



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Civil Appeal 74 of 2003

STANLEY KABIRA MWITHIMBU APPELLANT

VERSUS

JULIUS MWORIA RESPONDENT

(An appeal from a judgment of N. Ithiga S.P.M. Meru

dated 18th July 2003

JUDGMENT

This is an appeal from the judgment of Mr. Njeru Ithiga, SPM delivered at Meru on 18th July 2003. In the suit giving rise to this appeal, the appellant sought orders of permanent and mandatory injunction against the respondent.

The appellant and the respondent entered into an oral lease agreement in which the former leased to the latter premises located on Plot No. Meru block 11/173 at a monthly rent of Kshs. 2,000.

In the month of September, 2001 the appellant learnt that the respondent was making permanent adjustments to the leased premises. The appellant filed a suit and in the meantime obtained temporary restraining orders. But when the suit was heard the trial court found that the appellant did not prove the case against the respondent and dismissed the suit with costs to the respondent. The appellant was not satisfied and promptly filed the present appeal citing three grounds, which can be condensed into two and summarized as follows:-

- (i) the court having found that there was construction of a permanent structure on the leased premises ought to have given judgment to the appellant
- (ii) the court misconstrued the appellant's evidence.

The appellant testified and called one witness. The respondent did not call any witness. It was the appellant's case that the leased premises is jointly owned by himself and two others, Francis and Munene. But he (the appellant) manages it. The oral lease was in January 1979. The respondent used the premises initially for soda distribution. The appellant explained how on learning of the construction by the respondent he wrote to him asking him to stop. The respondent responded by stating that he was merely improving the premises.

The appellant then instituted a suit. The appellant's testimony was confirmed by his witness, Wilson M'Amwathi. On his part the respondent confirmed the existence of an oral lease. He also confirmed that he is engaged in butchery business in the leased premises. He, however, denied constructing a permanent structure in the leased premises. He maintained that all he did was to erect a counter for his butchery

which, in his view, amounted to an improvement of the premises.

The foregoing are the facts of this dispute which in my considered opinion are fairly straight forward. It is common ground that there was a tenant – landlord relationship consummated by an oral agreement.

The appellant urged the court to find that the respondent breached the tenancy by erecting a permanent structure within the leased property without first obtaining his approval. The respondent argued that the lower court had no jurisdiction to determine a tenancy under Cap 301. That, as a result, the suit was incompetent and ought to have been struck out. These form the two broad issues raised in this appeal, namely whether the trial court had jurisdiction to entertain the suit and whether the respondent was in breach of an unwritten agreement.

Regarding the issue of jurisdiction the respondent argued a preliminary point of objection in that regard. The court found that it had jurisdiction, thereby overruling the objection. Was the tenancy created by the parties a controlled tenancy under the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act? (the Act). Section 2(1) of the Act defined a controlled tenancy to mean 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-**
 - (i) is for a period not exceeding five years; or**
 - (ii)**
 - (iii)**”

Broadly speaking there can only be two types of creating a controlled tenancy, namely, in writing and orally. The premises in question can be described as a shop in terms of the definition of a shop in section 2(1) of the Act. The parties in this dispute had entered into an oral tenancy which is recognized by the Act. I come to the conclusion that the relationship between the parties was governed by the Act. Being oral, the terms and conditions of the lease in question are those found in the schedule.

It is an implied term that the lessee shall have quiet enjoyment of premises provided that he too complies with express or as in this case implied conditions. It is also an implied condition that the lessor shall not use the premises in a way which would render them unfit for the purpose for which they were let.

The appellant’s only complaint against the respondent is that the latter was putting up permanent structure inside the leased premises which would transform the premises. The respondent, of course, denied this. However, the trial court on visiting the *locus in quo* found; inter alia, that:-

“Court is shown the permanent walls with white ceramic wall tiles inside the butchery The walls are about 3 feet tall (sic).”

The trial court, therefore, confirmed that there were walls erected inside the butchery. The respondent concedes that before starting to construct the walls he did not obtain the appellant’s permission. By proceeding to build the walls in the leased premises, without the lessor’s permission, the respondent was in breach of implied term and condition.

The next question is whether the trial court had jurisdiction to determine the dispute. The preamble to the Act provides:-

“An Act of Parliament to make provision with respect to certain premises for the protection of tenants of such premises from eviction or from exploitation and for matters connected therewith and incidental thereto.”

The enactment was clearly intended primarily for the protection of the vulnerable tenants from the exploitation of the unscrupulous landlords. It is a tenants' legislation. Disputes arising from a controlled tenancy must of necessity be resolved by the forum created deliberately for that purpose by the Act.

The Tribunals' powers enumerated under sections 9 and 12 of the Act, in my view, are wide enough to bring the dispute herein within its purview. Regulation 8 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) (Tribunal) (Forms and Procedure) Regulation, envisages a power of the Tribunal to issue prohibition orders in form F in the schedule.

For these reasons, I come to the conclusion that the court below erred by holding that it had jurisdiction to determine a dispute arising from a controlled tenancy. Not even the High Court has such powers unless on appeal.

For the reasons stated the appeal is allowed, the judgment appealed against is set aside with costs to the respondent.

Dated and delivered at Meru this 17th day of April 2008.

W. OUKO

JUDGE