

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL 110 OF 2005

ISMAIL GAFUR REHEMTULLA.....APPELLANT

VERSUS

FATMA AHMED ABDALLA.....RESPONDENT

JUDGMENT

This appeal raises one major issue which is whether or not a tenancy under the Rent Restriction Act is terminated on the expiry of a termination notice given by the landlord if no reference is filed by the tenant.

This is how this issue arose: One ISMAIL GAFUR RAHEMTULLA (the deceased) who died in March 2005 was at all material times a tenant of the Respondent in the residential premises on Plot No.661/XII/MI commonly known as Tononoka Flats in Mombasa. On or about the 5th June,2004 the Respondent through her agents, Idime Enterprises Ltd, gave the deceased one calendar year's quit notice. He died before vacating the premises.

At the expiry of the notice his widow, the Appellant, neither made any reference to the Rent Restriction Tribunal (the Tribunal) nor vacate the premises. The Respondent therefore filed Mombasa RMCC No.2434 of 2005 against the Appellant and sought vacant possession, mesne profits and costs. The Appellant filed a defence denying that the Respondent was the registered owner of the premises; that the expiry of the quit notice terminated the tenancy; and challenged the jurisdiction of the Resident Magistrate's Court to entertain the claim.

The Respondent did not think that was a bona fide defence and applied for summary judgment. After the application was argued the Principal Magistrate allowed it and ordered the Appellant to vacate. That provoked this appeal which as I have said raises only one issue of whether the expiry of the quit notice terminated the tenancy.

Arguing the appeal on behalf of the Appellant Mr. Master submitted that unlike under the **Landlord & Tenant (Shops, Hotels & Catering Establishments) Act** a quit notice under the **Rent Restriction Act** does not terminate a tenancy whether or not a tenant makes a reference to the Tribunal. He further submitted that the deceased's widow, the Appellant, is as per the definition of a tenant in section 2 of the **Rent Restriction Act** a tenant duly protected under that Act and that as the purported quit notice did not terminate her tenancy the Respondent should have taken her complaint to the Tribunal and not the ordinary courts. He concluded that the learned Principal Magistrate therefore erred in not only entertaining the matter but in also failing to note that the defence raised triable issues. He urged me to allow this appeal notwithstanding the fact that the Appellant has, pursuant to the summary judgment, been evicted from the premises.

For the Respondent Mr. Kaburu submitted that the Appellant having not opposed the quit notice by making a reference to the Tribunal the notice took effect and accordingly terminated the tenancy and the Respondent was perfectly entitled to file, as he did, a suit in the ordinary courts and seek vacant

possession. Moreover, he further contended, the Appellant did not file any affidavit in opposition to the application for summary judgment to say whether indeed she was a widow of the deceased. As far as the Respondent is concerned she was a trespasser and the learned Principal Magistrate was right in allowing the application for summary judgment. At any rate, he concluded, this appeal has been overtaken by events as the Respondent has taken possession of the premises and is occupying it herself after the Appellant vacated it. In the Circumstances he urged me to dismiss this appeal.

I have considered these rival submissions and read the Rent Restriction Act. Unlike under the **Landlord and Tenant (Shops, Hotels and Catering Establishment) Act** which provides under **section 10** that a quit notice takes effect after expiry if the tenant does not make a reference to the tribunal under that Act, there is no such provision in the **Rent Restriction Act**. The quit notice does not therefore automatically terminate the tenancy on expiry. My understanding of **section 14** of the latter Act is that a landlord requiring possession of his premises from his tenant should after giving the requisite notice seek an order of vacant possession from the Tribunal. While the tenancy subsists the ordinary courts have no jurisdiction to give such an order. In this case as the Respondent required the premises for her own occupation, she should, after the expiry of the twelve months' notice she had given the appellant's husband under section 14(1)(h) of the Rent Restriction Act, have sought an order of a vacant possession from the Tribunal. I therefore agree with the Appellant's counsel's contention that the learned trial Magistrate had no jurisdiction to entertain this matter leave alone to grant the application and should instead have dismissed the suit for lack of jurisdiction.

That is, however, not the end of the matter. As counsel for the Respondent contended, the Appellant did not swear and or file any affidavit in the lower court. There was therefore nothing on record to confirm her claim that she was indeed a widow of the deceased tenant. In the circumstances and assuming that the learned trial magistrate had jurisdiction he could have been right in holding that she did not have a bona fide defence and treating her as a trespasser. The Appellant having been evicted from the premises which the Respondent as the owner is now occupying it is not right to reinstate the Appellant. Consequently this appeal is for dismissing and I accordingly hereby dismiss it.

As to costs each party has had some measure of success. In the circumstances I order that each party bears its own costs.

DATED and delivered this 25th day of October, 2007.

D. K. MARAGA

JUDGE