REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CIVIL APPEAL NO. 728 OF 2007

KENYA SHELL LIMITED …….....… APPELLANT/RESPONDEN ORIGINAL LANDLORD

VERSUS

VICE PRESTON LTD …….....…… RESPONDENT/APPLICANTORIGINAL TENANT

(Being an appeal from the judgment in the Business Premises Rent Tribunal (sitting in Nairobi Tribunal Case No. 168 of 2004,) Vic Preston Limited – Versus – Kenya Shell Limited, D. Mochache, Chairperson of the Business Premises Rent Tribunal dated 26th July 2007)

JUDGMENT

I. PRODEDURE

1. As this is the last and final court, in which an appeal may be heard from the Business Premises Rent Tribunal, (15(1) (4) (BPRT Cap 300 Laws of Kenya), on being admitted for hearing, **(Sitati J)** (25th June 2010), the file was placed before the Hon. The Chief Justice for directions. On the 16th September 2010, the Hon. The Chief Justice under Section 79 C of the Civil Procedure Act directed that this appeal be heard by two judges.

2. The parties appeared before the High Court before **Sitati J**, 28th October 2010, **Khaminwa J** 3rd February 2011, **Dulu J,** 7th April 2011 and **Angawa J**, 29th June 2011 for directions under Order 43 r 13(2)(3) & (4) Civil Procedure Rules.

3. Parties filed written, skeletal arguments.

4. On the day called out for hearing 7th July 2011 before us, the advocates addressed us on their respective arguments relying on their case law.

5. Due to unforeseen circumstances, whereby Hon. Justice Rawal was to be away from these courts to sometime in August/September 2011, the judgement date was fixed for reading after the court vacation. This explains the delay of delivering this judgment.

II. BACKGROUND

6. The parties in this appeal have had a long history together. The relationship between the two is that of landlord and tenant. The tenant runs a petrol station along the University Way, opposite the University of Nairobi. This relationship has been there and on-going since 1963.

7. No real difficulties arose between the parties until sometime in 1999 when the University of Nairobi students, as their custom used to be, went on a riot. The tenant raised issues with the landlord on security. The landlord filed suit in the High Court of Kenya, at Milimani Commercial Court, Case No. 1139/99 (OS) seeking determination by that court on the exact status and relationship between the parties. That High Court came to the findings that there existed two types of relationship between the parties. Where the service station existed, the relationship was one of licensor/licensee. Where the garage, showroom area existed, the relationship was that of landlord/tenant. This decision was determined on 9th August 2000

(**Onyango Otieno J)** (as he then was.) It established that the tenancy relationship fell under the controlled tenancy of the Business Premises (shops, Hotels and Catering Establishments) Act Cap 301 Laws of Kenya. This meant that any dealings with the tenant, the landlord would have to comply with the Act.

8. From 1963 to the year 2000, the rent had always been Ksh. 800/= per month. Sometime in 1998/1999, the shares of the company – Kenya Shell Ltd were sold partially to third parties directors. The family of the original owner still held 20% of the shares.
9. The new directors notified the landlord that he had no objection to the rent being increased provided it was reasonable. He also requested that if he is to make a profit on, he be given a discount of Ksh. 2/= on the oil products. The landlord wanted a rent of sh. 250,000/= to be paid per month, the tenant on the other hand stated a reasonable rent would be ksh. 150,000/=. As to the 2/= margin in profit/discount, this was totally rejected by the landlord. The landlord further wished that the tenant enter into a licensee/licensor agreement. This was not acceptable to the tenant. They wanted a lease agreement to be entered into for a period of 6 years making the premises uncontrolled.
10. This situation went on for a considerable time that the tenant finally conceded to let go the petrol station. This was given to a caretaker dealer in town. The area the dealers were handling was known as the forecourt. The tenant experienced increase in profits, as by letting the petrol station go, it meant less overheads.
11. Any attempts to alter the workshop area by the tenant was resisted by the landlord.
12. Eventually the landlord issued a notice of termination of tenancy on 23rd February 2004. This came as a surprise to the tenant as all along the parties had been negotiating on the issue of rent.
13. The notice of termination by the landlord was given on the grounds that the landlord wished to "*reconstruct and carry out substantial construction on the premises."* This could not be done without obtaining possession of the premises. The tenants were given 30 days to accept this notice or not.
14. On the 17th of March 2004, the tenants filed Reference dated 11th March 2004 to the Business Premises Rent Tribunal Case No. 168/04. They requested that the tribunal investigate this notice.
15. A trial hearing was heard before Hon. N Owino, the Chairperson of the Business Premises Rent Tribunal to its completion. She was not available to write the judgement. The judgment was eventually written by the new incoming chair, Hon. D Mochache.
16. In the said judgment, the tribunal held that the notice to terminate, for the purpose of reconstruction was motivated by the landlord's intention to increase rent. That this notice had not been given in good faith. The chairperson held that the tribunal reference referred to it by the tenant be accordingly allowed.
17. Being dissatisfied with this decision delivered on 26th July 2007, the landlord filed appeal to this High Court on the 24th August 2007.

III. APPEAL

18. The grounds of appeal were only four:-

18.1 That the chairperson erred and failed to consider evidence that the landlord intends to substantially reconstruct the premises [by] the notice to terminate dated 23rd February 2004.

18.2 That the chairperson failed to consider evidence that intended to [show the] construction would be substantial and would require [the] tenant to vacate the premises.

18.3 That the chairperson erred in finding the landlord in moving to terminate [the] lease did so

because discussion with the tenant being paid had fallen through, [When there was no such evidence deduced.]

18.4 That the chairperson erred in finding the reason for giving notice of termination dated 23rd August 2004, namely for purposes of reconstruction, was not hinged in good faith [yet] the appellant had acted in utmost good faith.

The landlord sought this High Court's orders to set aside the judgement of 16th July 2007 and the appellant be granted vacant possession.

IV SUBMISSIONS

19. It was the appellant's case that the Business Premises Rent Tribunal had no jurisdiction to write the judgement. The trial chairperson heard the then full evidence, then a new chairperson came in to write the judgement. There is no provision to allow for this situation under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301 Laws of Kenya. That on this ground alone, the appeal should be allowed and the tenant be evicted from the premises.

20. The tenant took issues with this line of arguments. The issue was never a part of the memorandum of appeal. If the landlord did not wish for the new chairperson to take over he would have stated so and requested for the whole trial to begin de novo. The court position would be to proceed from where the matter left off or de-novo. The appellants relied on the case of

Farmwine Distributors Ltd – Vs – Simeon John Muthuma

HCC 1095/87

Kubo J

A case that gave direction that a matter heard by another Judge was not to proceed under Order XVII r 10 (now rule 18) of the Civil Procedure Rules that the matter was to begin De Novo.

21.The applicability of the Civil Procedure Rules is in issue herein. The regulation under Section 16 of the Subsidiary Legislation as to forms and procedure states:

"The Tribunal shall have the same powers as one vested in a court when trying a suit under the Civil Procedure Act in respect of the following matters:-

a) Appearance of parties and consequence of non-appearance
b) Enforcing the attendance of any person and examining him on oath or affirmation.
c) Compelling the production of a document and
d) Issuing commissions for the examination of witnesses and any proceedings before the Tribunal shall be deemed to be a judicial proceedings within the meaning of Section 108,109, 112, 113, 114, 115, 116 and 121 of the Penal Code.

22.The regulation does not specifically state that the Civil Procedure Rules would apply, apart from summoning witnesses and "inter alia" regulations stated above.

23.We are of the view that the practice, powers as to the judicial proceedings, where not indicated, would generally follow the process as per the Act.

24.As stated by the tenant, this question of beginning the matter afresh or allowing a new chairperson take over from where the former chair left off ought to have been raised before the delivery of judgment, and to have been so raised before the tribunal.

25.We do still note that this issue was not part of the grounds of appeal, if per chance that it had been, this court would go to the regulations and note the procedure to be followed. In the normal circumstances, the tribunal would consist of a panel of members sitting with the chair. The regulations provide that the mememberswho heard the matter with their chairperson, if the chairperson is absent, they would elect one of the members amongst themselves to be the chairperson. (Regulation 21(1)(2). The members and

the chairperson so elected would proceed to write and deliver the judgment.

26.Under the Act, it does not preclude the chairperson to sit alone. We note difficulties arising where the chairperson is also a judicial officer and the tendency of their transfer would have consequences on a decidison as being raised in this instance, unless they would cease being chairperson. What then would be the situation? Would it mean that the new chairperson would not have jurisdiction to hear the matter?

27.We are of the opinion that once a chairperson has been appointed, such appointment is under the Act. The chairperson in his or her own right has the exclusive powers as the chairperson to conduct proceedings and make decision. The minute that chairperson ceases to be one, then he/she becomes funtus officio chairperson who has no jurisdiction to hear the tribunal case. The powers are vested in the new chairperson on being appointed by the Minister under Section 11:

28.Jurisdiction is conferred upon the person or persons as appointed by the Minister to exercise such jurisdiction. It is therefore the reading of this section that convinces us that the former chairperson would not be permitted to deal with the tribunal matters upon the appointment of a new person or persons.

29.The jurisdiction conferred by the Act therefore vests it in the new appointed person or persons. The person appointed as chair concluded the judgment from where it had left off. Such person so appointed was the only person who had jurisdiction to exercise that authority and pronounce judgment on the matter.

30.We would reject the argument that the chair had no jurisdiction to determine the matter or make decision.

31.We would recommend that the Minister should in future appoint persons to the Tribunal to avoid the type of situation as found in this case.

32. On the grounds of appeal raised, the appellant relied on case law where by he emphasized that as long as the landlord is able to show they require the premises in vacant possession in order to carry out major reconstruction, the orders for vacant possession should be issued.

33. In the case of
Nyeri Super Market Ltd – Vs – Nyeri District Co-operative
(2002) LLR 3113 (HCK) Juma J upheld the decision of the Business Premises Rent Tribunal to evict a tenant on grounds that the premises was required in vacant possession by the landlord for construction.

34. This was the same case in the case of
Gateria – Vs Mwaniki & Others
(2003) LLR 5518 (HC) Visram J
who upheld the tribunal decision to evict a tenant on grounds that the landlord required the premises for reconstruction.

35. The tenant relied on the English decisions of
Reohorn – Vs Barry Corporation
(1956) 2 AII E.R. 742 (C.A.)
(Denning, Birkett and Parker L.JJ)
Judges held that landlords who issue notice to terminate the tenancy with the intent (as in the above case) to develop the premises/site must show the real intent to possess the property.

36. Similarly in **Betty's Café Ltd – Vs – Philips Storms Ltd**
(1956) 2 AII E.R. 496
(Ch.D) (Danckwerts, J)

where a notice to terminate tenancy was issued also held that such notice must be given on a *"a firm and settled intention."* The work of renovation must be a primary prayer. They went on to state that:

"It must be remembered that if the landlord having got possession honestly changes his mind and does not do any work of reconstruction, the tenant has no remedy."

37. A further case law provided by the appellant;
Little Park Service Station – Vs – Regent Oil Co. Ltd
(1967)2 Q.B 655
(Sellers Davis, Russel LJJ)

where the landlord wished to enter the premises and do structural alteration and or demolish. It was held that it is the landlord who is to satisfy the court of their intention.

38. In the case of
Cunliffe –Vs – Goodman
(1950) ALL ER 725
(Cohen Asquith Singleton LJJ
the landlady had intention of demolishing premises and erecting flats and maisonettes subject to obtaining the local authority building license. The intention of pulling the premises down had not been established.

39. In issuing orders against the landlord, **Sitati J** in the case of
Abdul S Khirji – Vs – City Square Properties Ltd
HCCC 219/08 who examined the intention of the landlord and concluded that the intention of the said landlord was not one that would favour him

40. We are of the view that the English authorities quoted therein were based on the Landlord and Tenant Act of 1954. The Act deals with controlled tenancy. The legislation arose as a result of the war when an acute shortage of housing and business premises was experienced. In order to protect the tenants, the legislation was directed to have a fair playing field.

41. The Section 30(1)(f) of the said act is identical to our Kenya Section 7(1)(f) that reads:

"That on the termination of the tenancy, the landlord intends to demolish or reconstruct the premises comprised in the tenancy, on a substantial part thereof or to carry out substantive work of construction on such premises or part thereof and he could not reasonably do so without obtaining possession of such places."

42. The landlord in issuing termination notice used the above section as the reasons why the said termination should occur.

43. This court must be guided by the intention of the landlord. According to the landlord they asked to renovate and reconstruct the whole premises. The tenant sates this can be done when they are still in the premises. The landlord raises the issue of reconstruction for the first time in its termination notice. The tenant was actually negotiating the monthly rent of Ksh. 800/= per month since 1963 to a higher sum but not exceeding Ksh. 100,000/= to Ksh. 150,000/=.

44.**G.W. Smart Ltd (Modern Shoe Repair) – Vs – Hinckley & Leicestershire Building Society**
(2)(1952) 2 ALL ER.846)
that emphasizes that a landlord would generally have two purposes in seeking repossession;

i. "To get possession for his own business
ii. To get possession to reconstruct the premises"

45.Morris LJ elsewhere stated that:

"Intention can easily be asserted. [It] must have moved out of the zone of contemplation out of the sphere of the tentative provisional and the explanatory into the valley of decision."

42.The evidence before the tribunal and the decision arrived at, found that the intention of the landlord was not established to warrant termination of the tenancy of the tenant.

43.We would in the circumstances of this appeal do tend to concur with the decision of the chair person.

44. We hereby decline to grant orders sought in this appeal. The appeal is dismissed with costs to the Respondent/original tenant.

DATED THIS 6TH DAY OF OCTOBER 2011 AT NAIROBI

M.A. ANG'AWA
JUDGE

K. RAWAL
JUDGE

Advocates :

I. *K. Kiragu instructed by M/s Hamilton Harrrison & Mathews & Co Advocates for the Appellant/Respondent*

II. *P. Okeyo instructed by M/s Otieno Okeyo & Co Advocates for the Respondent/Applicant Original Tenant*