



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO. 42 OF 2014

HASSAN SWALEH SALIM.....PLAINTIFF

VERSUS

SALIM MOHAMMEDDEFENDANT

R U L I N G

PRELIMINARY

1. This Ruling was due to be delivered on 23rd April 2015 it was delayed by various circumstances amongst being that I was invited to attend to Judicial Training Institute and thereafter I was on annual leave until late May and on my return my secretary and court clerk were on transfer . The delay is however regreted.

INTRODUCTION

2. The plaintiff filed this suit seeking an order for vacant possession and an order for vacant possession and an order of eviction of the defendant from a shop on plot No. 57 Section XVII situated at Mombasa Municipality Town (the premises).

3. The defendant by his defence referred to previous proceeding at the Business Premises rent Tribunal (BPRT) between him and the plaintiff and proceed to raise a preliminary objection to the plaintiff's suit herein arguing that this court does not have jurisdiction to entertain this matter because his has controlled tenancy.

BACK GROUND

4. The plaintiff is the owner or landlord of premises that is a shop situated on plot No. 57 Section XVII, Kaloleni Mombasa. By a tenancy agreement (undated) the plaintiff let the shop on the premises to the defendant for a period of two years from 1st January 2010 terminating on 31st May 2012. By a reference of the Landlord and Tenant (Shop, Hotels and Catering Establishments) Act Cap 301 filed under the provisions of section 16 before BPRT being Tribunal Case No. 18 of 2014, the defendant opposed the plaintiff's notice of termination of tenancy. There is no information provided to this court whether that reference has been determined by BPRT.

5. Further the defendant has given the plaintiff Notice to obtain reassessment of the rent of the premises as per Section 4(3) of Cap 301 which Notice was filed at BPRT on 17th March 2014. Again this court has not been informed whether the plaintiff filed a reference to that notice of reassessment of Rent and whether such reference, if any, has been determined.

DEFENDANT'S PRELIMINARY OBJECTION.

6. Defendant through his learned counsel Mr Khatib raised an objection to this suit on the ground that this court does not have jurisdiction to entertain this suit. Defendant's objection is on the ground that jurisdiction to determine termination of the defendant's tenancy lies with the BPRT as provided under Cap 301. Defendant referred to the definition of a controlled tenancy under Section 2 of Cap 301 and submitted that his was a controlled tenancy as per that Section and that it being so, his tenancy could not be terminated otherwise than as provided by Cap 301.

7. Learned counsel for the plaintiff Mr Gekondo referred to the definition of a shop under section 2 of Cap 301 but I must admit that his argument on that definition and its relevance to this case was lost to me.

COURT'S ANALYSIS

8. The parties tenancy agreement was for a period of two years. That period of two years expired on 31st May 2012, now past. It follows indeed that since 31st May 2012 the tenancy of defendant is not reduced in writing and is therefore from month to month. Under section 2 of Cap 301 controlled tenancy is defined 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 that 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;”

9. Section 4 of Cap 301 provides the process that needs to be followed by a party wishing to terminate or alter the terms and conditions of a controlled tenancy. That section provides:

4.” Termination of, and alteration of terms and conditions in, controlled tenancy.

(1) Notwithstanding the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be terminated, and no terms or condition in, or right or service enjoyed by the tenant of any such tenancy shall be altered, otherwise than in accordance with the following provisions of this Act.

(2) A landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the tenant, any term of 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”.

10. By such virtue of Section 4 the plaintiff was indeed required to give Notice of termination of defendant's tenancy. The plaintiff instead of giving the Notice as required under that section served on defendant a demand letter seeking the defendant to give vacant possession. That demand letter contravened Cap 301. In any case it is that demand letter to which the defendant's reference under Tribunal case No. 18 of 2014 was directed. That being so, at least for now, this case cannot proceed for hearing until the BPRT does determine, as it is required under Cap 301 to terminate the defendant's tenancy. Although the defendant sought for the striking out of the plaintiff's suit I do not accept that that

would be the correct course to follow because if the BPRT does determine the reference on termination in favour of the plaintiff the plaintiff can then move under this suit to enforce the tribunals order for vacant possession. However until then and until further orders of this court this case shall be stayed.

CONCLUSION

The orders of the court are as follows:

- (a) This suit is hereby stayed until the determination of the BPRT on vacant possession or until further orders of this court.**
- (b) The defendant is awarded costs of preliminary objection.**
- (c) Each party is granted liberty to further apply.**

Dated at Mombasa this 25th day of June 2015.

MARY KASANGO

25.6.2015

Coram

Before Justice Mary Kasango

C/Assistant– Kavuku

For Plaintiff:

For Defendant:

Court

Ruling delivered in their presence/ absence.

MARY KASANGO

JUDGE