



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

APPEAL NO. 5 OF 2020

RAJNIKANT MADHAVJI JETHWA.....APPELLANT

VERSUS

S.G JANOOWALA1ST RESPONDENT

MARU ENGINEERING WORKS..... 2ND RESPONDENT

JUDGMENT

(Landlord having issued notices to persons he considered tenants where he wished to increase rent; a reference filed before the Business Premises Rent Tribunal opposing this notice; preliminary objections raised that the tenants do not exist; one of landlord's notice issued to a deceased person and the other to a business name; tribunal upholding the preliminary objections and declaring null and void the landlord's notices; on appeal, held no notice could issue to a deceased person, but in the same vein, no suit could be filed by the said deceased person; both notice and suit were null and void; on notice to the business name, court finding no issue, for if a business name can be sued in that name, then it can also be served in the same name; suit filed by the business name reinstated and to proceed to logical conclusion)

1. The appellant is landlord of the premises Mombasa/Block XIX/205. He wished to increase rent, and on 19 January 2017, he issued notices to terminate or alter terms of tenancy. The notices were issued to S.G Janoowalla who was said to occupy one premise and two notices to Maru Engineering Works who were said to be occupying two premises. In the notice to Janoowalla, the landlord wished to increase rent from Kshs. 3,354/= to Kshs. 55,000/= per month. In the notices to Maru Engineering Works, the landlord wished to increase rent from Kshs. 3,345/= to Kshs. 55,000/= for the first premise, and from Kshs. 2,528.40/= to Kshs. 35,000/= for the second premise. The three notices were contested through the filing of three references by tenant to the Business Premises Rent Tribunal (BPRT or simply 'the tribunal'). Janoowalla's case was registered as Mombasa BPRT Case No. 32 of 2017 while the cases by Maru Engineering Works were registered as Mombasa BPRT Case Numbers 33 and 46 of 2017.

2. Before the cases could be heard, the applicants filed preliminary objections. In respect of Janoowalla's case, it was said that the notice by landlord is defective as the tenant was deceased thus a non-existent tenant. In respect of the Maru Engineering Works cases, the objection was also that there was a non-existing tenant, in that Maru Engineering Works is a business name. Counsel filed submissions to the preliminary objections, and in a ruling delivered on 31 January 2020, the Chairman of the tribunal upheld the same. He thus struck out the landlord's notices as being incompetent and ordered the landlord to pay the applicants the costs of the reference. Aggrieved, the landlord has filed this appeal.

3. I directed that it be heard through written submissions and I have seen the submissions of Mr. Mwakisha, learned counsel for the appellant, and Mrs. N.A Ali, learned counsel for the respondents.

4. I have considered the matter. It will be recalled that in the objection to Janoowalla's notice, it was said that Janoowalla is deceased and therefore the notice was defective. Indeed, a Certificate of Death was presented, showing that Janoowalla died on 10 September 1999. This Certificate of Death was not challenged by the landlord and I take it that it is a fact that Janoowalla died in 1999. Now, if he died, then he cannot be tenant, because he does not exist, and no notice to terminate tenancy could issue to him. But again, in the same vein, no suit could be filed by Janoowalla as he was dead. Any suit purportedly filed by Janoowalla was also defective and null and void. I am persuaded that the Chairman fell into error in dismissing only the landlord's notice but failing to address himself as to the veracity of the suit purportedly filed by Janoowalla. The suit should also have been struck out with the order that whoever filed it should pay costs to the landlord, for such person, not being tenant, had no right to file suit before the tribunal pretending to be Janoowalla.

5. On the cases by Maru Engineering Works, the same would apply. If the Chairman thought that Maru Engineering Works did not exist for purposes of being served with a landlord's notice, then it also could not exist for purposes of filing suit. It could not now exist and be capable of filing a suit if it did not exist for purposes of being served with a landlord's notice. The Chairman clearly fell into error. Of course I find it a paradox that a party who has instituted suit, proceeds to say says that he/she does not exist. How do you not exist and yet be able to file suit

? It just doesn't add up. What strictly ought to happen in such case is for the entity or person that has filed that suit to withdraw it, on the basis that it was wrongly filed because the party mentioned as plaintiff does not exist. The basis would be that such suit has been filed by mistake.

6. Having said that, I am not even persuaded that the tenancy notice to Maru Engineering Works was invalid, and I do not think the suit was incompetent. Mr. Mwakisha in his submissions referred me to the provisions of Order 30 Rule 1, and I will also add the provisions of Order 30 Rule 9, which provide as follows :-

Order 30 Rule 1: Suing of partners in name of firm

Any two or more persons claiming or being liable as partners and carrying on business in Kenya may sue or be sued in the name of the firm (if any) in which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the court may direct.

Order 30 Rule 9: Suit against persons carrying on business in name other than his own

Any person carrying on business in a name or style other than his own name may be sued in such name or style as if it were a firm name; and, so far as the nature of the case will permit, all rules under this Order shall apply.

7. It will be seen from the above that a business name can be sued. If it can be sued, then it can certainly be served by a landlord with a notice. If the business name files suit, it is now the duty of the business name to disclose the person filing suit and trading in the name and style of that business, for example XYZ t/a EFGH. Order 30 does have other rules pertaining to disclosure of parties operating under a business name which can be applied to proceedings before the BPRT as well. I thus do not see why the BPRT dismissed *in limine* the landlord's notices to Maru Engineering Works without also questioning the capacity of the person/s who filed suit in the first place. If there was an issue about who was before court, he ought to have allowed the law to follow its course on disclosure, not to summarily dismiss the notices by the landlord.

8. So, what is to happen to the three cases? The landlord's notice to Janoowala is certainly null and void, but so too the suit purportedly filed by Janoowala. I will substitute the order of the tribunal with an order that the landlord's notice is declared null and void, and the suit before the tribunal, that is Mombasa BPRT Case No.32 of 2017, be struck out. Since the person who filed the case ought not to have filed it in the name of Janoowala, for in doing so, he was pretending to be Janoowala, he/she will pay the costs of the suit before the tribunal. That person will also pay the costs of this appeal. We cannot encourage people to file cases in the name of another who is deceased. Since Janoowala is dead, it is upon the landlord to determine where his remedies lie as against the person/s in occupation of that premises.

9. On the cases by Maru Engineering, as I have explained above, there was nothing wrong with the landlord's notice. The Chairman of the Tribunal was wrong in declaring the notice null and void and his decision is hereby set aside. The two cases filed by Maru Engineering Works, that is Mombasa BPRT cases No. 33 and 46 of 2017, are reinstated and the same to proceed to their natural conclusion. The appellant will have the costs of this appeal as relates to the cases concerning Maru Engineering Works and they will be payable by whoever filed the suit before the tribunal on behalf of Maru Engineering Works.

10. Judgment accordingly.

DATED AND DELIVERED THIS 10TH DAY OF FEBRUARY 2022

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA