REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI

Civil Appeal 47 of 2002

MARK GERALD BRIERLEY

KAREN BRIERLEY

SCUBA DIVING MALINDI LTD ………...…… PLAINTIFFS

VERSUS

THE DRIFTWOOD BEACH CLUB LTD ……... ..DEFENDANT

R U L I N G

By a plaint dated and amended on the 31st day of March 2006, the Plaintiff averred, *inter-alia;*

1. That the defendant was the registered proprietor of all those pieces of land situated along Silversands Beach. That on those pieces of land the defendant has caused to be developed a complex comprising of a hotel, restaurant, swimming pool, diving centre and other amenities and popularly known as Driftwood Beach Club.

2. That sometimes in September 2001, the 1st and 2nd plaintiff purchased all the shares held by one Frank Scholler and Julia Sekenet Kiolel, the then directors of the 3rd plaintiff at a price of US$ 50,000. The third plaintiff was incorporated by its esterwhile directors to take over the business of a diving centre operated and owned by one of the said sellers.

3. Prior to the completion of the sales, the 1st and 2nd plaintiffs informed the defendants' directors Bob Cronchey, Rodgers Sylvester and Phillip Chai – the latter who doubled as the hotel manager – that they intended to take over the said company and the business. The defendants encouraged the plaintiffs to proceed with the transaction and in deed assisted the plaintiffs to obtain all the requisite licenses including their work permits.

4. The tenancy agreement between the 3rd plaintiff and the defendants was controlled.

5. At the time the plaintiff negotiated the sale, the proprietor was entitiled inter-alia to pay monthly rent. That during the high seasons the plaintiff was paying monthly rent of sh.18,000,000/= but during the low season the defendant got a rebate and paid sh. 6,000/=

6. After purchase of the company the 1st and 2nd plaintiffs took residence in the residential section of the Diving Centre and commenced operations. The third plaintiff continued their operations and invested in the improvement of the equipment used at the centre. Among other things, undertook renovation by painting, installing air conditioners, repair of the makuti roof, improved communication between the radio in use in the boat and the base station and installed satellite dish.

7. That at all material times the 3rd plaintiff was a protected tenant paying monthly rent of sh. 18,000/= during January, February, March, April, August, September, October, November and December. The 3rd plaintiff paid sh.6,000/= only during the reminder of the year.

8. By a letter dated 21st November 2001 the defendant unlawfully purported to alter the terms of the tenancy without complying with the requirements of the Landlord and Tenants (Shops, Hotels and Catering Establishments Act Cap 301) Laws of Kenya

plaintiff rejected the purported changes save for the monthly rent.

9. Upon rejecting the defendants' offer, the defendant commenced a deliberate scheme to evict the plaintiff or only to frustrate and pester them in absconding the promises.

10. On or about the 16th day of July 2002, the plaintiff received all letter dated 15th May 2002 giving notice to vacate the Diving Centre. This was followed by the defendant's advocates letter dated 18th May 2002, requiring the plaintiffs to quit and vacate the said centre by 20th May 2002.

11. By the night of 19th May 2002, the defendants removed all the markings advertising the 3rd plaintiff's business from the club's bulletin board. All markings and signs relating to the diving centre, informed the plaintiff that the centre had been shut down.

Against that background, the plaintiff filed this suit claiming loss and damage *inter-alia*. In addition thereto the plaintiff sought injunction restraining them from removing the returned markings advertising the plaintiff's business from the club's bulletin board, and all areas where the same was posted before they were removed on the night of 19th May 2002.

By a further amended dated 5th June 2006, the defendant contended by way of pleadings:

1. That the 1st and 2nd plaintiffs did not purchase shares in the 3rd plaintiff in September 2001.

2. That in fact the 1st and 2nd plaintiffs purchased some diving equipment from, Mr Scholler, the former licensee of the premises.

3. The defendant denied that the 1st and 2nd plaintiffs were encouraged by the defendants directors to purchase the alleged shares. That the 3rd plaintiff, in any event, did not exist or carry the alleged business in the suit premises.

4. The defendant denied that it was its (defendants) responsibility to procure the necessary licenses for the business.

5. The defendant averred that in fact it a was requirement and a condition of the granting of the operating licenses to the 1st plaintiff, that the 1st plaintiff procure the necessary work permits and fulfil any other immigration requirements, a condition that the 1st plaintiff has failed to fulfil to date.

6. The defendant denied that any renovation works was ever undertaken by the 1st and 2nd plaintiffs.

7. The defendant denied that the 3rd plaintiff is or was protected tenant or a tenant of the defendant at all.

8. The defendant denied the existence of letters of 21st November 2001 purported to alter the terms of the 3rd plaintiffs tenancy as alleged by the plaintiffs.

9. The defendant denied that the Landlord and Tenants (Shops, Hotels and Catering Establishment) Act Cap 301 Laws of Kenya was applicable to the circumstances of the tenancy.

10. The defendant denied that it systematically subjected the plaintiffs to annoyance, or frustration or pestering – the plaintiffs thereby making it impossible for the plaintiff to enjoy quiet enjoyment of the suit property.

11. The defendant repeated that the plaintiffs are licensees.

By way of a counter-claim the plaintiff averred:

1. That on or about September 2001, the plaintiffs permitted the 1st defendant to enter its premises aforesaid as a licensee and operate therefrom Scuba Diving Business.

2. That the agreed terms and conditions of the license were reduced in writing in a letter of officer in or about November 2001 but the 1st plaintiff rejected the same and demanded to be offered a lease.

3. That on 20th May 2002, the plaintiff terminated the said licence granted to the 1st defendant and demanded vacant possession of the suit premises.

4. That at a date after March 2002, the 3rd defendant claimed to have entered the suit premises and have continued to claim possession by virtue of the 1st defendants occupation. That by reason of the continued occupation up to and including 5th July 2003 there is due and owing a sum of Sh. 204,000/= by way of license fee.

5. That accordingly, the defendants are trespassers on the suit property and the plaintiff's thereby claim vacant possession.

6. That the High Court has jurisdiction to entertain the plaintiffs' counter-claim.

7. **The defendant prayed that the plaintiffs' suit and the entire prayers in the further amended plaint be dismissed with costs**.

At the hearing of the suit, Mr Odera for defendant raised a preliminary point of law that the High Court lacks the requisite jurisdiction to entertain a suit founded upon the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act (Cap 301) Laws of Kenya.

He argued that the said Act has an elaborate procedure for settling disputes. In the event the procedure is not followed it is incumbent upon the tenant to file a reference. That the tenant herein failed to file a reference and instead chose to file a suit. In this regard I was referred to **389/95 LAVINGTONE GREEN BOOKSHOP LTD – VS – JOHN NJOROGE KINUTHIA CIVIL CASE NO. 389 OF 1995 (C.A.) (unreported).**

That the High Court has only appellate jurisdiction. The decision of the High Court, while exercising its appellate jurisdiction, is final and shall not be subject to further appeal.

On the premises, original jurisdiction of the High Court cannot be invoked in respect of matters averred by the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act (Cap 301) Laws of Kenya. In this regard, I was referred to the authority of **NORTH COAST RIDGE – V – TAIB: (2003) 2 E.A. 644.**

Mr Ole Kina, for the plaintiff, on the other hand contended that the High Court has jurisdiction to determine whether the subject tenancy was controlled or a license. That is a matter of law. In this connection I was referred to the authority of **MAWANLY – VS – CHATERS (1977) 3 ALL.ER 918.**

That even in circumstances where the tenancy is controlled by virtue of Cap 301, the High Court has original jurisdiction to hear and determine a dispute regarding the validity of the notice served on the tenant by a landlord.

If the notice is invalid the tribunal has no jurisdiction. In that event it is the High Court which has original jurisdiction. In this regard I was referred to the authority of **TIWI BEACH HOTEL LTD & JULIANE ULRIKE STAMM & CALEDONIA SUPERMARKET LTD – VS – KENYA NATIONAL EXAMINATION COUNCIL. (2000) 2 EA – 257.**

That all said and done, it would not be possible for the court to rule on the issue of jurisdiction because the facts are not agreed upon. They are in dispute. In this regard I was referred *inter-alia* to the authorities of **MUKHISA BISCUIT – VS – WEST END DISTRIBUTORS LTD (1969) EA 69** and **PARKLANDS PROPERTIES – VS – PATEL (1981) KLR Page 52,** AND **SAHEB – VS – HASSANLY (1984) KLR 186.**

Last but not least that the Business Rent Tribunal has jurisdiction when the parties are acting within the law. That once all the parties step out of the law it is only the High Court that is seized of jurisdiction.

LAW J.A. in MUKHISA BISCUIT – VS – WEST END DISTRIBUTORS (1969) (supra) defined a preliminary point of law as consisting of points of law which has been pleaded, or which arises by clear implications out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are on objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the despute to **SIR CHARLES NEWBOLD.** P had this to say in part on the same:

"…………**Preliminary objection is in the nature of what used to be a *demurrer*. It raises pure points of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any facts has to be ascertained or if what is sought is the exercise of judicial discretion…………."**

I have carefully analysed the pleadings in the light of submissions and arguments made by both counsel keeping in focus the issue at stake – whether the High Court has original jurisdiction to deal with landlord tenant relationship.

In my view, the basic issue is whether the plaintiffs were tenants or licensees in respect of the suit premises. While the plaintiffs contend that they are tenants, the defendant maintain that they were licensees. In view of the disagreement as to the status of the plaintiffs and defendants with regard to the subject premises it is necessary to ascertain the relationship between the parties by adducing evidence at the hearing. In the premises, this matter does not constitute a pure point of law because the facts regarding the actual relationship between the parties has to be ascertained.

Accordingly, the preliminary objection fails and is dismissed. Costs shall be in the cause.

Dated and delivered at Malindi this 20th Day of JUNE 2007

N.R.O. OMBIJA

JUDGE

Mr.Ole Kina for plaintiff.

Mr.Odera for defendant.