Njuguna* LLR No. 1176 (CCK) referred to in *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Ltd* [2014] eKLR and submits that the notice was presented together with the lease documents requiring him to take it or leave it and thus introduced without the tenant's knowledge.
20. He argues that the notice contained in the letter dated 16th September, 2021 did not comply with the requirements provided for under *Landlord and Tenants (shops, Hotels & Catering Establishment) Act*. The Respondent submits that the lease did not terminate on effluxion of time as the Landlord continued to accept rent converting the lease into a month by month periodic lease.
21. He relies on the Court of Appeal case of *Nandlal Jivraj Shah & 2 Others (all trading as Jivaco Agencies v Kingfisher Properties Limited)* [2015] eKLR. He further submits that the tenant ought to have filed an objection or reference within one month which never happened in the instant case hence the tenancy ought to have terminated. He added that the lease converted to a periodic lease as the Landlord continued to receive rent despite expiry of the notice and only declining to receive rent more than three months thereafter.
22. In conclusion, he relies on Section 60 of the *Land Act*, 2012 and submits that by conduct and acceptance of rent by the Landlord after the expiry of their tenancy resulted to a periodic lease.

Analysis And Determination.

23. I have considered the grounds of Appeal and the submissions filed in respect of this Appeal. In my view, the issues for determination are as follows:



- a. Whether the Tribunal erred in law and in fact in finding that it had jurisdiction to hear and determine the reference.
 - b. Whether the Tribunal erred in law and in fact in finding that the notice issued by the Appellants was illegal.
 - c. Whether the tribunal erred in law and in fact by issuing orders restraining the Appellants from evicting, harassing and intimidating the Respondent.
 - d. Which party should bear the costs of appeal?
24. The decision in In *United India Insurance Co. Ltd vs East African Underwriters (Kenya) Ltd* [1985] EA 898 reminds me of my duty as a court sitting on appeal. It was held as follows;

“The Court of Appeal will not interfere with a discretionary decision of the Judge Appealed from simply on the ground that its members, if sitting as at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of consideration of which he should have taken account of; or fifthly, that his decision albeit a discretionary one is plainly wrong.”

25. It is important to point out that the Tribunal in its ruling at paragraph 18 stated that the reference had been conclusively dealt and settled. In effect, there is no reference pending determination before the Tribunal and it shall not be necessary to issues an order striking it out.

A. Whether the Tribunal erred in law and in fact in finding that it had jurisdiction to hear and determine the reference.

26. I have perused the lease agreement executed by both parties on 5th August, 2019. The said agreement was for a term of two years and commenced on 5/8/2019. The annual rent was fixed at Kshs. 1,200,000.
27. On the same date, 5/8/2019, the Landlord (Appellants herein) issued a notice to terminate or alter terms of the tenancy. The grounds for termination are indicated as construction of a new building.
28. The Tribunal in its ruling observes that both parties peacefully co-existed till 16/9/2021 when the Tenant (Respondent herein) was served with a notice dated 16/9/2021 seeking that he vacates the suit premises.
29. In answering the question of jurisdiction, the Tribunal made reference to section 2 of the of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Chapter 301 of the Laws of Kenya which 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;

30. The Tenant (Respondent herein) continued to be in occupation of the suit premises despite the issuance of the notice of termination of lease on 5/8/2019. It is logical to deduce that the lease agreement did not take effect and therefore the Respondent's occupation and continued occupation was not on the basis of the agreement dated 5/8/2019. In the absence of a written agreement, the Tenancy is controlled. The Tribunal rightfully noted, at paragraph 8 and 9, of its Ruling that the circumstances presenting in the reference before it qualified the tenancy as a controlled.
31. The counter arguments by the Appellants that the relationship of Landlord and Tenant did to exist as at the date of filing the reference is a classic example of the applicability of the idiomatic expression that a person cannot have his cake and eat it. When it suits the Appellants, they are Landlords and issued a termination notice. When it doesn't suit them, the Landlord- Tenant relationship does not exist.
32. Taking all these into consideration, I find that the tribunal had jurisdiction to entertain the reference.

B. Whether the Tribunal erred in law and in fact in finding that the notice issued by the Appellants was illegal.

33. The Tribunal at paragraph 4 of its ruling stated that the Appellants herein (Landlord) did not address it on the issue of validity of the notice issued on 16/9/2021. It, however, found that the notice of 5/8/2019 was invalid.
34. The Tribunal rightly observed that the process of termination of a controlled tenancy is provided under section 4 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Chapter 301 of the Laws of Kenya.
35. On the notice issued on 16/9/2021, the Tribunal found that it was illegal to the extent that it does not comply with the mandatory provisions of section 4 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Chapter 301 of the Laws of Kenya. I reproduce section 4 (2) and (5) which provide 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. (Emphasis is mine)
 - (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 (Emphasis is mine) 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 (Emphasis is mine)
36. I have scrutinized the notice issued on 16/9/2021 and find that it is wanting both in form and content. The form to be used in form A.
37. On the questions of content of the notice, I reiterate that reference to the notice of 5/9/2019 is in utmost bad faith. The Appellants (Landlord) continued to receive rent for two years after its service of the said notice upon the tenant. Needless to state that it was served on the same date that the



lease agreement was executed. In the preceding paragraphs I made a deduction, I believe logical, that the notice of 5/9/2019 if intended to terminate the tenancy yet the Tenant (Respondent) continued occupation and the Landlord (Appellants) continued to receive rent, then the resulting tenancy is controlled whether for lack of reduction of its terms into writing or whether for the reason that it is for a period not exceeding five years.

38. The Tribunal invalidated the notice on 5/9/2019 for the reason that it amounted to economic duress. I agree with this finding and add that it is was and is in absolute bad faith on the part of the Landlord particularly for holding it in abeyance for 2 years, he continued to receive and enjoy rent and woke up to invoke it, when convenient to him, more than two years later.
39. Further, the notice of 16/9/2021 does not inform the tenant that he is required to inform the landlord in writing whether or not he agrees to comply with the notice. This is a mandatory requirement.
40. Consequently, I agree with the finding of the Tribunal that the notice of 16/9/2021 is illegal for failing to adhere to the mandatory provisions relating to form and content.

C. Whether the Tribunal erred in law and in fact by issuing orders restraining the Appellants from evicting, harassing and intimidating the Respondent.

41. The Tribunal properly lent its mind to the spirit of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Chapter 301 of the Laws of Kenya as set out in its long title. That it is An Act of Parliament to make provision with respect to certain premises for the protection of tenants of such premises from eviction or from exploitation and for matters connected therewith and incidental thereto.
42. Bearing this in mind and taking into consideration the facts and circumstances presenting in this case, I find that the orders of injunction issued against the Appellants herein (Landlord) restraining him from illegally evicting the Respondent (Tenant) from the suit premises on account of the illegal and defective notice (s) was fit and proper.
43. I not persuaded by the Appellants' submissions and or interpretation of the orders issued. The orders issued by the Tribunal neither have the effect of allowing the Respondent to continue his occupation without paying rent nor shield him from receiving further notices. It was not expressly or impliedly stated.

D. Which party should bear the costs of Appeal?

44. On costs, I am guided by the provisions of Section 27 (1) of the *Civil Procedure Act* (Cap 21) and the decision in *Jasbir Singh Rai & 3 others Vs Tarlochan Singh Rai & 4 others* SC. Petition No. 4 of 2012: [2014] eKLR. Costs follow the event and that the Court has the discretion in awarding such costs.

Disposition.

45. In the result, I find that this Appeal is not merited and is hereby dismissed with costs to the Respondent.
46. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 15TH DAY OF JUNE, 2023.

L. A. OMOLLO

JUDGE



In the presence of: -

Mr. Ndolo for the Appellants

No appearance for the Respondent

