Kenya Airports Authority v Paul K. Mugeke t/a Kairi Tours And Safaris (Environment and Land Appeal E041 of 2021) [2022] KEELC 13699 (KLR) (21 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13699 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL E041 OF 2021

EK WABWOTO, J

OCTOBER 21, 2022

BETWEEN

KENYA AIRPORTS AUTHORITY ..... APPELLANT

AND

PAUL K. MUGEKE T/A KAIRI TOURS AND SAFARIS ..... RESPONDENT

(Being an Appeal against the Judgment and Orders of Honourable Vice – Chair Gakuhi Chege delivered on 21st May 2021 at Business Premises Rent Tribunal Case No. 685 of 2018)

JUDGMENT

1. This Appeal arises from the decision of the Business Premises Rent Tribunal (herein after referred to as The Tribunal) which made a finding to the effect that the relationship between the Appellant and the Respondent herein was that of Landlord and Tenant within the meaning of Section 2 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* CAP 301 of the Laws of Kenya and thus restraining the Appellant from terminating the Respondent's tenancy in Jomo Kenyatta International Airport (JKIA) Terminal 1A.

2. The Tribunal's decision was rendered by Honourable Gakuhi Chege. (Vice Chair) on May 21, 2021.

3. By a memorandum of Appeal dated June 16, 2021, the Appellant appealed the tribunal's decision on the grounds that:

    a. The Learned Vice-Chair misapprehended and misinterpreted the law in failing to distinguish between the leases and licenses as distinctive modes of occupation that are legally exclusive of each other and thus erred in fact and law.

    b. The Learned Vice-Chair erred in law and fact by failing to uphold the contractual intention of the Landlord/Respondent (hereinafter the "Respondent") and the Tenant/Applicant

(hereinafter the "Applicant") to create an occupational agreement in the form of a licence as opposed to a lease given the circumstances at the particular location of the airport.

c. The Learned Vice-Chair erred in law and fact by making findings that were inconsistent with the evidence adduced and placed on record by the Respondent to the effect that the nature of operations at the particular location of the subject Airport premises necessitated the Respondent to have high levels of control and regulation of occupiers, including the Applicant, for purposes of enhancing security and ambience of an International Airport as is contemplated by licences.

d. The Learned Vice-Chair erred in law and fact by failing to appreciate and uphold that the Respondent had a statutory discretion to grant either an occupational licence or a lease under the *Kenya Airports Authority Act* No. 3 of 1991 (hereafter the "KAA Act") particularly under Section 12 (3) (e) depending on the location and circumstances at the subject Airport.

e. The Learned Vice-Chair misdirected himself in fact and law in holding that the provisions of the KAA Act empowering the Respondent to grant occupational licences were in conflict with the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Cap 301 rendering them null and void whereas the KAA Act grants the Respondent the discretion to grant either occupational licences, or alternatively, leases including controlled tenancies.

f. The Learned Vice-Chair misdirected himself in holding that licences are within the scope of controlled tenancies and particularly that the failure of CAP 301 to explicitly exclude licences from the definition of controlled tenancies under Section 2 of the said CAP 301 places licences within the ambit of controlled tenancies.

4. Thus the Appellant has sought the following orders:

a. That the appeal be allowed.

b. That the Judgment and Orders of Honourable Vice Chair Gakuhi Chege at Business Premises Rent Tribunal Case No. 685 of 2018 (Nairobi) be set aside and an Order be made dismissing the Reference/Suit with costs.

c. That the cost of this Appeal be provided for.

d. That this Honourable Court be pleased to make such further and any other orders as it may deem just in the circumstances.

Courts directions

5. On May 9, 2022, with the consent of the parties, this Court directed that the Appeal be canvassed by way of written submissions. Parties were granted time to file and exchange their written submissions. Both parties complied. The Appellant filed its written submissions dated July 4, 2022 through M/S Lesinko, Njoroge & Gathogo Advocates while the Respondent filed their submissions dated July 18, 2022 through M/S Ngugi Mwaniki & Co. Advocates.

The Appellant's submissions

6. Counsel for the Appellant outlined five issues for consideration by the Court. These included the following; -

a. Whether leases and licenses are distinctive modes of occupation that are generally exclusive of each other.

b. Whether licenses are within the scope of controlled tenancies.

c. Whether the Appellant granted a statutory occupational license that the Respondent accepted.

d. Whether the Honourable Tribunal had jurisdiction to hear and determine the Reference as it did.

e. Whether the Appellant is entitled to costs.

7. On the first issues, the Appellant submitted that Section 2 of the *Land Act* No. 6 of 2012 defined a "lease" as the " the grant, with or without consideration by the proprietor of land the right to exclusive possession of his or her land and includes the right so granted and the instrument granting it..." while a "licence" is means "a permission given by the...proprietor in respect of private or community land or lease which allows the licensee to do some act in relation to the land or the land comprised in the lease which would otherwise be a trespass". It was further submitted that common law has always affirmed the distinction between these two separate modes of occupation since leases and licences are distinctly not the same mode of occupation and the distinction is discerned from the circumstances of the occupation. The cases of *Merchant vs Charters* [1977] 1 WLR 1 1181,1185 and *Mark Gerlad Brierley & 2 Others vs Driftwood Beach Club* [2013] were cited in support of this position.

8. On whether the licences are not within the scope of controlled tenancies, Counsel stated that licences are not within the ambit of controlled tenancies as defined under Section 2 (1) of CAP 301. Counsel also referred to Section 11 of CAP 301 which outlines the jurisdiction of the Tribunal to determine whether any tenancy is a controlled tenancy which does not include licences.

9. The Appellant also submitted that under the *Kenya Airports Authority Act* (KAA Act) the Appellant had a clear and unfettered statutory power to grant an occupational license depending on the circumstances. Counsel made reference to Sections 12 (3) (e) (f) (i) of the KAA Act.

10. The Appellant further submits that the notification of award as was the case herein, does not satisfy the prerequisite element of "exclusive possession" as required for leases neither does it create a tenancy. and or controlled tenancy. confusion might have arisen because the Respondent's were not the Appellant's initial landlord.

11. The Appellant concluded its submissions by praying that his Appeal be allowed with costs.

The Respondent's submissions

12. The Respondent outlined three grounds for consideration by this Court;

a. Whether the Tribunal erred to entertain the matter.

b. Whether there exists a Landlord/Tenant relationship between the Appellant and Respondent.

c. Who bears the costs of the suit?

13. The Respondent submitted that the Tribunal had jurisdiction to hear the matter in view of Section 12 CAP 301. Counsel also stated that the Tribunal had the power to determine the kind of tenancy that existed between the parties and make appropriate orders which it subsequently did.

14. The Respondent also submitted that there existed a landlord tenant relationship between the parties when the Respondent first established his Tours and Safaris business at the Appellant's premises.

Counsel submitted that the Appellant had for instance orally promised the Respondent a lease for a period of five years and on the said promises the Respondent invested over Ksh 500,000/- to build his office for the business.

15. It was also submitted that the letter of award being relied upon by the Appellant, only gave the Respondent one year to conduct his business and the same was never renewed.

16. On costs, it was submitted that the same should be borne by the Appellant.

17. In conclusion, the Respondent urged this Court to find that the Tribunal had jurisdiction to handle the matter and that there existed a landlord tenant relationship and further that the Appeal be dismissed with costs.

Analysis and Determination.

18. I have considered the reference before the Tribunal, the evidence tendered before it, the judgment of the Tribunal, the grounds of Appeal in this Appeal and the rival submissions filed in respect of this Appeal. I have also considered the relevant statutes and jurisprudence on the key issues in this Appeal. In my humble view, the main issues for determination as follows: -

    i. Whether the Tribunal had jurisdiction to hear the matter herein.

    ii. Whether there existed a landlord and tenant relationship between the parties herein.

    iii. Whether the Appeal herein is merited.

19. I will handle all the issues sequentially with the salient issue being whether there existed a landlord and tenant relationship between the parties herein.

20. This being a first Appeal, this court is required to re-evaluate the evidence tendered before the Tribunal and make its own findings and conclusions as was held in the case of *China Zhingxing Construction Company Ltd vs Ann Akuru Sophia* [2020] eKLR and also *Selle vs Associated Motor Boat Company Ltd* [1968] EA 123.

21. The High Court in the China Zhongxing Construction Company Ltd case (supra) cited the Court of Appeal for East Africa in *Peters vs Sunday Post Limited* [1958] EA 424 where Sir Kenneth O'Connor stated as follows:

> "It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt –vs-Thomas (1), [1947] A.C. 484."

22. From the foregoing, I just wish to reiterate that the mandate of this court in the present instance is to evaluate the factual details of the case as presented in the trial court, analyze them and arrive at an independent conclusion, bearing in mind that the trial court had the advantage of seeing and hearing the parties.

23. The jurisdiction of the Business Premises Rent Tribunal is provided for under Section 12 of CAP 301 which provides as follows:

1. A Tribunal shall, in relation to its area of jurisdiction have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in addition to and without prejudice to the generality of the foregoing shall have power—

   a. to determine whether or not any tenancy is a controlled tenancy;

   b. to determine or vary the rent to be payable in respect of any controlled tenancy, having regard to all the circumstances thereof;

   c. to apportion the payment of rent payable under a controlled tenancy among tenants sharing the occupation of the premises comprised in the controlled tenancy;

   (d) where the rent chargeable in respect of any controlled tenancy includes a payment by way of service charge, to fix the amount of such service charge;

   (e) to make orders, upon such terms and conditions as it thinks fit, for the recovery of possession and for the payment of arrears of rent and mesne profits, which orders may be applicable to any person, whether or not he is a tenant, being at any material time in occupation of the premises comprised in a controlled tenancy;

   (f) for the purpose of enabling additional buildings to be erected, to make orders permitting landlords to excise vacant land out of premises of which, but for the provisions of this Act, the landlord could have recovered possession;

   (g) where the landlord fails to carry out any repairs for which he is liable—

      (i) to have the required repairs carried out at the cost of the landlord and, if the landlord fails to pay the cost of such repairs, to recover the cost thereof by requiring the tenant;

      (ii) to pay rent to the Tribunal for such period as may be required to defray the cost of such repairs, and so that the receipt of the Tribunal shall be a good discharge for any rent so paid;

      (iii) to authorize the tenant to carry out the required repairs, and to deduct the cost of such repairs from the rent payable to the landlord;

   (h) to permit the levy of distress for rent;

   (i) to vary or rescind any order made by the Tribunal under the provisions of this Act;

   (j) to administer oaths and order discovery and production of documents in like manner as in civil proceedings before the High Court, to require any landlord or tenant to disclose any information or evidence which the Tribunal considers relevant regarding rents and terms or conditions of tenancies, and to issue summons for the attendance of witnesses to give evidence or produce documents, or both, before the award costs in respect of references made to it, which costs may be exemplary costs where the Tribunal is satisfied that a reference to it is frivolous or vexatious;

   (l) to award compensation for any loss incurred by a tenant on termination of a controlled tenancy in respect of goodwill, and improvements carried out by the tenant with the landlord's consent;

(m) to require a tenant or landlord to attend before the Tribunal at a time and place specified by it, and if such tenant or landlord fails to attend, the Tribunal may investigate or determine the matter before it in the absence of such tenant or landlord;

(n) to enter and inspect premises comprised in a controlled tenancy in respect of which a reference has been made to the Tribunal.

(2) A Tribunal shall not have or exercise any jurisdiction in any criminal matter, or entertain any criminal proceedings for any offence whether under this Act or otherwise.

24. It is clear that in exercising the powers conferred under the Landlord and Tenants, Shops, Hotels, and Catering Establishments Act, the Tribunal must restrict itself to the powers conferred under section 12 aforesaid. In *Pritam vs. Ratilal and Another* Nairobi HCCC No. 1499 of 1970 [1972] EA 560 the court stated as hereunder:

> " As stated in the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* itself, it is 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 scheme of this special legislation is to provide extra and special protection for tenants. A special class of tenants is created. Therefore, the existence of the relationship of landlord and tenant is a pre-requisite to the application of the Act and where such relationship does not exist or it has come to or been brought to an end, the provisions of the Act will not apply. The applicability of the Act is a condition precedent to the exercise of jurisdiction by a tribunal; otherwise the tribunal will have no jurisdiction. There must be a controlled tenancy as defined in section 2 to which the provisions of the Act can be made to apply. Outside it, the tribunal has no jurisdiction." [Emphasis mine].

25. Section 12(1) is clear that the Act provides for the powers of the Tribunal "to do all things which it is required or empowered to do by or under the provisions of this Act" and is not concerned with any other Act. This position is reinforced by the fact that the preamble of the Act provides that it is:

> " 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."

26. In the instant Appeal the Appellant argued that the Tribunal did not have jurisdiction to hear the matter since there existed a licence agreement between the parties. However, the Tribunal dismissed the said objection on the basis that the letter of award was for a one-year period which expired on 31st December 2017 and there was no renewal and hence in the circumstances their existed a controlled tenancy which is defined to include a period not exceeding five years.

27. Having reviewed the evidence of the parties that was tendered before the Tribunal, it is evident that the letter of award that was issued to the Respondent was not renewed and, in any event, the same had a clause that it was valid for a period of one year with effect from January 1, 2017. The said letter also had a clause vi which stipulated that;

> " the licence agreement shall be signed by the parties within twenty-eight days from the date of acceptance bit not earlier than fourteen days from the date of this letter" There was no evidence of any agreement signed within the stipulated period and in my view the lack of a formal agreement as was envisaged by the parties can only be construed to the the protection

of the Respondent as is set out in the preamble of CAP 301. In the circumstances, it is the finding of this court that the Tribunal had the jurisdiction to hear the matter from the onset.

28. The second issue is whether there existed a landlord tenant relation between the parties. The Appellant had argued that there was a licence between the parties and hence there could not have existed a landlord tenant relationship. However, the Tribunal held otherwise and stated that CAP 301 does not exclude licences and the relationship of the parties was that of the landlord and tenant within the meaning of Section 2 of CAP 301.

29. A Controlled Tenancy is defined under section 2(1) (a) of the Act as follows:

    i. Which has not been reduced into writing; or

    ii. Which has been reduced to writing and which-

        a. is for a period not exceeding five years; or

        b. contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or

        c. Relates to premises of a class specified under subsection (2) of this section.

30. It is not clear from the record, the circumstances that qualified the Tenant as a controlled tenant. What is clear, however, is that there is no written agreement between the Appellant and the Respondent, since what was produced was a notification of award dated November 15, 2016 which had clause vi that required a licence agreement to be signed by the parties within 28 days and not less than 14 days from the date of its execution. It is evident that none was signed and in lack of a written agreement it can only be concluded that the tenancy was deemed as a controlled tenancy within the meaning of the Act.

31. The purpose for the enactment of Cap 301 is that it is:

> 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.

32. Keeping the spirit and letter of this law in mind, I find that the Learned Vice Chair of The Tribunal did not err in finding that their existed a landlord and tenant relationship between the Appellant and the Respondent.

33. On costs, I am guided by the provisions of Section 27 (1) of the *Civil Procedure Act* (Cap 21) and the decision in *Jasbir Singh Rai & 3 others Vs Tarlochan Singh Rai & 4 others* SC. Petition No. 4 of 2012: [2014] eKLR. The Supreme Court held that costs follow the event and that the Court has the discretion in awarding such costs.

34. In *United India Insurance Co. Ltd Vs East African Underwriters (Kenya) Ltd* [1985] EA 898 it was held that:

> " The Court of Appeal will not interfere with a discretionary decision of the Judge Appealed from simply on the ground that its members, if sitting as at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly that he took account of considerations of which he should not have taken

account; fourthly, that he failed to take account of consideration of which he should have taken account of; or fifthly, that his decision albeit a discretionary one is plainly wrong."

35. In the instant case, the Learned Vice Chair had awarded the Respondent costs of Ksh 50,000 which were reasonable in my view and I find no reason to interfere with the said decision.

36. Before I conclude, I wish to state that the Appellant to a greater extend was an author of its own misfortune. Had the Appellant prepared a separate agreement from the notification of award dated November 15, 2016 pursuant to clause vi of the said notification clearly detailing the said agreement as a licence agreement, I would have arrived at a different decision.

37. In conclusion, I find the Appeal herein is unmerited and the same is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF OCTOBER, 2022.

E.K. WABWOTO

JUDGE

In the presence of: -

Mr. Omondi h/b for Dr. Kabau for the Appellant.

Ms. Waweru h/b for Mr. Gachomo for the Respondent.

Court Assistant; Caroline Nafuna

E.K. WABWOTO

JUDGE