



REPUBLIC OF KENYA



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Dhingira Ramesh Chander t/a Himani Traders v Tailor (Environment and Land Appeal 4 of 2020) [2022] KEELC 3332 (KLR) (27 July 2022) (Judgment)

Neutral citation: [2022] KEELC 3332 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND APPEAL 4 OF 2020**

JM ONYANGO, J

JULY 27, 2022

BETWEEN

DHINGIRA RAMESH CHANDER T/A HIMANI TRADERS APPELLANT

AND

A.M. TAILOR RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. S.N. MAKILA (Principal Magistrate) delivered on the 17th day of January, 2020, in the KISII CMCC ELC NO. 667 OF 2019)

JUDGMENT

Introduction

1. The appellants herein, aggrieved by the judgment and Decree of Hon. S.N. MAKILA (Principal Magistrate) dated and delivered on the 17th day of January, 2020, in the KISII CMCC ELC NO. 667 of 2019 filed an Appeal vide a Memorandum of Appeal dated January 20, 2020.
2. The Appeal is premised on the following grounds:
 - a) The learned trial Magistrate erred in fact and in law in finding that the court had jurisdiction when parties by their lease agreement had vested the court with the same.
 - b) The decision to strike out the appellant's suit was blatantly against the weight of the evidence on record.
 - c) The learned trial Magistrate erred in fact and law in not considering the law that relates to the matter as submitted by the Appellant.



Background Of The Suit

3. Before delving into the merits of the Appeal, it is necessary to give the background of the suit before the lower court.
4. The appellant herein who was the plaintiff in the lower court instituted the suit in the lower court against the respondent (then defendant) vide a plaint dated August 26, 2019 seeking the following reliefs;
 - a) An order of injunction restraining the respondent herein from in anyway interfering with the quiet possession of the appellant's lease on the suit premises until the lease expires.
 - b) A declaration that the respondent's purported Notice of Termination dated August 18, 2019 was null and void.
 - c) Costs of the suit
 - d) Any other relief the court may deem fit to grant.
5. In support of his claim, the appellant stated that vide a Lease Agreement dated January 1, 2016, the respondent leased an office in his premises that stood on land parcel No. Kisii Town /block/III /276 for a period of 5 years based on the terms and condition stated in the said agreement.
6. He claimed that the respondent in violation of the agreement issued a termination notice dated August 18, 2019 before the expiry of the 5-year lease Period the parties had agreed on in their agreement dated January 1, 2016.
7. He was apprehensive that the respondent would forcefully evict him from the premises where he runs a bookshop should he effect the termination notice.
8. He therefore prayed for an injunction barring the Respondent from terminating the 5-year lease agreement because the termination notice.
9. In response to the appellant's claim, the respondent filed a Notice of Preliminary Objection dated September 4, 2019 wherein he claimed that the court did not have jurisdiction to hear and determine this suit or at all.
10. The lower court with the consent of the parties decided to dispose of the Preliminary Objection by way of written submissions.
11. In her ruling dated July 17, 2020, the learned trial Magistrate allowed the preliminary objection and determined that she lacked jurisdiction to hear and determine the matter. Specifically the learned trial Magistrate held that:

“I concur with the submissions of the Respondent on the issue of the right forum for the instant dispute.

The tenancy in dispute falls within the definition of section 2 of the Business Premises Rent Tribunal (BPRT) Act and should therefore be filed in the Business Premises Rent Tribunal

I find that this court lacks Jurisdiction to determine this suit. I will accordingly down my tools upon striking the suit and the instant application with costs”



12. It is against this background that the appellant has filed this Appeal. Both parties filed their submissions as directed by the court.

Appellants Submissions

13. Learned counsel for the appellant submitted that the trial court failed to consider that the tenancy between the parties dated May 13, 2016 was for a period 5 years and one month and was written and thus the same was not a controlled tenancy as provided for in section 2 of *Landlord and Tenant (Shops, Hotels and Catering Establishments Act* cap 301) which would have ousted the jurisdiction of this court and vested the same in the Business Premises and Rent Tribunal.
14. Counsel submitted that the parties voluntarily ousted the jurisdiction of the BPRT by specific and clear terms and conditions of the Lease Agreement date May 13, 2016.

Respondent's Submissions

15. Learned Counsel for the respondent submitted that the learned trial Magistrate was on point when she determined that she did not have jurisdiction to hear and determine the matter. Counsel underscored that the learned trial Magistrate was barred from hearing and determining the dispute by section 12 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments Act)* which vested the jurisdiction in Business Premises and Rent Tribunal given that this was a controlled tenancy within section 2 of the Act.
16. Counsel while arguing on the issue as to whether parties through their lease agreement could confer jurisdiction on the court, contended that a court's jurisdiction flows from either the constitution or legislation or both.
17. He argued that consequently parties cannot confer jurisdiction to any court or Tribunal by agreement or consent by putting special conditions in their agreement.
18. He relied on the Supreme Court case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others* (2012) eKLR and the case of *Adero & another v Ulinzi Sacco Society Ltd* (2002) 1 KLR 577.

Issues For Determination

19. The main issue for determination as whether the trial court erred by determining that it lacked jurisdiction to hear and determine the Appellant's case.

Analysis And Determination

20. It is common ground that the parties to this appeal entered into a written tenancy agreement on 1st January 2016 pursuant to which the Appellant leased to the Respondent premises known as Kisii Block III/276. Clause 1 of the Lease Agreement specified the period of the lease and read as follows:

- “ 1. In consideration of the rent hereinafter reserved and of the covenants by the lessee hereinafter contained the lessor(s) hereby demises unto to the lessee an office space on the ground floor of the building known as Imperial Building the premises To Hold the same unto the lessee for the term of 5 years plus One Month (hereinafter called the said term) from 1st January, 2016 Yielding And Paying the rent of Kshs. 25,000/= per month inclusive of 16% VAT payable quarterly”



21. It is also not in dispute that clause 3 of the Special conditions contained a provision for termination of the tenancy by the tenant otherwise than for breach of a covenant, in the following verbatim terms:
- “ 3. Before the expiration of the Agreement one (1) Calendar months’ notice to be issued for renewal or termination”
22. It is further not contested that the Respondent had vide letter dated 18th August, 2019 issued a one month termination notice on grounds that he intended to expand his business and was in dire need of more space.
23. Central to the controversy however, is the issue of whether the tenancy that the parties entered into was a controlled tenancy within the meaning of section 2 Section 2 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, cap 301 which vests jurisdiction of such tenancies in the Business Premises Rent Tribunal.
24. Section 2 (1) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, chapter 301 of the Laws of Kenya) defines a controlled tenancy as a tenancy of a shop, hotel or catering establishment:
- a) which has not been reduced into writing; or
 - b) which has been reduced into writing and which is;
 - 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 the commencement thereof.
25. Counsel for the Appellant submitted that it was erroneous for the trial Magistrate to hold that she lacked jurisdiction to hear and determine the dispute since the lease agreement expressly stipulated that the tenancy was for a term of five years and one month; hence the dispute was rightfully before the trial court.
26. Counsel for the respondent maintained the position held by the learned trial Magistrate that the tenancy was a controlled tenancy within the definition of section 2 of the Act.
27. My analysis of the submissions by the parties reveals sadly that while arguing that the 5 year one month Tenancy was not controlled tenancy only dwelt on section 2(1)(b)(i) as reproduced above and did not bother to consider Section 2 (1)(b)(ii) which stipulates that if a tenancy agreement has provision for termination, otherwise than for breach of covenant, within 5 years from the commencement of the term, it is a controlled tenancy. In other words, if such a tenancy has provision for termination, which can be invoked at any time during the term, it is in my view a controlled tenancy.
28. It is clear that the termination clause that I have highlighted above was a blanket provision that gave liberty to the parties to terminate at any time before the expiry of the lease period and for any reason within the 5-year one month term of the tenancy. To that extent, I am satisfied that the termination Notice brought the tenancy within the meaning of a controlled tenancy under section 2 (1) (b) (ii) of the Act. Consequently, the trial court was not clothed with jurisdiction over the matter.

Conclusion

29. The upshot is that the Appeal is without merits and is dismissed in its entirety with costs to the Respondent.



DATED, SIGNED AND DELIVERED AT KISII THIS 27TH DAY OF JULY,2022.

J.M ONYANGO

JUDGE

