



REPUBLIC OF KENYA

High Court at Mombasa

Miscellaneous Civil Cause 11 of 2012

IN THE MATTER OF: AN APPLICATION BY SAIFUDEEN ABDULLABHAI, HUSSEIN ABDULLABHAI,

HASSAN ABDULLABHAI, FAKHRUDDIN ABDULLABHAI AND MUSTAFA ABDULLABHAI FOR

LEAVE TO APPLY FOR JUDICIAL REVIEW AND FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: BUSINESS PREMISES RENT TRIBUNAL'S CASE NOS. 261 OF 2011 AND 12 OF 2012

(AHMED SURURU =VS= SEIFUDDEIN HUSSEIN ABDALLA & 2 OTHERS

AND

IN THE MATTER OF: ORDERS GIVNE IN BUSINESS PREMISES RENT TRIBUNAL CASE NO.261 OF 2011

ON 28TH NOVEMBER 2011 AND ORDERS GIVEN IN BUSINESS PREMISES RENT TRIBUNAL

CASE NO.12 OF 2012 ON 25TH JANUARY, 2012

AND

IN THE MATTER OF: LANDLORD AND TENANT (SHOPS, HOTEL & CATERING ESTABLISHMENTS)

ACT, CAP 301 OF THE LAWS OF KENYA AND THE CIVIL PROCEDURE RULES

J U D G M E N T

1) These Judicial Review proceedings are an aftermath of orders made by the Business Premises Rent Tribunal in Tribunal cases No.261 of 2011 (hereinafter the “**case No.261 of 2011**”) and No.12 of 2012 (hereinafter the **case No.12 of 2012**”). In the Notice of Motion dated 22nd February 2012 the Applicants seek the following orders:-

1) THAT an order of Certiorari to bring to this Honourable Court the Orders Made and issue on the 28th day of November, 2011 by the Business Premises Rent Tribunal in Tribunal Case No.261 of 2011 (Ahmed Sururu =vs= Seifuddin Hussein Abdalla & 2 others) for purpose of quashing thereof.

2) THAT an order of Certiorari to bring to this Honourable Court the orders made and issued on the 25th day of January, 2012 by the Business Premises Rent Tribunal in tribunal Case No.12 of 2012 (Ahmed Sururu =vs= Seifuddin Hussein Abdalla & 2 others) for purpose os quashing thereof.

3) THAT an order of Prohibition to issue directed to the Chairperson of the Businesses Premises Rent Tribunal prohibiting the Tribunal from enforcing the orders made and issued on the 28th day of November, 2011 in the Tribunal Case No.261 of 2011 (Ahmed Sururu =vs= Seifuddin Abdalla & 2 others) and from hearing and determining the said tribunal case and/or from hearing and determining any issues relating to and/or affecting the licence hitherto enjoyed by Mr. Ahmed Sururu over a portion of the Plot No.Mombasa/Block XVI/27.

4) THAT an order of Prohibition to issue directed to the Chairperson of the Business Premises Rent Tribunal prohibiting the Tribunal from enforcing the orders made and issued on the 25th day of January, 2012 in the Tribunal Case No.12 of 2012 (Ahmed Sururu =vs- Seifuddin Hussein Abdalla & 2 others) and from hearing and determining the said tribunal case and/or from hearing and determining any issues relating to and/or affecting the licence hitherto enjoyed by Mr. Ahmed Sururu over a portion of the Plot No.Mombasa/Block XVI/27.

2) It is not agreed between the parties as to whether or not the Interested Party Ahmed Sururu (hereinafter "Sururu") is a tenant or a licensee of the Applicants on a portion of premises known and described as Mombasa/Block XVI/27 (Hereinafter the "Premises"). What seems agreed is that Sururu is in possession of those premises. It would also seem that Sururu is paying a monthly fee for the use of that space. The Court shall revisit this debate as to the exact status of Sururu.

3) In reaction to a Notice dated 5th October 2011 issued by the firm of Sherman Nyongesa, Sururu filed case No.261 of 2011. That Notice which was said to be written on behalf of Seifuddin Hussein Abdalla (hereinafter **Abdalla**) & 2 others is reproduced below:-

AHMED SURURU,

MOMBASA.

Dear Sir,

RE: NOTICE OF TERMINATION OF LICENCE

PLOT NO:MOMBASA/BLOCK XV/27

LICENSOR (LANDORD): SEIFUDDIN HUSSEIN ABDALLA & 2 OTHERS

We have been duly retained by your above named Licensor to furnish you, as we hereby do, with a calendar month notice of termination of licence enjoyed in respect of the captioned Plot with effect from the 1st day of November, 2011 and you are accordingly expected to vacate and handover vacant possession of the demised portion of the Plot under your possession to our client on or before the 30th day of November, 2011.

That you are accordingly expected to remove the stalls erected on the plot and completely keep the Plot clear of charcoal and to discharge the accrued licence fee for the months of January to November, 2011 without any deductions therefrom whatsoever.

PLEASE TAKE NOTICE that failure on your part to vacate and handover vacant possession of the

demised portion of the Plot to our client on or before the 30th day of November, 2011 our client shall have no option but to immediately proceed to take appropriate remedial action for your forcible eviction from the demised portion of the Plot and removal of the charcoal and stalls at your obvious risks as to costs incidental to such remedial process and without any further reference and/or indulgence to you whatsoever.

Yours faithfully,

SHERMAN NYONGESA 7 CO. ADVOCATES

NYONGESA WAFULA

C.C. SEIFUDDIN HUSSEIN ABDALLA,

MOMBASA

4) Those proceedings, a complaint, were brought under Section 12 (4) of The Landlord to Tenant (Shops, Hotels and Catering Establishment) Act 1965 (hereinafter **the Act**). Sururu challenged the validity of the Notice and sought the Tribunal's intervention as follows:-

“That this Honourable Tribunal to issue a prohibitive order, prohibiting and restraining the Landlord and/or his agents, employees and/or any other person from evicting the tenant pending the hearing and determination of this complaint.”

The Tribunal on 28th November 2011 issued a restraining order against the Respondents therein.

5) Subsequently Abdalla raised a preliminary objection to the Tribunal proceedings. The objection was taken up pursuant to a Notice dated 22nd December 2011 which raised the following issues:-

- a) That the said complaint is incompetent, misconceived and otherwise an abuse of the due process of the Tribunal.
- b) That the Tribunal lacked jurisdiction to hear and determine the complaint.

Neither the proceedings nor the ruling made in answer thereto was made available to this Court. Sururu contends that another issue that arose was whether his was a Tenant or licensee and that the Tribunal held that he was a tenant. It is common ground that the Tribunal dismissed the Preliminary Objection.

6) Although dissatisfied with the Tribunal's decision, Abdalla states that he never pursued an appeal because on further reflection it became apparent that the Notice was defective. The defect being that the Notice was issued on behalf of 3 instead of all the 5 registered proprietors to the premises. The idea of the appeal was abandoned and instead a fresh Notice dated 22nd December 2011, and in the names of all the 5, served on Sururu. Not unexpectedly Sururu filed a second complaint being Tribunal case No.12 of 2012 and again the Tribunal restrained the proprietors from effecting the Notice. That triggered these proceedings.

7) This Court will abridge the rival positions taken by the parties. For the Applicants it was stated that the Tribunal acted without jurisdiction for the following reasons:

- i) Sururu was a licensee not a tenant.
- ii) The user of the space, being a store for charcoal, does not constitute a shop as defined under the Provisions of the Act.
- iii) The Tribunal is not seized of authority to grant orders in the nature of injunctions and declarations.

8) In support of their position the Applicants cited two decisions of the Court of Appeal namely Civil Appeal No.258 of 2003 Mombasa Gas Supplies Limited –vs- The Registered Trustees of National Union of Kenya Muslims of Coast province and Caledonia Supermarket Ltd –vs- Kenya National Examination Council (2000)2 EA 352. Mombasa Gas Supplies was for the proposition that the Tribunal has no jurisdiction to grant an injunction while in Caledonia Supermarket, the Court held,

“Faced with what was clearly an illegal eviction, the Appellant could not seek protection from the Business Premises Tribunal because the Notice given being an invalid Notice deprived the Tribunal power to intervene. In any case the Tribunal has no power to issue an injunction.”

9) The State Counsel, representing the Respondent took a neutral position and did not raise any arguments. Sururu opposed the motion and argued that:-

a) He sought the intervention of the Tribunal vide the Provisions of Section 12(4) of the Act:

b) The Tribunal has jurisdiction to protect a tenant from the arbitrariness of a Landlord.

10) Sururu made the following comments on the authorities cited by the Applicants:

a) The decision in Mombasa Gas Supplies Ltd involved Section 4(2) of the Act as opposed to the matter at hand which was filed Under Section 12(4) of the Act as a complaint.

b) The decision in Caledonia Supermarket Ltd was in respect of a defective Notice seeking to terminate a protected Tenancy as opposed to here where the Landlord denies the existence of a tenancy and the Tenant has filed a complaint to restrain the harassment.

11) The following seem, to me, to be the issues arising for determination:-

a) Does the Tribunal have jurisdiction to hear and determine a complaint in respect to a Notice said to be invalid?

b) Did the Tribunal have jurisdiction to make the orders in the nature of those sought to be impugned?

c) If the answers to (a) and (b) are in the affirmative, how was the Tribunal to determine whether or not the dispute related to a tenancy or a licence?

12) I begin by observing that Sururu, on both occasions, approached the Court under the Provisions of Section 12(4) of the Act. What he filed were complaints and not references under Section 4 of the Act. A reference under Section 4 of the Act is a challenge to a Notice issued by either the Landlord or tenant taken up by a receiving party who is unwilling to comply with the given Notice. It is a challenge to a notice which is issued in the form prescribed by Act. Whilst Section 12(4) reads as follows:-

“(4) In addition to any other powers specifically conferred on it by or under this Act, a Tribunal may investigate any complaint relating to a controlled tenancy made to it by the landlord or the tenant, and may make such order thereon as it deems fit.”

13) The scope of the Tribunal’s authority in respect to this provision has been the subject of much debate. The vexing question, which is also raised by this application, is whether a Notice said to be invalid can be challenged through a complaint. There is a view that a complaint contemplated in Section 12(4) of the Act relates to minor matters only. The decisions in Re Hebtulla Property Ltd. (1979)KLR 93 and The Republic –vs- Nairobi Business Premises Rent Tribunal & others Exparte Karasha (1979)KLR 197 are often cited to support this view. In Re Hebutulla Simpson J. (as he then was) said:

“in my opinion the word complaint is referable only to minor matters, such as the examples I mentioned in Choitram –vs Mystery Model Star Saloon [1972] EA 525.”

Examples given in Choitram's case include turning off water, obstruction of access and other act of harassment by the Landlord.

14) Chesoni J (as he then was) sat with Judge Simpson in Re Hebutulla. This is what he said,

“whether Section 12(4) is limited to minor complainants only I find it unnecessary to comment on as this is not the issue before us. Suffice it to say that the Act uses the words “any complaint” and the only qualification is that it must be “relating to a controlled tenancy”.

15) On my part, I have mulled over this question and I have settled on a position, at least for now. I am attracted to the proposition made by Muriithi J in Mombasa Misc. Civil Application (JR) No.26 of 2010 Republic –vs- The Chairperson Business Premises Rent Tribunal at Mombasa (Bench Mochache) Exparte Baobab Beach Resort (Mombasa Limited) & Monica Clara Schriel. The Judge held,

“I agree with Chesoni J in Re Hebutulla case that the phrase area of jurisdiction under section 12 of the Act is to be construed to mean that the complaint must be about a matter the tribunal has jurisdiction to deal with and that the complaint filed under that sub section (4) thereof need not be restricted to simple matters as suggested by Simpson J in the same case and that the only qualification to the words “any complaint” is that it must be “relating to a controlled tenancy.” (my emphasis).”

I recently endorsed that view in Misc. Civil Application No.27 of 2010 The Chairperson Business Premises Rent Tribunal, Exparte Kenya Safari Lodge Hotels Ltd where I said of it,

“This departure is attractive as it gives a purposive interpretation of the Tribunal’s power to act in matters within its area of jurisdiction in line with the objective of the Act which is “to make provision with respect to certain premises for the protection of tenants of such premises from eviction or from exploitation and from matters connected therewith the incidental thereto.” In addition such an interpretation gives the Tribunal a clear guide as to its jurisdiction so that it does not have to repeatedly engage in a subjective assessment as to whether a complaint before it is minor or major.”

16) I reach a conclusion that a protected Tenant who is faced with an illegal eviction which is premised on an invalid Notice can raise a complaint of such harassment to the Tribunal through the Provisions of Section 12(4) of the Act. This might appear to conflict with the holding in Caledonia Supermarket but I suggest that it does not. The provisions under discussion in Caledonia Supermarket were those of Section 4 of the Act. A Notice which conforms to the prescription of Section 4 is challengeable by way of a reference to the Tribunal. While the holding in Caledonia Supermarket is that an invalid Notice cannot be challenged by way of a reference under Section 4 of the Act I do not read it as precluding the Tribunal from determining a dispute on the validity of such Notice if raised as a complaint under Section 12(4) of the Act.

17) Others have taken a more radical view. Maraga J(as he then was) thought that the holding in Caledonia Supermarket that an invalid Notice deprives the Tribunal of the power to intervene was made obiter. This is what he said in Nakuru Civil Appeal No.171 of 2008 Ann Mwaura & 9 others vrs David Wagatua Gitau & 2 others

“With profound respect, I cannot see how the Tribunal can deal with the issue of termination of the tenancy without deliberating on the validity or otherKHKwise of the Landlords Notice, referred to in the Act as “the Tenancy Notice”. To say as the Court of Appeal said in Caledonian Supermarket case that an invalid Notice deprives the Tribunal of The jurisdiction to deal with the usual would, in my respective view, render the Tribunal otiose and leave the determination of the validating or otherwise of the tenancy Notices to the tenants and/or their advisers. I cannot find any warrant for such view of the Act.”

18) I then turn to the nature of orders made by the Tribunal. I accept that the Court of Appeal has repeatedly stated that the Tribunal has no jurisdiction to issue an injunction. This Court is, however, of the view that the Tribunal has jurisdiction to make an order to preserve the Status quo of a matter before it pending the hearing and determination of a reference or complaint made to it. I fully endorse the exposition of Murithi J in **Baobab Beach Resort (Mombasa) Ltd** (Supra) when he said,

“In my view, an order to Status quo to be maintained is different from an order of injunction both in terms of the principles for grant and the practical effect of each. While the latter is an substantive equitable remedy granted upon establishment of right, or at interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for the preservation of the situation as it exists in relation to pending proceedings before the hearing and determination thereof. It does not depend on proof of right or prima facie case. In its effect, an injunction may compel the doing or restrain the doing of a certain act, such as, respectively, the reinstatement of an evicted tenant or the eviction of the tenant in possession. An order for status quo merely leaves the situation or things as they stand pending the hearing of the reference or complaint. In its negative form, however, an injunction may have the same effect as an order for status quo. I find that the Tribunal has among the orders that it may make on a complaint under section 12(4) of the Landlord and Tenant Act an order for status quo to hold the situation in the controlled tenancy until the determination of the proceedings filed thereon.”

19) The Tribunal made the following order on 28th November 2011

“The landlord either by themselves, their servant, agents and/or employees be and is hereby restrained from harassing the tenant, evicting, intimidating, threatening and/or in any other manner whatsoever interfering with the tenant’s peaceful and quiet occupation of the business premises pending hearing of the complaint on 6/12/2011.”

And on 25/1/2012 an order to this effect.

“The landlord either by themselves, their servants, agents and/or employees be and is hereby restrained and prohibited from evicting the tenant, on the basis of the defective and invalid notice dated 22nd December 2011 and/or in any other way evicting or attempting the tenant without complying with the provisions of the landlord and Tenant (shops, Hotels and Catering Establishments) Act 1965 pending hearing of the complaint interparties at Mombasa next session.”

Granted, the orders are injunctive in form but their substance and effect was simply to preserve the relationship that existed between the applicants and Sururu prior to the giving of the disputed Notice. Those orders maintained that Status quo. The Tribunal, in my view, had jurisdiction to issue such preservatory orders as it considered the complaints on merit.

20) In interpreting the jurisdiction of a Tribunal established by an Act of Parliament, Courts must adopt an approach that supports, and does not undermine, the functions of such Tribunals. They should be allowed to flourish. This is not to say that the Courts should read a jurisdiction where none exists but rather that in interrogating the scope of a Tribunals authority the Courts should lean towards making a Tribunal effective for the purpose it was established. The Constitution 2010 in Article 169 has mainstreamed Tribunals within the Judiciary and they are now part of our Subordinate Courts system. The Tribunals must be given juridical powers to carry out their functions. There would be many reasons why Tribunals should be allowed to operate robustly. One would be that they could help decongest the business of the Courts. Another is that they would be best placed to develop rich jurisprudence in their niche areas.

21) That was a detour. I now must consider the contention on the use of premises. The Act defines a shop to be:-

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

There was no consensus as to the use. Sururu says that he used it for purposes of selling charcoal while the Applicant says that it is for storage of charcoal. It may not be possible to reconcile these positions without receiving and evaluating evidence from the rival parties. But that really would be the business of the Tribunal. All this Court observes is that a store used for purposes of supporting a trade or business would be a shop within the meaning of the Act in so far as it is auxiliary or an appendage to the trade and business.

22) I turn my attention to the argument that the relationship between Sururu and the Applicants is a licence and not a tenancy. I have to agree with Sururu's advocate that this is a question that again must be determined by the Tribunal on the evidence placed before it. In distinguishing a tenancy from a licence one would have to bear in mind the words of **Denning L.J.** in **Errington –vs- Errington** [1952] 1 ALLER where he said,

“words alone may not suffice. Parties cannot turn a tenancy into a licence merely by calling it one. But if the circumstances and the conduct of the parties show that all that was intended was that the occupier should be granted a personal privilege with no interest in the land, he will be held only to be a licensee.”

I agree. It is not a question of words but of substance. The purposes, terms and circumstances surrounding a grant must be examined before a conclusion is reached as to whether the grant confers a licence or a tenancy. That examination can only be carried out by the Tribunal on receipt and evaluation of evidence.

23) A party cannot, and should not, be allowed to deprive the Tribunal of jurisdiction by simply setting up a plea that the dispute is not in respect to a tenancy. If the nature of the relationship is in contention then the contestation must be resolved by the Tribunal on the basis of the evidence. If aggrieved by the decision reached by the Tribunal then the party can appeal to the High Court vide the Provisions of Section 15 of the Act. An Appellate Court, unlike a court sitting in Judicial Review, will re-consider the evidence and review the merits of the Tribunal's decision.

24) For all the reasons stated I am unable to accede to the Applicants request for the Judicial Review orders. I dismiss the Notice of Motion dated 22nd February 2012 with costs.

F. TUIYOTT
J U D G E

Dated and delivered in open court this 19th day of April, 2013

In the presence of:

J U D G E