



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

**CIVIL DIVISION**

**CIVIL CASE NO. 171 OF 2013**

**JAMES MOSES THAMU & OTHERS.....PLAINTIFFS**

**VERSUS**

**JOSEPH M MUIRURI.....DEFENDANT**

**RULING**

1. The Plaintiffs were tenants in premises that were subsequently purchased by the Defendant. They plead in their plaint dated 14<sup>th</sup> May 2013 that their respective tenancies with the previous owner had been renewed for six (6) years in or about October 2010; and that the Defendant had acknowledged and “taken over” their tenancies under the same terms, and had stated that he had no intention of evicting them from the premises.
2. The Plaintiffs further plead that this notwithstanding, the Defendant, between 3<sup>rd</sup> and 6<sup>th</sup> May 2013, served the Plaintiffs with notices to terminate their tenancies with effect from 1<sup>st</sup> July 2013 under the ***Landlord and Tenant (Shops, Hotels & Catering Establishments) Act, Cap 301*** and that the Defendant then instigated Nairobi City Council to serve them with summons under the ***Public Health Act*** with a view to having the premises closed, and thereby achieving his intention of evicting them.
3. The Plaintiffs therefore seek the following main reliefs –
  - i. A declaration that the notices of termination of their tenancies dated 29<sup>th</sup> April 2013 are illegal, null and void.
  - ii. A permanent injunction to restrain the Defendant from evicting them, or terminating their tenancies, or otherwise interfering with their quiet possession pending expiry of their respective leases.
  - iii. General damages.
4. The Defendant filed defence dated 3<sup>rd</sup> June 2013. He averred that he purchased the suit property for KShs 75 million through a loan that he repays at the rate of KShs 1.2 million per month; that he purchased the same subject to any subsisting registered leases at the time of completion of the sale; that none of the Plaintiffs had a registered lease with the previous owner at the time of the sale; and that the suit property was transferred to him on 16<sup>th</sup> January 2013.
5. The Defendant further pleaded, *inter alia*, that the Plaintiffs’ tenancies are controlled tenancies under Cap 301 and he has no lease with any of them expiring in 2016 as alleged in the plaint; and that he

purchased the property as a *bona fide* investor and has obtained approval from the planning authority for re-development of the property. He has also denied that this Court has jurisdiction to hear and determine the suit.

6. Together with the plaint the Plaintiff had filed notice of motion dated 14<sup>th</sup> May 2013 seeking temporary injunction to protect their tenancies pending disposal of the suit. In the grounds for the application appearing on the face thereof and in the supporting affidavit the Plaintiffs restated their case as pleaded in the plaint. Many documents are annexed to the affidavit.

7. The Defendant responded to the application by **notice of preliminary objection dated 16<sup>th</sup> May 2013**. The following single point of law is raised –

**That the Plaintiffs’ tenancies are controlled under Cap, 301, and this Court has no original jurisdiction to hear and determine the suit, and can only hear appeals from orders of the Business Premises Rent Tribunal (the Tribunal) established under the Act to hear landlord and tenant disputes in controlled tenancies.**

This preliminary objection was canvassed on 11<sup>th</sup> June 2013 and is the subject of this ruling.

8. I have considered the submissions of the learned counsels appearing including the various authorities relied upon.

9. The following are the legal issues raised in the preliminary objection –

(i) What is the legal nature of the Plaintiffs’ tenancies?

(ii) If they are controlled tenancies under Cap, 301, whether this Court has jurisdiction to hear and determine the dispute now before the Court?

(iii) Whether in any event the High Court has jurisdiction any longer in landlord and tenant disputes in view of the relevant provisions of the *Constitution of Kenya, 2010* and relevant laws?

### **What is the legal nature of the Plaintiffs’ tenancies?**

10. There is no dispute that the Plaintiffs were already tenants in the premises when the Defendant was registered proprietor of the same on 16<sup>th</sup> January 2013. That fact of his registration cannot be in dispute. It is Entry No. 29 in the title to the property exhibited at page 88 of the Plaintiffs’ application bundle.

11. The property was previously registered under the **Registration of Titles Act, Cap 281**, since repealed by the **Land Registration Act, No 3 of 2012 (section 109)** thereof). The suit property is now registered under the said Act No. 3 of 2012 (which commenced operation on 2<sup>nd</sup> May 2012) by dint of **sections 104(1) and 105(1) (b)** thereof. Section 104(1) provides as follows –

**“104.(1) A register maintained under any of the repealed Acts shall, on the commencement of this Act, be deemed to be the land register for the corresponding registration unit established under this Act.”**

And section 105 (1)(b) of the same Act provides –

**“105. (1) On the effective date, the following provisions shall apply in respect of every parcel of land, the title to the land which is already registered under the repealed Act, -**

a. ...

b. If the title to the parcel is comprised in a grant or certificate of title registered under the repealed Registration of Titles Act -

(i) the grant or certificate of title shall be deemed to be a certificate of title or certificate of lease, as the case may be, issued under this Act; and

(ii) the folio of the register of titles kept under section 7 of the repealed Registration of Titles Act shall be deemed to be the register under this Act:

Provided that the Registrar may at any time prepare a register, in the prescribed form, showing all subsisting particulars contained in or endorsed on the folio of the register of titles kept as aforesaid and substitute such register for such folio and issue to the proprietor a certificate of title or certificate of lease, as the case may be, the prescribed form.

c. ....”

12. Section 25(1) of Act No 3 of 2012 (hereinafter called the Act) provides as follows –

“25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –

- a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.”

13. There is no evidence placed before the Court that the Plaintiffs’ tenancies are shown on the register of the property. Indeed, the material placed before the Court by the Plaintiffs is to the effect that whereas leases were prepared and they signed them with the previous proprietor, the same were never registered.

14. Section 28(f) of the Act provides –

“28. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register –

.....

(f) leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies;

.....”

15. The Plaintiffs had written lease offers for periods exceeding six years, which they had all accepted, again in writing. In law they had six year leases with the previous owner from 2010. Had they been now dealing with the previous owner, there is no doubt that, their tenancies having been reduced into writing and being for periods exceeding five (5) years, would not have been “controlled tenancies” within the definition of that term in section 2(1) of Cap 301.

16. But the Plaintiffs are not dealing with the previous owner. They are dealing with the new owner, the Defendant, who was registered proprietor of the suit premises on 16<sup>th</sup> January 2013. The premises are now registered under the Land Registration Act, No. 3 of 2012 (the Act). His liability in respect to the Plaintiffs’ leases can only be as prescribed under that Act.

17. We have already seen that the Defendant's title cannot be encumbered under section 25(1) because the Plaintiffs' leases were **not** registered, and hence not noted on the register. But he accepted the Plaintiffs' as his tenants upon acquiring the property. His title to the property can thus only be subject to overriding interests under section 28 (f) of the Act. For purposes of this provision the Plaintiff's tenancies can only have been periodic from month to month and hence controlled under Cap 301. I so hold.

### **Jurisdiction**

18. The Plaintiffs came to this Court because they felt that they were under threat of eviction. They seek injunction to protect their tenancies. It has long been held that this Court has jurisdiction in such cases. The Court of Appeal observed as follows in the case of *Narthidas & Company Ltd – vs – Nyali Air Conditioning and Refrigeration Services Ltd, Nairobi Civil Appeal No. 205 of 1995 [1996] eKLR –*

**“What does a controlled tenant confronted with an illegal threat of forcible eviction do? He cannot go to the Business Premises Rent Tribunal established under the Act as that Tribunal has no jurisdiction to issue an injunction or similar remedy against the landlord...**

**“The learned judge was therefore in our view clearly wrong in holding that the superior court had no jurisdiction to hear the matter before him. There was clearly jurisdiction to deal with the matter.”**

19. But that was before the Constitution of Kenya, 2010 was promulgated. It provides at **Article 162(1) & (2) (b)** for establishment by Parliament of a court, *inter alia*, with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. At **sub-article (3)** of the same Article Parliament shall determine the jurisdiction and functions of such court. **20.** By the **Environment and Land Court Act, No 19 of 2011** (which commenced operation on 30<sup>th</sup> August 2011) Parliament established the *Environment and Land Court*. The jurisdiction of that Court is set out in **section 13** of Act No. 19 of 2011. For our purpose subsections (1) and (2) of that section will be sufficient. They provide –

**“13. (1) The 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 this Act or any other written law relating to environment and land.**

**(2) In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court shall have power to hear and determine disputes relating to environment and land, including disputes –**

**(a) relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;**

**(b) relating to compulsory acquisition of land;**

**(c) relating to land administration and management;**

**d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and**

**e. any other dispute relating to environment and land.**

21. That list is not exhaustive, and must be read together with the *Practice Directions on Proceedings relating to the Environment and the Use and Occupation of, and Title to, Land* issued by the Chief Justice vide *Gazette Notice No. 16268 of dated 9<sup>th</sup> November 2012*. Paragraph No. 12 thereof is relevant. It states –

**“12. All new cases relating to the environment and the use and occupation of, and title to, land not falling under paragraph 7 above (Magistrates’ Courts...) shall be filed in the nearest Environment and Land Court for hearing and determination by the said Court.”**

22. It was submitted by learned counsel for the Defendant that a tenancy dispute is a dispute involving an interest in land and ought to go to the *Environment and Land Court*, and that the High Court has no jurisdiction in such matters.

23. Section 2 of the Land Registration Act, No. 3 of 2012 defines “lease” as follows –

**“ ‘lease’ means –**

**a. a lease or sublease, whether registered or unregistered, of land; or**

**(b) a short-term lease or agreement to lease.”**

24. The *Land Act, No. 6 of 2012* contains a more comprehensive definition of “lease”. This statute which commenced operation on 2<sup>nd</sup> May 2012 was enacted **“to give effect to Article 68 of the Constitution, to revise, consolidate and rationalize land laws; to provide for the sustainable administration and management of land and land based resources, and for connected purposes”**.

The statute has application to all public, private and community land (see **section 3** thereof).

25. Under **section 2** of Act No. 6 of 2012 –

**“ ‘lease’ means the grant, with or without consideration, by the proprietor of land of the right to exclusive possession of his or her land, and includes the right so granted and the instrument granting it, and also includes a sublease but does not include an agreement for lease.”**

26. By this definition a lease, which gives exclusive possession of land or premises to the lessee, is an interest in land. It is not a mere or ordinary contract. It is a grant of an interest in land. A tenancy is by definition a lease.

27. Landlord and tenant disputes therefore are disputes that involve an interest in land.

28. **Article 165(5)** of the Constitution specifically denies the High Court jurisdiction in respect of matters falling within the jurisdiction of the *Environment and Land Court*. By dint of the Constitution and the Environment and Land Act, the High Court has no jurisdiction to hear and determine such disputes. I so hold.

29. Having held that this Court has no jurisdiction to hear and determine landlord and tenant disputes, the proper thing to do is to forward this suit to the proper court. I will direct that this suit be transferred forthwith to the *Environment and Land Court* for disposal. Costs will be in the cause. It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 17<sup>TH</sup> DAY OF SEPTEMBER 2013**

**H. P. G. WAWERU**

**JUDGE**

**DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF SEPTEMBER 2013**