



**MORRIS KINYUA WAITHAKA**

**& OTHERS.....APPELLANTS**

**VERSUS**

**KENYA CREDIT TRADERS LIMITED.....RESPONDENT**

(An appeal from the ruling and orders of the Chairperson, Business Premises Rent Tribunal, the Hon. (Ms.) Mochache D. delivered on the 2<sup>nd</sup> August, 2007 in Business Premises Rent Tribunal at Nairobi Case No. 350 of 2007)

## **J U D G M E N T**

1. This is an appeal arising from the ruling and order of the Business Premises Rent Tribunal delivered on the 2<sup>nd</sup> August, 2007. The genesis of the appeal was a complaint filed by Kenya Credit Traders Limited, (hereinafter referred to as the respondent), under section 12 (4) of the Landlord and Tenant (Shops, Hotels & Catering Establishments) Act. Cap.301. The respondent who was a tenant in premises known as L.R. 209/1413/30 Accra Road, complained that the landlords, Morris Kinyua Waithaka and six others (hereinafter referred to as the appellant), had unilaterally locked the premises without giving the respondent any notice, and the respondent was thereby suffering a great loss of business.
2. The complaint, which was brought under certificate of urgency, was supported by an affidavit sworn by Evanson Njue Ndirangu, the general manager of the respondent. He deponed that the respondent had been tenants of the appellants since 1995 at a monthly rent of Kshs.20,000/= . There was a tenancy agreement which was to expire on 31<sup>st</sup> May, 2012. Although the respondent had paid rent upto and including July, 2007, the appellant unilaterally closed the premises by welding the metal doors to the premises thereby denying the respondent access into the premises.
3. The appellant filed a response to the complaint, through a replying affidavit sworn by Samuel Waithaka Mwaniki, who claimed to be a director of the landlord firm. He deponed that on 24<sup>th</sup> July, 2007 the appellant found the premises abandoned by the respondent, and a notice pinned on the outer door, informing the respondent's customers that the respondent had moved from the premises. Mwaniki swore that the appellant took action to secure the premises from being vandalized or getting into the hands of a third party without the landlord's consent.
4. During the hearing of the complaint, the appellant raised a preliminary objection to the jurisdiction of the Tribunal. The objection was two pronged. Firstly, that the tenancy agreement was for 5 years and 1 month, thereby ousting the jurisdiction of the Tribunal. Secondly, that the tenancy had lapsed through the abandonment of the premises by the respondent. The Tribunal had therefore no jurisdiction as there was no landlord tenancy relationship subsisting.

5. In a ruling delivered the same day, the Tribunal found that the tenancy agreement was for a period of 5 years i.e. from 1<sup>st</sup> June 2007 to 21<sup>st</sup> May, 2012 and was therefore within the Tribunal's jurisdiction. As regards the second ground, the Tribunal found that the notice posted on the door of the premises by the respondent, was directed to its customers and not the landlord. The Tribunal ruled that the landlord tenancy relationship could only be terminated through compliance of section 4 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap.301. The Tribunal therefore overruled the preliminary objection.

6. At the hearing of the complaint, Mr. Ndegwa who appeared for the respondent, submitted that the appellant had blocked the respondent's access to the suit premises by welding the doors thereby interfering with the respondent's rights to access and possession. It was submitted that the appellant was seeking to alter the terms of tenancy without following the proper procedure. It was maintained that the respondent did not abandon the suit premises, but had merely locked the premises using keys which was still in its possession. It was maintained that the notice pinned on the door was intended for the respondent's customers and not for the appellant.

7. For the appellant, it was submitted that it was clear that there was a notice on the door showing that the respondent had moved out of the premises. The Court was urged to investigate the matter and make a finding as to whether the appellant locked the premises after the respondent had abandoned them, or before they were abandoned. The appellant urged the Court to grant it leave to appeal on the issue of jurisdiction.

8. In her ruling, which was also delivered on the same day, the chairperson of the Tribunal ruled that she had no power to grant leave to the appellant to appeal against her ruling on the issue of jurisdiction. She rejected the appellant's plea to have the premises visited. She found that the appellant had fully paid the rent for the premises and the landlord could not act on the notices pinned on the door, which were not meant for it.

9. The chair of the Tribunal further found, that the respondent had neither abandoned the premises nor terminated the tenancy. She therefore concluded that the appellant was in breach of the provisions of section III to the schedule which says that the lessee should have quiet enjoyment of the premises. Accordingly she ordered the appellant to open the premises for the respondent immediately, in default she authorized the respondent to break in and gain access and deduct the costs incurred therefrom from the rent payable.

10. Being aggrieved by the ruling and orders made by the Tribunal on 2<sup>nd</sup> August, 2007, the appellant has lodged this appeal raising 4 grounds as follows:

(i) The Honourable chairperson erred in law and in fact by failing to appreciate that the Honourable Tribunal did not have jurisdiction to hear and determine the complaint thereof, and hence acted without jurisdiction to grant the reliefs given.

(ii) The Honourable chairperson erred in law and in fact without any sufficient cause acted *ultra vires* and granted orders and reliefs which had not been pleaded, applied for and/or canvassed by any party.

(iii) The Honourable chairperson erred in law and in fact in failing to appreciate sufficiently the evidence adduced by the appellants, by way of a replying affidavit sworn on 1<sup>st</sup> August, 2007 hence failure to make findings that the respondent's complaint lacked merit and could not be sustained.

(iv) The Honourable chairperson erred in law and in fact by failing to appreciate sufficiently or at all

the well laid down principles applicable in dealing with the respondent's application/complaint thereof, and even in reinstating the respondent to the suit premises when the tenancy had lapsed and/or been terminated.

11. Pursuant to directions given by the Honourable the Chief Justice under section 79C of the Civil Procedure Act, this appeal was heard by two Judges.

12. Mr. Kamau who argued the appeal on behalf of the appellants, maintained that the Tribunal had no jurisdiction to grant the orders for the appellant to open the premises. He submitted that section 12(4) of the Business Premises Shops Hotels & Catering Establishment Act, under which the respondent lodged his complaint, only deals with issues of a minor character. He maintained that the substantive complaint made by the respondent that is to say that the landlord had unilaterally locked the premises, exceeded the jurisdiction of the Tribunal. Counsel relied on **Re. Hebtulla Properties Limited [1979] KLR 96** in which it was held that the Business Premises Rent Tribunal had no jurisdiction to make an order for recovery of possession on the application of a tenant who had been forcibly dispossessed by his landlord.

13. Mr. Kamau submitted that the respondent having moved from the suit premises, the landlord had taken possession of the premises to avoid the premises being vandalized. Mr. Kamau argued that the jurisdiction of the Tribunal ceased as the tenant abandoned the premises and was no longer in possession. **Republic vs. Nairobi Business Premises Rent Tribunal & Others ex parte Karasha [1979] KLR 147** was also relied upon for the proposition that the Tribunal has no jurisdiction to hear a complaint by a tenant of forcible and wrongful dispossession by his landlord. Mr. Kamau submitted that the orders issued by the Tribunal, having been made without jurisdiction, the same were null and void.

14. Mr. Kamau further submitted that the orders issued by the Tribunal were never pleaded or applied for. This was because the respondent moved the Tribunal by way of a certificate of urgency, to which only an affidavit was annexed. There was no motion or application seeking substantive orders. It was submitted that the Tribunal lacked jurisdiction and therefore ought to have dismissed the reference. It was maintained that in taking possession where the tenancy had lapsed, the Tribunal exceeded its powers. The Court was therefore urged to set aside the orders of the Tribunal reinstating the respondent back into the suit premises.

15. Mr. Ndegwa who appeared for the respondent urged the Court to dismiss the appeal. He maintained that the premises were still in the hands of the respondent as the respondent had locked the premises and still had the keys. No communication was made to the appellant indicating that the respondent had abandoned the premises. The question of dispossession did not therefore arise, the respondent's complaint being only the unilateral action of the appellant of welding the doors thereby denying the respondent access to the premises. It was submitted that the Tribunal had powers to investigate any complaints, and the issues raised by the respondent herein required investigations. Mr. Ndegwa argued that there were no grounds upon which the tenancy of the respondent could be considered lapsed or terminated. He therefore urged the Court to dismiss the appeal.

16. We have carefully reconsidered and evaluated all the arguments and submissions which were made before the Tribunal. We have also considered the submissions which were made before this Court. It is not disputed that the matter before the Tribunal which led to the ruling subject of the appeal before us, was a complaint under section 12 (4) of the Landlord and Tenant (Shops, Hotels & Catering Establishments) Act. It was further not disputed that prior to the complaint, there was a subsisting tenancy agreement between the appellant and the respondent, pursuant to which the respondent had paid rent for the premises upto and including July, 2007.

17. The main issue for determination was whether the respondent abandoned the suit premises thereby severing the landlord/tenant relationship. Secondly, whether the respondent was dispossessed of the suit premises. Thirdly, whether the Tribunal had jurisdiction to hear the complaint which was before it. And finally, whether the orders issued by the Tribunal were proper.

18. Section 12(4) of the Landlord and Tenant (Shops, Hotels & Catering Establishments) Act states as follows:

***“12(4). In addition to any other powers specifically conferred on it by or under this Act, a Tribunal may investigate any complaint relating to a controlled tenancy made to it by the landlord or the tenant, and may make such order thereon as it deems fit.”***

19. The appellant’s complaint as contained in the reference dated 27<sup>th</sup> July, 2007 was as follows:

***“The complaint concerns the landlord/tenant in the closure of its business premises on L.R. 209/1413/30 Accra Road.***

***(i) The landlord has unilaterally locked the premises on LR 209/1413/30 Accra Road – Nairobi.***

***(ii) The action was not preceded by notice at all and is not justified at all costs.***

***(iii) The tenant is losing a great deal of business thereon.***

***Cost of this suit to tenant.”***

20. From the affidavit evidence, it was not denied that the appellant had unilaterally locked the respondent’s premises by welding the metal doors. It was also not disputed that prior to the appellant’s action, the respondent had locked the doors to the premises with the keys and pinned a notice on the door of the premises informing its customers that it had moved its business to some other premises. The appellant justified its actions by maintaining that the respondent had in fact abandoned the premises and the appellant was thereby merely securing the premises from being vandalized or falling into the hands of unauthorized persons.

21. As at the time when the respondent pinned the notice on the door and locked the premises, the tenancy agreement with the appellant was still subsisting and the rent fully paid. The respondent maintained that it never abandoned the premises but was merely relocating its business. This is why the respondent never informed the appellant that it was moving from the premises but merely pinned a notice on the door to advise its clients. The fact that the respondent had locked the door to the premises and pinned a notice on the door advising its customers of the relocation of its business, was not evidence that the respondent had abandoned the premises, more so since the tenancy was still running and rent for the premises was fully paid. The issue of the tenancy having lapsed by abandonment did not arise. We are therefore satisfied that the tenancy relationship was still subsisting.

22. In “Black’s Law Dictionary” possession is defined as “(1) the fact of having or holding property in one’s power; the exercise of dominion over property; (2) the right under which one may exercise control over something to the exclusion of all others; (3) the continuing exercise of a claim to the exclusive use of a material object.” In this case, barricading of the doors to the suit premises did not

give the appellant any rights over the premises nor did it transfer possession of the suit premises from the respondent to the appellant. All it did was to restrict the respondent's access to the premises. Even though the respondent had moved its business and locked the premises, it was still fully in possession of the premises.

23. We find that the appellant's action of barricading the door through welding was a deliberate attempt to deny the respondent access to the premises, which was an interference with the respondent's rights to quiet possession of the premises. In coming to the Tribunal the respondent was seeking the Tribunal's intervention, in having the appellant restrained from breaching the tenancy agreement by denying the respondent access to the premises. Unlike the case of *Re. Hebatulla Properties Limited* where the tenant complained that the landlord had "forcibly taken possession of the premises" and had by the time of going to Court relet the premises, in this case the respondent has not been evicted from the premises but is merely being denied access.

24. In our view, the respondent rightly lodged its complaint to the Tribunal as the respondent was still a tenant in the premises. The complaint relating to the interference of the respondent's access to the suit premises was rightly brought under section 12(4) of the Landlord and Tenant (Shops, Hotels & Catering Establishments) Act. We find the respondent properly lodged its complaint to the Tribunal as the Tribunal had jurisdiction to deal with the respondent's complaint.

25. The question is whether in hearing and investigating the complaint, the Tribunal could grant the orders it issued, which were that the appellant be ordered to open the premises for the respondent immediately, and that the respondent was authorized to break in and gain access, if the appellant did not comply. The answer to this question turns on whether the orders issued amount to orders of recovery of possession of the suit premises by the respondent from the appellant.

26. In our view, the orders issued did not address the issue of exclusive control over the suit premises nor were they orders for recovery of possession of the suit premises from the respondent to the appellant. They were orders specifically addressing the issue of access to the suit premises by ordering the appellant to open the premises (presumably by removing the metal barricades) to enable the respondent gain access to the premises.

27. We therefore come to the conclusion that the appeal before us has no merit. It is accordingly dismissed with costs.

Those shall be the orders of this Court.

**Dated and delivered this 26<sup>th</sup> day of October, 2009.**

**H. M. OKWENGU**

**JUDGE**

**R.N. SITATI**

**JUDGE**

In the presence of: -

L.W. Kamau for the appellant

Wambua holding brief for Ndegwa for the respondent

Eric, court clerk