REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 338 of 2012

FRANCIS KOMU GITAU T/A BOMAS MOTORMART …….....APPELLANT

VERSUS
MOHAMMED NYAOGA
JOHN MURIU
JAMES RUITHA

(Suing as registered Trustees of Parklands Sports Club)..... RESPONDENT

R U L I N G

The application before the court is the Notice of Motion dated 6.7.2012 mainly seeking a stay of execution through eviction pending the determination of the appeal dated the same date. The appeal is against the Ruling and/or orders of the Business Premises Rent Tribunal in Tribunal case No. 56 of 2012 of Nairobi, dated 5/7/2012.

However, the Respondent who was served with an interim stay of execution pending the hearing of the said application, filed and served a Notice of Preliminary Objection dated 11.7.2012 through their advocates M/s Mutimu Kangata & Company. It raised one main issue – that this court lacks jurisdiction to hear and determine the appeal herein and also lacks jurisdiction to hear and determine the said Notice of Motion dated 6.7.2012 on the basis that no appeal lies against the decision of the Business Premises Rent Tribunal made pursuant to a **complaint** filed under the provisions of Section 12(4) of the Landlord and Tenant (Shops, Hotels, and Catering Establishments) Act, Chapter 301 of the Laws of Kenya.

Both parties filed written submissions as agreed between them and this court. This ruling is the result of both counsel's said submissions.

The original facts, as this court now understands them, are as follows. The Applicant/Appellant and the Respondent entered into a written agreement relating to the use by the Applicant of the Respondent's club land space in Westlands, Nairobi. The Respondent who owned the land allowed the Applicant to use a specified or defined part of it for the purpose of washing customers' cars as a business.

The record before the court shows that from the onset, the agreement between the parties clearly defined the Applicant/Appellant agreement as a Licencee Agreement which was to last for one yea. During the said time the Applicant/Licencee's rights over the land space provided would be no higher than those defined in the agreement. When the **"licence"** expired and was not renewed or extended, the landlord nevertheless appears to have allowed the Applicant/Appellant to continue running the washing business under no specific new terms but a probable holding over during which period the Respondent continued to receive licence rents as per the terms of the expired Agreement.

A problem arose in January, 2012 when the Respondent served the Applicant/Appellant with a Notice of

eviction. The Applicant promptly filed a complaint before the Business Premises Rent Tribunal seeking to be declared a protected Tenant in terms of some provisions of Cap 301 of the Laws of Kenya on the ground that the landlord, having continued to receive rents after expiry of the licence, created a protected tenancy.

The Respondent/Landlord on the other hand, asserted that the holding-over of the licence over the space in question after the expiry of the Licence Management Agreement in question on same terms, could only continue granting the Applicant the licence of the space on same terms at the maximum. The Applicants did not therefore hold any rights over same space. That even during the existence of the licence the appellants stood to be and were often transferred from and to any other space in the same compound at the convenience of the landlord in accordance with Clause 10(iii) of the said Licence Management Agreement which specifically provided that the applicant could not be granted or otherwise conferred with any legal or equitable estate or interest or any exclusive right of possession or occupation in the premises for the carwash business. He further argued that the parties from the beginning intended to create a licence and never, a tenancy or licence with any recognizable interest.

The Tribunal having taken into account all the evidence above, found that no further or additional rights were created in favour of the Applicant Licencee and ordered that the Licencee's complaint and application for injunction had no merit. It dismissed the complaint by upholding the Preliminary Point of Objection on a point of law, thereby provoking this appeal and application for stay of execution to stall any probable eviction.

The main matter for determination by this court as I understands it, is whether this court has jurisdiction to entertain and determine this application and the appeal under which the application is brought.

The Respondents argued that the suit or cause of action filed before the Business Rent Tribunal was a **Complaint** as opposed to a **Reference** and that while in respect of the latter, an appeal could lie to this court, such appeal is not allowed or sanctioned in respect of a **complaint**.

I have examined the available pleadings and record in reference to the matter filed before the tribunal. The Respondent refers to it as a **"Complaint."** The Applicant/Appellant in his ground four (4) of the Memorandum of Appeal also calls it the **"complaint".** M/s Kimandu Gichohi & Co. Advocates in their letter to M/s Mutimu Kangatta & Co. dated 5.7.2012 refers to the dismissed or struck out matter as a **"complaint"** in paragraph three (3) thereof. The Tribunal itself on page 2 of the disputed Ruling referred to the matter before it as **"The Complaint"**. I am accordingly satisfied that the matter struck out by the Business Premises Rent Tribunal was a **"Complaint".**

It is important to note and appreciate the difference between a **"Complaint"** and a **"Reference"** in terms of causes of action through which either a tenant or a landlord may seek relief from the Business Premises Rent Tribunal, in their relationship as a Landlord and Tenant under the jurisdiction of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301 of the Laws of Kenya. In the case of **Choitram Vs. Mystery Model Hair Saloon (1972) EA 525**, Simpson, J defined a **"Complaint"** as follows:-

"I am of the opinion, however, that the term 'complaint' is intended only to cover complaints of a minor character ..... such complaints would include complaints by a tenant of the turning off of water, obstruction of access and other acts of harassment by the landlord calling for appropriate orders for their rectification or cessation....."

However, under the 1970 amendment to the above Act, Section 12(4) of the Act now provides thus:-

"In addition to any other powers specifically conferred on it by or under this Act, a Tribunal may investigate any Complaint relating to controlled tenancy made to it by the landlord or tenant and may make such order as it deems fit."

The stress by underlining above belongs to this court. As I understand the provision above, the above

powers and jurisdiction is reposed in the Business Premises Rent Tribunal in addition to any other jurisdiction reposed in it. The other power or the original jurisdiction reposed in the Tribunal is the one referred in Section 2 of the Act as **"a reference to the Tribunal under Section 6 of the Act".** A **"reference"** to the Tribunal, as I understand it from the Section, is the alternative cause of action which can be made to the tribunal by either the landlord or he tenant as distinct from the **"complaint"** that is filed under Section 12(4) aforestated. Section 6 of the Act provides it as follows:-

"(1) A receiving party who wishes to oppose a tenancy notice ..... may before the date upon which such notice is to take effect, refer the matter to a Tribunal, whereupon such notice shall be of no effect until and subject to, the determination of the reference by the Tribunal: ....."

The underlining services from this court again. It is clear from above, that the Tribunal has power or jurisdiction to conclusively determine a **"reference"** or a **"complaint"** made to it by a landlord or tenant under Section 6(1) or Section 12(4), of the Act, respectively. The jurisdiction is clearly defined by the statute and shall be exercised strictly as provided by the Act. It is further noted that whether a determination of the Tribunal is appealable or not depends on whether the cause of action filed before the Tribunal by either the Landlord or Tenant, was so filed and/or determined as a **"reference"** or as a **"complaint".** This is because Section 15(1) of the relevant Act provides as follows:-

"Any party to a reference aggrieved by any determination or order of a Tribunal made therein may, within thirty days after the date of such determination or order, appeal to the High Court....."

A similar provision is not made by the Act in relation to a **"Complaint",** although as earlier indicated the Tribunal has power to finally determine both a **"complaint"** and/or a **"reference"**. Clearly, Parliament deliberately made a provision for an appeal from a Tribunal's determination of a **"reference"** but chose to be silent in respect to a determination from a **"complaint".** If the legislature intended otherwise, it could have expressly stated so.

This Court in reference to this point stated as follows in the case of **Re Hebtulla Properties Ltd (1979) KLR 101**:-

"Thus, until 1970, there was a right of appeal against order made, not only on a reference, but also on a complaint. In inserting the words "to a reference" after the words "Any party" and "made therein" after "Tribunal" the legislature must have had some object in mind, and that object could only have been to restrict the right of appeal to the High Court to determinations and orders made on a reference. The legislature would not have removed the right of appeal to the High Court against orders made on a "complaint" if the term "complaint" had been intended to include such matters as forcible disposition by the landlord, an act which amount to the tort of trespass."

In this case, as earlier found there was no dispute as to what was filed before the Tribunal since both sides and the court defined it as a **"complaint".** The Tribunal struck out the Tenant's **"complaint"** and Notice of Motion on the basis that it had no jurisdiction to hear and determine the same since no controlled tenancy was revealed or demonstrated by the Tenants facts and pleadings. The Tenant promptly appealed to this court. The Respondent argued that in view of the fact that it was a **"complaint"** that was struck out by the Tribunal, there was no right of appeal.

I have carefully considered the Preliminary Objection above. In the face of the exposition of the law herein above, the facts above clearly demonstrate that the Appellant/applicant herein had no right of appeal to this court because the matter determined by the Tribunal was a "complaint". That is to say that this appeal and any application under it, are fatally incompetent. They are hereby struck out with costs to the Respondent. Orders accordingly.

DATED and DELIVERED at Nairobi this 16th day of April, 2013

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D. A. ONYANCHA

JUDGE