



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 6 OF 2011**

KINGFISHER PROPERTIES LIMITED ..... PLAINTIFF

V E R S U S

NANDLAL JIVRAJ SHAH

VIMAL NANDLAL SHAH

MEHUL NANDLAL SHAH (all trading as

JIVACO AGENCIES ..... DEFENDANTS

**RULING**

1. It is not denied that the Defendants are the Plaintiffs tenant at a property known as Manyara Building Msa/Block 1/351 (***hereinafter called the Property***). It is a controlled tenancy as defined under Section 2 of The Landlord and Tenant (Shop, Hotel and catering Establishment) Act Cap 301 (hereinafter called the Act).
2. It is also not denied that the Plaintiff on 2nd March 2010 issued the Defendants with a notice of termination of the Defendants' tenancy over the said property in accordance with the Act.
3. The notice sought termination of the tenancy on the ground that the Defendants' rent arrears for the period December 2009 to the date of notice that is March 2010 had not been paid.
4. The Defendants by its defence dated 18th April 2011 pleaded that the notice for termination was irregular and consequently was a nullity. In the alternative the defendant pleaded that if the termination notice was valid this suit should have been filed before the Business Premises Rent Tribunal (BPRT). Further that the plaintiff had refused to accept monthly rent from the Defendant.
5. The plaintiff filed a Notice of Motion dated 8th March 2012 which is the subject of this ruling. The Plaintiff seeks by that application orders for-

***(a) Vacant possession over the property***

***(b) Rent arrears for Kshs. 232,000/-***

***(c) Mesne profit of Kshs. 46,400/- from 3rd July 2010***

***until the defendant gives vacant possession.***

***(d) Interest on (b) and (c)***

6. The Plaintiff deponed in the affidavit in support of that application that the Defendants did not serve it with objection to the notice of termination and did not file a reference as required under the Act. It was deponed that the Defendants were indebted to the Plaintiff to the tune of Kshs. 232,000/- being rent arrears.
7. The Defendants did not file a replying affidavit. The Defendants however filed written submissions opposing the application. In those submissions the Defendants argued that this court has no jurisdiction to hear this matter and that jurisdiction only lay in the BPRT as provided under Section 4 of the Act. That the High Court could only entertain a matter relating to a controlled tenancy on appeal from BPRT. It was therefore the position of the Defendants that its tenancy had not terminated in view of the plaintiffs failure to move BPRT. The Defendants relied on the case of **HCCC Mbsa No. 363 of 2002 Mwai's Ltd & Another -Vs- Bridge Container Services Ltd**. In that Case the High Court held that it had no jurisdiction to entertain a dispute of a controlled tenancy relating to the valuation of rent or collection of rent arrears.
8. Parties in this matter are in agreement that the tenancy between them is a controlled tenancy. Section 2(1) of the Act defines controlled tenancy to mean-

***“tenancy of a shop, hotel or catering establishment -***

- a. ***Which has been reduced in writing: or***
- b. ***Which has been reduced into writing and which-***

***(i) is for a period not exceeding five years: or***

***(c) contains provisions for termination, otherwise***

***than for breach of covenant, within five years from***

***the commencement thereof:”***

The Minister can also gazette a tenancy to be a controlled tenancy.

9. It is such tenancy that Section 4 of the Act relates to. Section 4 provides that there can be no termination and alteration of the terms and conditions of a controlled tenancy other than provided therein. Section 4(2) provides-

***“A landlord who wishes to terminate a controlled tenancy or to alter, to the detriment of the tenant, any term or condition in, or right of service enjoyed by the tenant under, such a tenancy shall give notice in that behalf to the tenant in the prescribed form.”***

10. The Plaintiff issued to the Defendants such a notice seeking to

terminate the Defendants’ tenancy on the ground that the Defendants had persistently defaulted in paying rent. That notice required the Defendants to intimate in writing within one month whether they were or were not in agreement with a notice.

11. Section 4(1) of the Act provides-

***“No tenancy notice shall take effect until such date not due less than two months after receipt thereof by the receiving party, as shall be specified therein ....”***

12. The Plaintiff deposes that the Defendants' tenancy ended when the

termination came to effect on 2nd July 2010. Further that the defendant as at the date of filing suit owed the plaintiff rent arrears of Kshs. 232,000/- and that the rent had continued to accrue at Kshs. 46,400/- per month from 3rd July 2010 until the Defendants do yield possession of the property.

13. Section 6(1) provides that a party served with the notice and wishes to

oppose a tenancy notice and has notified the serving party may before the notice takes effect file a reference before the BPRT. Such a reference has an effect of stopping the notice from taking effect until the determination of the reference. The Defendants did not file such reference. The notice therefore did take effect.

14. I find and I hold that the jurisdiction of the BPRT could only have been activated by the defendants filing such a reference. In the absence of such a reference the tribunal had no jurisdiction but rather it is this court that has jurisdiction. Section 6 makes that very clear. It is on that basis that I part company with the Defendants' case of **Mwai's Ltd** (supra). In that case, the court did not set out the facts of the case. From the little facts I could find it would seem that the landlord in that case had varied the rent and distressed for rent in a controlled tenancy. It would seem that the landlord did so without serving a notice on the tenant as required under Section 4 of the Act. If he had served that notice and the tenant failed to file a reference the landlord would have been justified to vary the rent and distress for the arrears without referring the matter to BPRT. If notice had not been served the actions of variation and distress of rent were illegal and contrary to the Act.

15. The Defendants in submissions stated that if the court found it had jurisdiction to entertain this matter, it should find that a controlled tenancy cannot be terminated otherwise than set out in the Act. The Defendants did not expound on that submission but as stated above, and in this I am in agreement with the Defendants that a controlled tenancy cannot be terminated nor can its terms be altered prior to a notice as per Section 4 being given. Even then it is only if the receiving party fails to file a reference at BPRT or the tribunal determined the reference in favour of the party given notice that the notice would take effect. The plaintiff here gave notice to terminate, the Defendants failed to respond to it and failed to file a reference before the BPRT. The notice therefore took effect and the plaintiff was entitled to sue for termination and rent arrears as it has done in this case.

16. The other issue raised by the Defendants in submissions is that its defence raises triable issues. The Defendants in paragraph 3(a) dealt with issues that were corrected by the plaintiff's amended plaint filed with the leave of the Court on 28th February 2012. In paragraph 3(b)(c) the defence pleaded that the Plaintiff's notice was irregular and that the tenancy between the parties was still subsisting. The Defendants did not elaborate under which provision of the law the notice became irregular or invalid. Since the Defendants failed to file a replying affidavit to the present application the court is unable to determine in favour of the Defendants on that score. The court does find that the notice served by the Plaintiff upon the Defendants was valid and on the Defendants failing to file a reference before the BPRT the notice took effect and that failure thereby ousted the BPRT's jurisdiction.

17. The Defendants in their defence also pleaded that the Plaintiff had persistently failed to accept its rent. The Defendants did not prove that allegation by any evidence and it is therefore rejected.

13. The Plaintiff's application is essentially for summary judgement be entered in its favour. Having considered the plaintiff's pleadings and the Notice of Motion dated 8th March 2012 and having also considered the Defendants' defence and written submissions, I find that the Defendants did not raise any triable issues which can go to full trial. I would state that I find no shortcoming to the Plaintiff's application for having failed in seeking the striking of the Defendants' defence. On

finding that the Defendants' defence has no merit it therefore follows that judgement will be entered for the Plaintiff as prayed. I rely on the case of **Gupta -Vs- Continental Builder Ltd {1978} KLR 83 where the Court of Appeal** stated that-

*“... if no prima facie triable issue is put forward to the claim of the Plaintiff, it is the duty of the court forthwith to enter summary judgement for it is as much against natural justice to shut out without proper cause a litigant from defending himself as it is to keep a Plaintiff out of his dues in proper case, Prima facie triable issues ought to be allowed to go to trial, just as a sham or bogus defence ought to be rejected peremptorily.*

In the end the court's ruling is as follows-

1. *The plaintiff is hereby granted vacant possession of the property known as Manyara Building/MBSA/BLOCK 1/351.*
2. *Judgement is hereby entered for the Plaintiff against the Defendants for Kshs. 232,000 plus mesne profit at Kshs. 46,400/- from 3rd July 2010 until the Defendants vacate the property known as Manyara Building MSA/1/351.*
3. *The Plaintiff is awarded interest on (1) and (2) above at Court rates from the date of this suit until payment in full.*
4. *The Plaintiff is awarded costs of this suit and costs of the Notice of Motion dated 8th March 2012.*

**Dated and delivered at Mombasa this 23<sup>rd</sup> day of August, 2013.**

**MARY KASANGO**

**JUDGE**