



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL CASE NO.290 OF 2012

BEATRICE NDATA KIARIE (Suing as the legal representative of the estate of
CLEMENT KIARIE GACHIE (Deceased).....PLAINTIFF

VERSUS

JOHN MWANGI THUO.....DEFENDANT

RULING

By a notice of motion dated 26th September, 2012 brought under Sections 1A, 1B, 3A and Orders 36 Rule 1(1) (b) and Order 51 Rule 1 of the Civil Procedure Act and Rules, the applicant (Beatrice Nduta Kiarie) seeks summary judgment against the respondent, John Mwangi Thuo, as prayed for in the plaint dated 6th August, 2012.

The application is premised on the grounds that the plaintiff is the co-administrix of the estate of the late Clement Kiarie Gachie; that the suit property (land parcel no. **Nakuru Municipality Block No. 4/119**) forms part of the estate of the late Clement Kiarie Gachie; that whereas the defendant was a tenant of the said estate his tenancy has been determined and a notice issued to him to vacate; that in total disregard of the notice, the respondent has without any justifiable cause or lawful reason, refused to vacate the premises; that as a consequence of the defendant's refusal to vacate the suit property, the property is being wasted; and that the defendant's actions amount to a violation of the plaintiff's constitutional and property rights.

The application is supported by the affidavit of the applicant sworn on 26th September, 2012. In this affidavit the applicant has basically reiterated the contentions in the grounds on the face of the application, as listed above.

In opposition to the motion, the respondent filed the preliminary objection dated 8th October, 2012 and also swore an affidavit in reply to the application.

In the preliminary objection, the respondent contends that this court lacks jurisdiction to hear and determine this matter; that it is the Business Premises Rent Tribunal which has jurisdiction to try and determine the application and the entire suit; and that the termination notice is not attached to the application.

On 9th October, 2012 this court directed that the application herein be disposed of by way of written submissions. Consequently, counsels for the respective parties filed submissions which I have read and considered.

The issues for determination are:-

1. Whether this court has jurisdiction to hear and determine the dispute herein? if yes,
2. Whether the applicant has made up a case for granting the order sought?
3. What is the order as to costs?

To address the 1st question, it is contended that this court lacks jurisdiction to determine the validity of the termination notice on which the suit and application is premised.

Regarding the foregoing contention Mr. Njuguna, counsel for the applicant, submitted:-

1. That under Section 150 of the Land Act No. 6 of 2012 this court (Environment and Land Court) is “vested with exclusive jurisdiction to hear and determine disputes, actions and proceedings concerning land under the Act”;
2. Further that under section 101 of the Land Registration Act No.3 of 2012 this court is clothed with jurisdiction to hear and determine disputes or actions concerning land under the Act; and
3. That under section 13(2)(d) and (e) the Land Act No. 6 of 2012 this Court (Environment and Land Court) has jurisdiction to deal with matters touching on contracts, choses in action, or other instruments granting any enforceable interest in land and any other dispute relating to environment and land.

Section 13 (1) of the aforementioned Act provides:-

“The Environment and Land Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of the Act or any other written law relating to environment and land.”

Subsections (5) and (6) thereof provide:-

“(5) The Court shall have supervisory jurisdiction over the subordinate courts, local tribunals, persons or authorities in accordance with Article 165(6) of the Constitution.”

“(6) For the purposes of subsection (7)(b), the Court may call for the record of any proceedings before any subordinate court, body, authority or local tribunal exercising judicial or quasi-judicial functions, or a decision of any person exercising executive authority referred to in subsection (7)(b), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”

The fact that the parliament conferred both appellate and supervisory jurisdiction on the Court negates the possibility that it intended to confer exclusive original jurisdiction on the Court. It is in the same spirit that Section 30 of the Act (Transitional clause) provides:-

“All proceedings relating to the environment or to the use or occupation and title to land pending before any court or local tribunal of competent jurisdiction shall continue to be heard and determined by the same court or as may be directed by the Chief Justice or the Chief Registrar.”

Pursuant to the powers given to the Chief Justice under the above Section, the Chief Justice has so far issued 3 practice directions the latest being the practice direction contained in Gazette Notice No. 16268, dated 9th November 2012 to the effect that:-

“Magistrates court shall continue to hear and determine all cases relating to the environment and the use and occupation of, and title to land (whether pending or new) in which the courts have the requisite pecuniary jurisdiction.”

Even though the above practice direction addresses cases filed before Resident Magistrate Courts, a literal and purposive interpretation of Section 13 as read with Section 30 of the Environment and Land Court Act, aforementioned, leads one to the conclusion that the sub-ordinate courts, local tribunals, persons or authorities with requisite pecuniary or subject matter jurisdiction will continue to hear and

determine disputes concerning environment and use and occupation, and title to land subject to their pecuniary or subject matter jurisdiction.

The local tribunals, persons or authorities contemplated under Sections 13 and 30 aforementioned are:-

- (i) The Tribunal established under section 4 of the the Rent Restrictions Act, Cap 296;
- (ii) The Tribunal established under section 11 of the Lanlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap, 301;
- (iii) The Tribunal Established under section 125 of the Envirnemental Management and Co-ordination Act, No.8 of 1999.

Whereas the Land Act, 2012, the Registration of Titles Act, 2012 and the Environment and Land Court Act, repealed a number of statutes that dealt with environment and land, it is worthwhile to note that the statutes under which the above tribunals or authorities are established were not repealed. The tribunals or authorities established therein continue exercising their mandate in accordance with their 'forming Act'.

Having determined that not all matters concerning environment and use and occupation, and title to land, should originate in this Court, I now turn to the issue raised in the instant application namely, whether this court has jurisdiction to determine the dispute herein.

It is common ground that the respondent carries on the business of a garage on the suit property. On the material presented before this court, the respondent came to the suit property pursuant to a tenancy agreement entered between him and M/S Nakuru Fitness Studio Ltd on 1st August, 1996 at a monthly rent of Kshs. 5,000/= . The lease was for one year. However, upon expiry of the tenancy period the respondent continued and continues to operate his business activities on the suit property.

On or about 4th october, 2011, the applicant, through Jojean Properties Ltd issued the respondent with a notice of intention to terminate his tenancy with effect from 4th January, 2013. Upon expiry of the notice period the respondent declined to vacate the suit property prompting the applicant to file the suit herein for eviction orders.

In accordance with the provisions of order 36 (1)(b) of The Civil Procedure Rules, after the respondent filed appearance and before he filed his defence, the applicant brought the instant application for summary judgment on the grounds aforementioned.

In reply to the application the respondent filed a preliminary objection and a replying affidavit. In both pleadings the respondent has challenged the jurisdiction of this court to hear and determine this dispute, arguing that the jurisdiction to hear and determine the dispute lies elsewhere.

As the issue of jurisdiction is so crucial to the determination of this dispute I propose to tackle it first.

Having already determined that the Tribunal established under Section 11 of the Landlord & Tenant (Shops, Hotels and Catering Establishments) Act has jurisdiction to hear and determine disputes on which parliament has clothed it with jurisdiction, the question for determination is whether, notwithstanding the finding that the Tribunal has the jursidication to hear disputes relating to Envirnement and Land, this court has concurrent jurisdiction to hear and determine the dispute herein .

The jurisdiction of the Tribunal established under Section 12 of the Landlord and Tenant (Shops Hotels And Catering) Establishments Act, hereinafter referred to as the Act, the Tribunal has power to, among other things:-

- (1) Determine whether or not any tenancy is a controlled tenancy;

- (2) Make orders, upon such terms and conditions as it thinks fit, for the recovery of possession and for the payment of arrears of rent and mesne profits, which orders may be applicable to any person, whether or not he is a tenant, being at any material time in occupation of the premises comprised in a controlled tenancy;
- (3) For the purpose of enabling additional buildings to be erected, to make orders permitting landlords to excise vacant land out of premises of which, but for the provisions of this Act, the landlord could have recovered possession;
- (4) 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.

Under Section 15 (1) of the Act, any party to a reference aggrieved by any determination or order of the Tribunal may, within thirty days after the date of such determination or order appeal to the High Court.

From the above mentioned provisions of the law, it is clear that it is the Tribunal established under Section 11 of the Act which has original jurisdiction to determine whether or not a given tenancy is controlled and to make orders for recovery of possession and payment of arrears of rent and mesne profits.

Section 12 as read with Section 15 aforementioned leaves no doubt that the Tribunal is the one clothed with original jurisdiction to hear and determine this dispute in as far as it relates to a controlled tenancy.

Without going into the merits of the case, *prima facie*, the tenancy that existed between the respondent and his disputed landlord was a controlled one. I say this because by dint of the provisions of Section 2 of the Act as read with Section 106 of the Transfer of Property Act, 1882 of India (now repealed) the tenancy that existed between the respondent was a controlled one.

Section 2, of the Act states:-

“a controlled tenancy” means a tenancy of a shop, hotel or catering establishment-

- a) **which has not being reduced into writing; or**
- b) **which has been reduced to writing and which-**
 - i. **is for a period not exceeding five years; or**
 - ii. **contains provision for termination otherwise than for breach of covenant, within five years from commencement thereof; or**
 - iii. **relates to premises of a class specified under subsection (2) of this section:**

Provided that no tenancy for which the Government, the Community or local authority is a party, whether as a landlord or tenant, shall be a controlled tenancy.

"A shop" means premises occupied wholly or mainly for the purposes of a retail or wholesale trade or business or for purpose of rendering services for money or money's worth.

“A tenancy” means a tenancy created by a lease or underlease, by an agreement for a lease or underlease, by a tenancy agreement or by operation of law, and includes a sub-tenancy but does not include any relationship between a mortgagor and a mortgagee.

“A tenancy notice” on the other hand, means a notice given under subsection (2) or subsection (4) of the Act.

From the foregoing, there is no doubt that the tenancy signed between the respondent and the initial landlord was a controlled one. This is because it was for a period of one year, clearly making it fall under

Section 2(b) (i) *supra*.

When the initial tenancy expired, the respondent continued running his business on the suit property but without any written contract with the initial landlord or his successors in title. This effectively made him a tenant by operation of law. See Section 106 of the Transfer of Property Act, 1882 of India (now repealed) which provides:-

“In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months’ notice expiring with the end of a year of the tenancy; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days’ notice expiring with the end of a month of tenancy.

Every notice under this section must be in writing signed by or on behalf of the person giving it, and tendered or delivered either personally to the party who is intended to be bound by it, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.”

Having determined that the tenancy that is the subject matter of this suit is a controlled one and that the Business Premises Tribunal is the one with original jurisdiction to hear and determine disputes relating to controlled tenancies I uphold the respondent's preliminary objection dated 8th October and dismiss the applicant's application dated 26th September 2012 with costs.

Dated, signed and delivered in open Court on this 26th day of July 2013.

L WAITHAKA

JUDGE

PRESENT

Mr Muthanwa for the Respondents

N/A for the plaintiff

Stephen Mwangi: court Clerk

L WAITHAKA

JUDGE