REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Civil Suit 350 of 2008

ALI MWINYIMVITA.....PLAINTIFF

-VERSUS-

STAR TRANSPORT COMPANY LIMITED.....DEFENDANT

RULING ON A PRELIMINARY OBJECTION

The main cause was initiated by plaint dated 15th December, 2008; and the claim was for rent arrears and vacant possession.

The preliminary objection raised by the defendant was foreshadowed in the very first paragraph of the statement of defence dated 3rd February, 2009: "The defendant shall at the hearing of the suit raise a preliminary objection on a point of law, that the entire suit is incompetent, bad in law and [a] gross abuse of Court process".

Learned counsel ***Mr. Abed*** urged that the tenancy in question is a controlled tenancy, and consequently, that this Court has no jurisdiction to hear the plaintiff's claim; and he submitted that this fact was not in dispute as between the parties.

It is stated in the statement of defence that the defendant held a lease for 20 years and that upon expiry, it was not renewed in writing; renewal was done verbally. It was urged that there does exist between the parties a tenancy that is not reduced into writing – and so it was a controlled tenancy in respect of which the appropriate forum to entertain a dispute is the tribunal.

Learned counsel ***Mr. Khatib***, in his response, submitted that the premises in this case was not covered by the terms of the Landlord and Tenant (shops, Hotels and Catering Establishments) Act (Cap. 301, Laws of Kenya) – and that, consequently, it was not true that this Court lacked jurisdiction in this matter. Although there is at this stage no evidence to support the point, learned counsel said: "what was leased to the defendant was a vacant plot; it is vacant land, it is not a shop for retail or wholesale business". For validity of that point, ***Mr. Khatib*** called in aid the content of para. 9 of the statement of defence, which thus states:

> ***"The defendant will further aver that the portion of land leased to it was an excavated site and was being used as a dumping site. The defendant had to spend a lot of money to remove the waste and level the land".***

Such a premises, learned counsel urged, is not a ***shop*** under the applicable Act of Parliament. Thus, even though the terms of lease would otherwise coincide with those of a controlled tenancy, the agreement regarding the land in question, it was urged, does not fall within the terms of the Act.

Counsel relied on the authority of ***Panesar V. Balbir*** [1972]E.A. 208, where the question was whether the premises in question were for the manufacturing of furniture, or for the sale of the furniture. The Court of Appeal in that case (Mustafa, J. A. at P. 210) thus expressed itself:

> ***"In my opinion the definition of a 'shop' in the Act has to be construed from a common***

sense point of view…….I think that the trial judge was justified, on the evidence before him, in concluding that the suit premises were mainly used for the purposes of manufacturing furniture, not to sell it, and that they were not occupied wholly or mainly for the purpose of a retail or wholesale trade or business…..The long title to the Act refers only to shops, hotels and catering establishments, not to factories or premises for manufacturing goods."

The response of learned counsel ***Mr. Abed*** was that the Court should take the definition of "shop" as set out in the Act, but also bear in mind that a shop need not have walls; he said the defendants operate a transport company – and that should be regarded as a business falling within the concept of "shop". Counsel contended that the ***Panesar*** authority was inapplicable in the instant case.

In the Act, "controlled tenancy" is defined (s.2) as –

"....a tenancy of a shop, hotel or catering establishment –

(a) which has not been reduced into writing ……."

Clearly, this categorisation fits the tenancy in the instant case, save that there other applicable tests as well.

The enterprise in question, to be protected, would have to be a "catering establishment", which means, by s. 2(1) of the Act –

"any premises on which is carried out the business of supplying food or drink for consumption on such premises, by persons other than those who reside and are boarded on such premises".

Or the enterprise would have to be a "hotel", which means (s.2(1) of the Act) –

"any premises in which accommodation or accommodation and meals are supplied or are available for supply to five or more adult persons in exchange for money or other valuable consideration".

Or, alternatively, the undertaking would have to be a "shop", which means (s.2 (1) of the Act) –

"Premises occupied wholly or mainly for the purposes of a retail or wholesale trade or business or for the purpose of rendering services for money or money's worth."

Although the defendant, after pleading that "the portion of land leased to it was an excavated site", only adds that there was no need for a walled structure to constitute the same into a "shop", or "hotel", or "catering establishment", it has yet to arrive at the state of evidence which will inform the Court as to the nature of the undertaking which was being pursued at that site. It is also not possible, at this stage, for the plaintiff to inform the Court of the facts relating to the enterprise in question. Therefore, this Court is not at this stage in a position to ascertain that the defendant's pursuit was in the nature of a shop, a hotel or a catering establishment.

It is quite clear that this is an issue which the Court cannot decide judiciously unless certain basic evidence is given. For this very reason, it follows that the question ill-suits the preliminary objection on a point of law.

Since the rights of the parties can only be justly determined after a proper hearing of the case on both sides, unless there are clear circumstances that persuade the Court one way or the other, the policy position is to be taken that suits once filed, are to be preserved as much as possible. The defendant has not convinced this Court that the instant suit is one not to be preserved.

Consequently, the preliminary objection is overruled. The suit shall be heard in the normal manner, and, from the same, the rights of the parties shall be determined.

Orders accordingly.

DATED and **DELIVERED** at **MOMBASA** this 6th day of November, 2009.

J. B. OJWANG

JUDGE

Coram: ***Ojwang, J.***
Court Clerk: ***Ibrahim***
For the Plaintiff: ***Mr. Khatib***

For the Defendant: **Mr. Abed**