REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL 171 OF 2008

ANN MWAURA …….....…….1ST APPELLANT
PETER MWANGI…….....….2ND APPELLANT
WALLACE CHEGE……...….....….3RD APPELLANT
PATRICK MAINA…….....4TH APPELLANT
SAMUEL MWANGI…….....5TH APPELLANT
ISABELA NDACHI t/a Bendac Enterprises….6TH APPELLANT
JAMES N. CHEGE……...…....……7TH APPELLANT
PENNINAH ADHIAMBO…….....…..8TH APPELLANT
MARY ATIENO…….....….9TH APPELLANT
ELIJAH DELHI MURIU…….....10TH APPELLANT

VERSUS

DAVID WAGATUA GITAU…….....….....….1ST RESPONDENT
MICHAEL NJENGA GITAU…….….....2ND RESPONDENT
EVANSON KAMAU GITAU…….....….3RD RESPONDENT
(Sued as the Legal Representatives of the
Estate of DAVID GITAU KARIUKI (DECEASED)

JUDGMENT

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This appeal raises one fundamental legal point which is whether or not the Business Premises Rent Tribunal (the Tribunal) established under the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act** (the Act) has jurisdiction to determine a dispute based on a termination notice which does not comply with **Section 4** of the **Act**.

The brief facts of this case are these. **L.R. No. 1317/9, 1317/10 and 1317/120 Gilgil Township** are registered in the name of the late David Gitau Kariuki (Deceaased). On 14th October 2008, David Wagatua Gitau, Michael Njenga Gitau and Evanson Kamau Gitau, the administrators of the estate of the deceased served the tenants in the buildings erected on those pieces of land (the premises) with termination notices which read:-

"1. We DAVID WAGATUA GITAU, MICHAEL NJENGA GITAU and EVANSON KAMAU GITAU being the administrators of the estate of DAVID GITAU KARIUKI (deceased) Landlord of P. O. Box 120 Gilgil the landlords of the above mentioned premises hereby give you notice terminating your tenancy with effect from 14th day of July 2008.

2. The grounds on which we seek the termination are:-

i. You have refused to pay the increased rent despite your knowledge of the value of the premises.
ii. You have failed to treat the landlord with courtesy and to dialogue and re-negotiate the tenancy.
iii. You have demanded to stay in the premises without a valid lease.

3. We require you within one month after receipt of this notice to notify us in writing whether or not you agree to comply with the notice as from that date.

4. This notice is given under the provisions of Sec. 4(2) of the landlord and tenants (shops, hotels and catering establishments) Act."

The tenants did not vacate or refer the matter to the Tribunal. Instead they filed Nakuru CMCC No. 620 of 2008 and sought a declaration that those notices were null and void for non-compliance with the provisions of the Act and a perpetual injunction to restrain the landlords from evicting them or in anyway interfering with their quiet occupation of the premises.

At the hearing of that case counsel for the landlords raised a preliminary objection challenging the competence of the suit on the grounds that the plaint was not supported by a valid verifying affidavit. He also submitted that the Chief Magistrate's court had no jurisdiction to entertain the dispute between a landlord and a tenant of a controlled tenancy. The Resident Magistrate who heard the preliminary objection determined it on the issue of jurisdiction only. As his ruling is fairly short I would like to set it out verbatim:-

"I have considered the submissions by both learned counsels. It is not disputed that the plaintiffs are protected tenants as provided under the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act Cap 301 laws of Kenya. It is also not disputed that the plaintiffs were served with notices to terminate their tenancy dated 14th June 2008. If at all the plaintiffs desired to challenge the notices they ought to have referred the matter to the tribunal before the notices took effect as provided vide section 6 of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act. It is not upon this court to determine whether the notices to terminate the tenancies are unlawful. This is the mandate of the tribunal. The tribunal is capable of issuing the declaration sought in prayer (a) of the plaint. On prayer (b) of the plaint, this court cannot issue a permanent injunction restraining a landlord from evicting a tenant. The upshot is that this court has no jurisdiction to entertain this matter. I accordingly uphold the preliminary objection and strike out the suit herein together with the chamber summons dated 11th July 2008 with costs to the defendants."

This appeal is against that ruling.

Relying on the Court of Appeal decision in **Caledonia Supermarket Ltd Vs Kenya National Examinations Council [2002] 2 EA 357** Mr. Kurgat for the tenants submitted that as the notices were on an ordinary letter and not on the prescribed form as required by **Section 4(2)** of the **Landlord Tenant (House and Catering Establishments) Act** (the **Act)** and as they, contrary to **Subsection (4)** thereof, gave the tenants only one month's notice instead of two, that divested the Tribunal of the jurisdiction to entertain the matter. He concluded that the learned trial magistrate therefore erred in holding that the subordinate court had no jurisdiction to entertain the dispute.

The first respondent who also spoke for the other two, while admitting that the notices were by way of an ordinary letter and that they gave the tenants only one instead of two months notice to vacate, dwelt on what the landlords considered the obstinacy of the plaintiffs in refusing to pay the increased rent and subletting the premises.

The issue as I have said is whether or not the Tribunal has jurisdiction to deal with a dispute arising from such notice. I have already set out verbatim the notices the landlords served on the tenants.

As I have pointed out Mr. Kurgat for the Appellants submitted that as the notices were on an ordinary letter and not on the prescribed form as required by **Section 4(2)** of the **Act** and as they, contrary to **Subsection (4)** thereof, gave the tenants only one month's notice instead of two, that divested the Tribunal of the jurisdiction to entertain the matter.

I find no merit in the first limb of this submission. The prescribed form that the Act talks of is not necessarily the actual form that the Government Printer extracted from the Act. The phrase "prescribed form" should be understood to refer to the contents of the form provided in the Act. In the computer age in which we live in I cannot see why one cannot make the format of a given form and use it. As long as the landlord's notice incorporates the contents of the form in the **Act** of the notice supposed to be given under **Section 4** of the **Act** that notice is valid.In the circumstances, I find no merit in Mr. Kurgat's submission on the form of the notice.

As regards the period of notice, I concur with the Court of Appeal holding in the said case of **Caledonia Supermarket Ltd Vs Kenya National Examinations Council [2002] 2 EA 357** that "… failure to comply with these mandatory requirements rendered the purported notice(s) null and void and incapable of enforcement." I, however, find it hard to appreciate its further holding in that case that:-

"Faced with what was clearly an illegal eviction, the Appellant could not seek protection from the Business Premises Tribunal because the notice given being an invalid notice deprived the Tribunal of the power to intervene. In any case the Tribunal has no power to issue an injunction. That left the Appellant with only one course of action. It had to seek redress from the High Court. In the case of *Tiwi Beach Hotel Ltd v Julian Ulrike Stamn [1990] 2 KAR 189* where a

protected tenant applied to the High Court for an injunction when, as in the present case, she was threatened with an illegal eviction, Kwach JA put the matter beyond dispute when in the course of his judgment he said at page 200:

'Although Mr. Lakha stressed that both these letters constituted an offer for a lease, in my judgment it is plain beyond argument that they were a demand by a landlord for rent from a tenant in possession. The tenant claimed, quite properly in my view, statutory protection under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act and the Appellant, as landlord of the premises was therefore obliged to comply with the statutory procedure under the Act if it was its intention either to terminate the tenancy or alter its terms to the detriment of the Respondent. If the Appellant thought that those letters were notices, I must disabuse it of that notion by stating at once that they were not in the prescribed form and consequently had no effect on the Respondent's tenancy. For this reason alone the Respondent was entitled to an order restraining the Appellant and the judge was therefore perfectly justified in making the order.'"

With the increase in social and economic regulation by governments and the need for more specialized bodies to implement government policy there has been a vast increase in the establishment of administrative tribunals.The need for specialization and expertise to consider local circumstances as well as the need for the adoption of expeditious, informal, and inexpensive procedures compels the establishment of such bodies by legislation. **Section 77(9)** of the Kenyan **Constitution** recognizes this need.

The Business Premises Rent Tribunal (the Tribunal), established under **Section 11** of the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act** (the Act) is one such body. It is established to deal with disputes arising from the relationship of landlord and tenant in respect of business premises. The preamble to the Act gives the purpose of the Act as being "for the protection of tenants…from eviction or from exploitation." It therefore follows, in my view, that the major issue the Tribunal is established to deal with has to do with the termination of tenancies. **Section 4** of the **Act** stipulates the procedure to be followed by a landlord who wishes to obtain possession of premises from his tenant. It declares that:-

"4(1) Notwithstanding the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be terminated, and no term or condition in, or right or service enjoyed by the tenant of, any such tenancy shall be altered, otherwise than in accordance with the following provisions of this Act.

(2) 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 or service enjoyed by the tenant under, such a tenancy, shall give notice in that behalf to the tenant in the prescribed form.

(3) A tenant who wishes to obtain a reassessment of the rent of a controlled tenancy or the alternation of any term or condition in, or of any right or service enjoyed by him under, such tenancy, shall give notice in that behalf to the landlord in the prescribed form.

(4) No tenancy notice shall take effect until such date, not being less than two months after the receipt thereof by the receiving party, as shall be specified therein: Provided that –

(i) where notice is given of the termination of a controlled tenancy, the date of termination shall not be earlier than the earliest date on which, but for the provisions of this Act, the tenancy would have, or could have been, terminated;

(ii) where the terms and conditions of a controlled tenancy provide for a period of notice exceeding two months, that period shall be substituted for the said period of two months after the receipt of the tenancy notice;

(iii) the parties to the tenancy may agree in writing to any lesser period of notice.

(5) A tenancy notice shall not be effective for any of the purposes of this Act unless it specifies the grounds upon which the requesting party seeks the termination, alteration or reassessment concerned and requires the receiving party to notify the requesting party in writing, within one month after the date of receipt of the notice, whether or not he agrees to comply with the notice."

Section 9 authorizes the Tribunal, after hearing the dispute arising from the notice issued under **Section 4**, to either grant the landlord possession or dismiss his plea.

With profound respect, I cannot see how the Tribunal can deal with the issue of termination of the tenancy without deliberating on the validity or otherwise of the landlord's notice, referred to in the Act as "the tenancy notice." To say as the Court of Appeal said in the **Caledonian Supermarket case** that an invalid notice deprives the Tribunal of the jurisdiction to deal with the issue would, in my respective view, render the Tribunal otiose and leave the determination of the validity or otherwise of the tenancy notices to the tenants and/or their advisers. I cannot find any warrant for such view in the Act

I entirely concur with Justice Simpson's view in **Re Hebtulla Properties Ltd, [1979] KLR 96 at p.100** that "the tribunal is a creature of statute and has only such jurisdiction as has been specifically conferred upon it by the statute." Justice Chesoni echoed the same point at page 104 in the same case when he said that the tribunal "derives its power from the statute that creates it. Its jurisdiction being limited by statute it can do only those things which the statute has empowered it to do. Its powers are expressed and cannot be implied." However, as Madan J said in **Pritam v Ratilal and Another [1992] EA 560 at 564**, "No court can curtail the powers conferred upon a tribunal by a statue." It follows therefore that not even the Court of Appeal can curtail the powers conferred by the Act on the Tribunal.

The jurisdiction of the High court or any of its subordinate courts as well as that of the Tribunal to deal with a landlord and tenant dispute was not an issue in **Tiwi Beach Hotel Ltd Vs Stamn [1991] KLR 658** or in the case of **Caledonia Supermarket Ltd Vs Kenya National Examinations Council [2002] 2 EA 357.** In the former case, the owner of some property at Tiwi Beach sold it to the appellant with vacant possession. For some reason or the other the property was not transferred to the appellant as envisaged. Sixteen months later, the original owner let it to the respondent who knew about the sale. Meanwhile, in a suit by the appellant in Nairobi, the original owner conceded to judgment for specific performance and vacant possession and executed a transfer of the property. The same could, however, not be registered because of the caution the respondent had lodged against the title. The appellant then wrote to the respondent that it was the new owner of the property and demanded increased rent. When the respondent refused to pay, the appellant threatened eviction. The respondent filed a suit in the High Court claiming that the appellant was not the registered proprietor of the suit property and had therefore no right to demand rent or possession from her. She also claimed that she was, under the Act, a protected tenant and that the appellant's demand letters did not constitute notice under **Section 4** of the Act. Contemporaneous with the filing of the suit she sought and obtained an injunction restraining the appellant from evicting her or demanding the increased rent. The above quoted observation was made in the appeal arising from that decision.

There was no issue of whether or not the matter should have been taken to the Business Premises Rent Tribunal. The jurisdiction of the High Court to entertain the matter was also not challenged.

In the **Caledonia Supermarket Ltd** case the appellant who occupied one of the shops on L.R. No. 209/357/1 Dennis Pritt Road Nairobi, was a protected tenant under the Act. After acquiring the premises, the respondent served him with notice to vacate and hand over possession on the ground that it wanted to occupy it for its own use. The respondent refused to vacate and filed a suit in the High Court in which he sought inter alia an injunction to restrain the appellant from evicting it. Contemporaneous with the filing of the suit it also applied for an injunction. The trial Judge dismissed the application for injunction and ordered the appellant to vacate the premises thus provoking the appeal. The Court of Appeal decided the appeal only on the issue of the validity of the notice that the appellants had been served with. It is not clear from the report on that decision whether or not the jurisdiction of the High Court to entertain the matter was challenged. If it was it did not form part of the basis of the Court of Appeal decision.

In the circumstances the observations quoted herein above from the two cases are obiter and therefore not binding on me.

Even if the holding in the **Caledonian Supermarket** case that "**the notice given being an invalid notice deprived the Tribunal of the power to intervene**" was not obiter, that as well as the further holding that the Tribunal has no jurisdiction to grant injunctions would, in my opinion, have been bad law. The Tribunal establishment under the Act is chaired by a lawyer who may be much senior than the Resident Magistrates in the ordinary courts who issue injunctions almost on a daily basis. I cannot therefore see why the Tribunal cannot injuct a landlord who threatens to unlawfully evict his tenant. I therefore concur with the learned trial magistrate that it was not for him to determine the validity or otherwise of the Respondents' tenancy notice. The jurisdiction to determine the validity or otherwise of the tenancy notice is not for the ordinary courts but for the Tribunal established by **Section 11** of **Landlord and Tenants (Shops, Hotels and Catering Establishments) Act Cap 301 laws of Kenya.** Consequently, I dismiss this appeal with costs.

DATED and DELIVERED at Nakuru this 29th day of June 2010.

D. K. MARAGA
JUDGE.