



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
ENVIRONMENT & LAND COURT

ECL. CASE NO. 104 OF 2014

ESTHER ADEDE OBURA.....PLAINTIFF

VERSUS

PANDI HOLDINGS LIMITED.....DEFENDANT

RULING

1. On 12/5/2014, the defendant herein, **PANDI HOLDINGS**, filed a Notice of Preliminary objection seeking to strike out the suit filed by the plaintiff – **ESTHER ADEDE OBURA**.
2. The preliminary objection was premised on two points viz:
 - a. The tenancy herein is a controlled tenancy and by virtue of the establishment of the Business Premises Rent Tribunal under Section 11 of the Landlord and Tenant (Shop, Hotels and Catering Establishments Act, cap 301) this court lacks jurisdiction to handle this case as the court of first instance.
 - b. The tenancy agreement herein was entered between the estate of the late Adede Obura and the defendant. There is privity of contract. The plaintiff is a stranger and non-suited.
 - c. The suit as filed alleged violation of a tenancy agreement that required the defendant to occupy some premise and pay 65,000/= monthly. But payment was supposed to be paid quarterly, meaning 195,000/= for each quarter.
4. The plaintiff is said to have defaulted. It did not, it was alleged, even pay for the first quarter. The plaintiff want payment of all arrears, eviction, costs and interest, and/or other just relief.
5. Submissions were filed in lieu of oral arguments. According to the defendant, the tenancy concerned a shed L. P. No.2/83, which the defendant was to use for fruits, vegetables and meat processing. This means, it was submitted, the premises were let as business premises and the tenancy was deemed controlled under the applicable statute.
6. According to the defendant, the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, cap 301, conferred special original jurisdiction on a special tribunal set for the purpose for all matters concerning controlled tenancy. Section 2
 - (b) (1) of the Act defines such tenancy as one not running beyond 5 years.

7. The plaintiff's complaint is said to relate to non-payment of rent and the appropriate action would be to Levy distress for rent after getting orders from the tribunal. No provision, it was alleged, is made for going to court. The decided case of **BEATRICE NDUTA KIARIE VS JOHN MWANGI THUO {2013} eKLR** was availed for guidance.

In the case the defendant had raised a preliminary objection to the effect that the High Court had no jurisdiction to entertain matters relating to controlled tenancy. The objection was upheld.

8. The submissions of the plaintiff were filed on 22/1/2015. The plaintiff averred that the Statute applies to Shops, Hotels and Catering establishment as defined in Section 2(1) of the Statute. The shed leased to the defendant was not one such establishment. And this is so because it was meant only for fruit, vegetables and meat processing.

9. According to the plaintiff, the defendant is trying to “squeeze” the definition of “fruit, vegetable and meat processing” into what is defined as a shop or hotel or catering establishment. The defendant was faulted for not coming out clearly to say whether the shed was a shop, hotel or catering establishment.

10. Further, it was alleged that before other conditions for controlled tenancy come into play, one must establish first whether the premises are a shop, hotel or catering establishment.

11. According to the plaintiff, a lease is an interest in land. The Environment and Land court deals with matters of interest in land. It therefore has jurisdiction and the case of **JAMES MOSES THAMU & OTHERS Vs Joseph M. Mwiruri {2013} eKLR** was cited for necessary effect.

12. On the issue of privity of contract, the plaintiff submitted that the court should look at the tenancy agreement.

It is essentially between the two parties, with the plaintiff acknowledging in the agreement that the property was registered in the name of her late husband, whose estate she was the administratrix.

13. I have considered the material availed by both sides. I agree with the plaintiff's submissions that before one considers other conditions of controlled tenancy, one must clarify whether the premises leased are a shop, hotel or catering establishment. The defendant fails this simple test. It is not clear whether the shed is being treated as a shop, hotel, or catering establishment.

14. According to the defendant, the shed is a business premise whose tenancy does not exceed five years. And because of that, it becomes a controlled tenancy. But the defendant failed to capture the essence of Section 2(1) of the Act properly. According to that section, a Controlled tenancy is first and foremost one which relates to a Shop, Hotel or Catering establishment. It is only secondly a tenancy that does not exceed five years.

15. It is necessary to consider what is meant by a “Shop” “Hotel” and “Catering establishment” in the context of the Act. Section 2(1) has the answers and they are as follows:

- **“Catering establishment”** means any premises on which is carried out the business of supplying food or drinks for consumption on such premises by persons other than those who reside and are boarded on such premises.
- **“Hotel”** means any premises in which accommodation or accommodation and meals are supplied or are available for supply to five or more adult persons in exchange for money or other valuable consideration.
- **“Shop”** means premise occupied wholly or mainly for purposes of retail or wholesale trade or business or for the purpose of rendering services for money or money's worth.

16. In this case, the tenancy agreement was clear. The defendant was not to use the premises or any

portion thereof for any purpose other than Fruits, Vegetables and meat Processing. The operating word here is **PROCESSING**. In all the definitions given above, processing does not feature anywhere. It is not even mentioned. No wonder then the defendant avoids to state whether the premises are a shop, hotel or catering establishment. It is obvious that it does not fall in any of the categories.

17. An objective look at the work supposed to be done at the shed shows that it was more of a factory or small industry rather than hotel, shop and catering establishment. The defendant got it wrong.

18. The other aspect to consider concerns the second point raised in the preliminary objection namely, it is the estate of the plaintiff's deceased husband, rather than the plaintiff herself, that contracted with the defendant.

There, I need to point out that the defendant failed to submit on this point. But the point is well covered in the plaintiff's submissions. The plaintiff therefore has the upper hand.

19. On this point, I once again agree with the plaintiff. It is very clear that the parties entered into the agreement in their individual capacities. It is only further in the agreement that it emerges that the property belonged to plaintiff's late husband. But even then, the plaintiff was the administratrix of that estate. Having contracted as such, the defendant now wants to turn around to fault the plaintiff for suing in her own names. It seems like splitting hairs.

20. I think the defendant is being unduly technical both in the first and the second point. It seems like he is gunning for a quick – fix solution. And in order to achieve that, he is elevating technicalities to a fetish.

21. But if one were to choose to be that technical, it would be well worth reminding the defendant that his so called preliminary objection does not amount to such in law.

22. And here is why: the law is that a preliminary objection raises a pure point of law which is argued on the assumption that all facts raised by the other side are correct.

It can not be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion (please see **MUIRURI V KEMEMIA (2008) 2 KLR 677** and **SIRMA V KIPRONO (2005) 1 KLR 197**).

23. Question is: Is there an assumption that the facts raised by the plaintiff are correct? Is it not clear that the defendant has denied everything in the plaint? The fact of the matter is that all facts have to be ascertained in this case as the defendant has denied all of them.

24. The upshot, in light of all this, is that the preliminary objection is found unmeritorious and is hereby dismissed with costs.

A.K. KANIARU

ENVIRONMENT & LAND – JUDGE

20/8/2015