Adventure Adrenalin Africa Limited v Hartley (Environment and Land Appeal E001 of 2021) [2022] KEELC 15693 (KLR) (9 December 2022) (Judgment)

Neutral citation: [2022] KEELC 15693 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

ENVIRONMENT AND LAND APPEAL E001 OF 2021

AE DENA, J

DECEMBER 9, 2022

BETWEEN

ADVENTURE ADRENALIN AFRICA LIMITED ..... APPELLANT

AND

HELLEN KAY HARTLEY ..... RESPONDENT

(Civil Appeals No 28 of 2018 and 29 of 2018 in ELC Mombasa which were consolidated and subsequently dismissed by Justice CK Yano.)

JUDGMENT

BACKGROUND

1. For purposes of this judgement I shall refer to the appellant as the tenant and respondent as the landlord. On January 31, 2022 I delivered a ruling in respect of the tenant's application for stay of execution. Instead of reinventing the wheel I will adopt the background therein since the facts have not changed. The suit premises subject of these proceedings are on Title No Kwale/Diani Beach Block/808 measuring about 6.5 acres and comprise a 9-bedroom main house, a 2-bedroom guest house, a swimming pool and some outbuildings. The tenants case is that they have been the respondent's clients from the year 2014 with a two-year lease executed on May 1, 2015. The user was a guest house and rent payable was Kshs 50,000 monthly which they were faithfully paying until the dispute herein arose when the landlord refused to accept rent.

2. From the pleadings, vide a letter dated December 5, 2016 the landlord gave notice to the appellant to vacate the premises by May 1, 2017 which was the end of the two-year term lease above. The tenant filed BPRT case No 107 of 2016 which was compromised by the parties and the notice was withdrawn. Another notice was issued guided by the lease terms and in response thereto the tenant filed BPRT No 70 of 2017 on the basis that the notice was illegal since the tenancy being a controlled one, could only be terminated in accordance with the provisions of section 4(2) of the *Landlord & Tenant (Shops Hotels*

and Catering Establishments Act) Chapter 301 of the Laws of Kenya herein the Act. The Tribunal confirmed that the tenancy was a controlled one and would remain in force until termination by the Tribunal and or by mutual consent of the parties. Aggrieved, the landlord filed Civil Appeals No 28 of 2018 and 29 of 2018 in ELC Mombasa which were consolidated and subsequently dismissed by Justice CK Yano.

3. After the dismissal of the Civil appeals the landlord issued the tenant with a notice dated November 24, 2020 terminating the tenancy on the basis that she intended to occupy the premises for herself and the family as their residence. The tenant responded thereto indicating that it would not comply with the notice and filed a case before the Tribunal being BPRT No 17 of 2021 Adventure Adrenalin Africa Limited Vs Hellen Kay Hartley where judgement was delivered on November 5, 2021.The Tribunal dismissed the tenants reference and upheld the notice to terminate the tenancy and further issued an eviction order against the tenant in the event of failure to voluntarily vacate and for the police to provide security during the enforcement of the order. The appeal before this court is subject of the said decision of the Tribunal. Additional facts will be highlighted in the course of this judgement.

The Respondents/ Landlord Case

4. The landlord's case was that the tenant was notified of the intention to terminate the controlled tenancy as she intended to occupy the same with her family as she had no place to live. It is stated that the suit premises were originally the family's dwelling premises where the landlord lived with her husband and children. However, they had to relocate to Naivasha sometime in the year 2020 and it was imperative that they let the premises. That it is then that the arrangements herein were entered with the tenant. According to the landlord the tenant refused to comply with the orders of the final judgement herein in pursuit of their own selfish interests. Further details are discussed elsewhere in this judgement.

The Appeal

5. The tenant filed a Memorandum of Appeal dated December 9, 2021 against the decision of the Tribunal stating that the tribunal erred in law and in fact; -

    1. In finding that the Respondent proved her intention to occupy the premises as her residence for a period of not less than one year.
    2. When it lowered the threshold of proof which the Respondent had to meet in order to prove that she intended to occupy the premises as her residence for a period of not less than one year.
    3. In re-opening and considering the issue whether the tenancy was infact controlled whereas the issue had been considered and determined in ELC Civil Appeals No 28 of 2018 and 29 of 2018.
    4. When it upheld the Respondents Notice dated November 24, 2020 after considering grounds which were not specifically pleaded therein specifically the one of effluxion of time of the lease agreement and which ground was res judicata.
    5. When it upheld the Respondents Notice dated November 24, 2020 when the same was defective.

6. When it held that the issues raised in the appellants submissions were determined earlier by the Tribunal and Superior court but later delved into the same in its own judgement.

7. When it held that the Respondent was entitled to issue a notice to terminate the tenancy when a period of two years had lapsed after delivery of judgement in earlier references filed by the Respondent.

8. When it ignored and failed to consider pending proceedings between the tenant and the Respondents regarding the termination of the tenancy.

9. In failing to hold that the Notice to terminate the tenancy dated November 24, 2020 was an abuse of court process.

10. In finding that the Respondent was entitled to vacant possession of the premises when the reasons given to terminate the tenancy were not genuine.

11. In issuing an immediate eviction order against the Appellant without giving it a grace period to vacate the premises.

12. When it considered extraneous matters when arriving at its decision and which was in any event against the weight of evidence.

13. In not following the correct and proper legal principles and thereby arriving at a bad decision.

6. The appellant prays that this court be pleased to set aside the entire judgement and order of Hon Gakuhi Chege dated November 5, 2021 and allow the tenants reference dated January 12, 2021.

Submissions

7. The appeal was canvassed by way of written submissions. The appellant filed submissions dated May 2, 2022 and supplementary submissions on May 20, 2022 the later being a response to the respondent's submission. Parties were given an opportunity to highlight orally on May 24, 2022.

Appellants/Tenants Submissions

8. The appellant identified the following four issues for determination.

    1. Intention to occupy the premises

    2. Ground given being unknown in law

    3. Re-opening and considering the issue whether or not the tenancy was controlled or not

    4. Determination of BPRT Case No 68 of 2020

    5. Grace period

    6. Alternative remedy

9. On intention to occupy the premises it was submitted that the respondent did not prove that she had a firm and settled intention to occupy the premises. The decision in *Gurdial Singh & Ano Vs Indian*

Spray Painters (1995)eKLR and *Eldomart Holdings Ltd Vs Ticket Company Ltd (2019) EKLR* were cited to buttress this point. It was also urged that the reason given for termination is not known in law.

10. Discounting the period between 21 December and 13th January as per order 50 it was contended the notice did not meet the statutory period of 12 months of the tribunal's determination.

11. It was urged on behalf of the appellant that the tribunal in its judgement failed to consider the import of the pending cases ELC 257 of 2017 filed by the Landlord seeking a declaration that the lease agreement expired by effluxion of time and Tribunal case No 68 of 2020 filed by the tenant seeking restraining orders against the landlord from interfering/evicting the appellant from the premises following his leasing the suit property to a 3rd party which was aimed at evicting the tenant. That in view of the pending cases the notice to terminate was therefore a clear abuse of the tribunal process.

12. It was submitted that the tribunal misapprehended the law regarding a controlled tenancy. Examples were cited showing the tribunals findings that were at variance with the findings in tribunal case No 107 of 2016 and 70 of 2017 that the tenancy was controlled. That the tribunal did not have jurisdiction to seat on appeal of its own decision and overturning the Environment and land court decision.

13. Additionally, it was submitted that the appellants intention to terminate other than for her own use was again confirmed in her admission that she had long transferred the premises to another entity and was no longer a registered owner. Finally, that the tribunal went overboard by giving orders for immediate vacant possession without a grace period indicative of that extraneous factors were considered leading to a wrong decision. The court was invited to set aside the judgement and make an order dismissing the notice given.

The Respondents/Landlord Submissions

14. The respondent submitted that the appellant has taken advantage of Cap 301 and managed to keep possession of the respondent's sole family residence for over six years. It is for this reason that the tribunal ordered the appellant to vacate and be evicted in default. That should this court allow the respondents continued possession it will have unconscionably allowed the injustice upon the appellant and her family.

15. The respondent identified one issue for determination whether the tribunal erred in upholding the respondents notice of termination dated November 24, 2020 and consequently directing for the respondents to vacate or be evicted. He also condensed the appellants grounds of appeal into seven as follows; -

    i. 'Whether the Tribunal erred in finding and holding that the Respondent had proven her intention to occupy the premises,

    ii. Whether the Tribunal erred in allegedly 're-opening' and considering the issue of whether or not the tenancy was controlled.

    iii. Whether the Tribunal erred in upholding the Respondent's notice of termination on a ground which was not specifically stated in the notice, in particular, the question of effluxion of time?

    iv. Whether the Respondent's termination dated November 24, 2020 was defective,

    v. Whether the Tribunal erred when it found and held that certain matters raised by the Appellant in her submissions before the Tribunal had been determined

earlier by both the Tribunal and the Superior Court but later delved into them in its judgment,

vi. Whether the Tribunal erred when it found and held that the Respondent could issue a termination notice before the lapse of 12 months after the delivery of judgements in the earlier references filed by the Respondent,

vii. Whether the Tribunal erred in directing the Appellant to immediately vacate the premises without giving it a grace period to vacate the premises.

16. It was submitted that the notice dated November 24, 2020 was compliant with the provisions of Section 7(1) and 7(g) having specified the grounds, that the landlord required it as his and family residence for a period of not less than 1 year. It also required feedback from the tenant as to any objection thereto. The court was referred to paragraph 70 and 89 of the impugned judgement which gave the basis of the finding upholding the notice. In response to the ground that the appellant had not demonstrated the settled intention to occupy the premises for her own and family use citing Khamoni J in Lavington Green Vs John Njoroge Kinuthia it was submitted that the genuineness or otherwise of the landlord's intention was a question of fact best determined by the tribunal that takes or hears evidence. That in any event uncontested documentary evidence had been supplied.

17. As to whether the tribunal erred in reopening and considering the issue of whether or not the tenancy was controlled, it was pointed that parties had by consent in BPRT 106 of 2016 agreed there was a controlled tenancy, in BPRT 70 of 2017 and ELC appeals herein the reaffirmed this position and that the tenancy could only be terminated in accordance to the Act. That this was not a re-determination. Referring to paragraph 88 of the judgement it was urged that the decision to uphold the notice was based on emergency of new material developments adverse to the landlord that occurred from April 2020 and not earlier. That the tribunal cautioned itself of the fact that there was a controlled tenancy but for the additional reason that the express agreement of the parties was for 2 years and the same having been extended by dint of the multiple litigations between the parties benefiting the respondent, coupled with non-acceptance of rent, the tribunal pointed that it would not extent the lease

18. On the ground that the termination notice dated November 24, 2020 was defective it was contended on behalf of the respondent that this was a new issue that had never been raised in the tribunal. Further the notice ran for a full two months and that the provisions of Order 50 rule 4 as relates to the doing of any other act relied upon to exclude the Christmas vacation were not applicable. That the said provisions only applied in respect of execution of the tribunals orders and appeal of the tribunals decision to the ELC by dint of sec 14(1) and (2) and 15(4).

19. On whether the ground cited is not known in law, it was urged that counsel had misapprehended the provisions of section 7(1)(g)- of the Act.

20. In response to whether the tribunal erred in finding and holding that a notice could issue before 2 years of the determination by the tribunal it was urged that at no time was the issue for assessment of rent before the tribunal and therefore the provisions of section 9(33)(a) of the Act did not apply to the circumstances of this appeal.

21. On whether the tribunal ignored and failed to consider pending proceedings regarding the termination of the tenancy in case no.68 of 2020 it was submitted that this was not a ground pleaded and leave was required. That even if leave were to be granted the case had been twice overtaken by events following the surrender of the lease by the 3rd party herein and the tribunals decision in case 17 of 2021 terminating the tenancy. That indeed a determination was made under paragraphs 78 -80 of the judgement.

22. Citing the provisions of sections 12(1) and 12(e) of the Act it was submitted that the tribunal in ordering the appellant to vacate forthwith was within the law for this was an order towards recovery of possession. That the Act did not provide for a grace period.

23. Counsel for the landlord in addition to the foregoing submitted on alternative remedy to the respondent and offered that should the court be inclined to consider this, then damages should be granted in terms of good will and any improvements carried out with the landlord's consent. This would be in lieu of continued possession by the appellant. A figure of Kshs 3.2 million was proposed based on a letter dated April 15, 2015. Additionally the court was invited to award the respondent mesne profits in respect of the outstanding monthly rents of USD 5000 with effect from May 1, 2017 upto the date of the delivery of the suit property in vacant possession. Finally placing reliance on Kasturi Limited Vs Nyeri wholesalers (2014)eKLR that a tenant cannot impose or force herself on a landlord. The court was urged to put an end to this 6-year-old dispute.

Analysis and determination

24. The jurisdiction of this court to hear this appeal is admitted by both the parties and I need not belabor the point. In my determination of this appeal I will be guided by *Selle Vs Associated Motor Boat Co (EA 123)* where the court stated thus;-

> 'Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.'

25. I have perused the proceedings and the judgment of the tribunal. I have also perused the grounds of appeal and the submissions of counsel. The grounds of appeal in my view can be condensed into the three thematic areas namely i) the landlord's intention to occupy the premises, proof thereof and this is where grounds of appeal 1, 2 & 10 would be included, ii) The Notice to terminate and its validity where grounds 4, 5, 6, 9 would be subsumed, iii) Reopening of proceedings and the import of the pending cases iv) the order for immediate eviction. I will therefore frame the issues as follows; -

    a. 'Whether the Tribunal erred in finding and holding that the Respondent had proven her intention to occupy the premises,

    b. Whether the Tribunal erred in upholding the respondents notice of termination dated November 24, 2020

    c. Whether the Tribunal erred in directing the Appellant to immediately vacate the premises.

    d. Alternative remedy.'

Whether the Tribunal erred in finding and holding that the Respondent had proven her intention to occupy the premises

26. It is not in dispute that the Landlord issued a notice of termination dated November 24, 2020. The effective date of the notice was given as February 1, 2021. The notice is issued pursuant to the provisions of Section 4(2) of the Act and this is read together with section 7 which sets out the grounds under

which a controlled tenancy may be terminated. The ground upon which the termination was sought was stated as;-

> 'I intend on the termination of the tenancy, to occupy the premises comprised in the tenancy as mine and my family's residence for a period of not less than one year'.

The notice further goes to state that; -

> 'I require you within one month after receipt of this notice to notify me in writing whether or not you agree to comply with the notice from that date'

Section 7 (1)(g) of the Act provides for the following ground on termination; -

> 'Subject as hereinafter provided that on termination of the tenancy, the Landlord himself intends to occupy for a period of not less than one year, the premises comprised in the tenancy for the purposes or partly for the purposes of a business so to be carried on by him therein or at his residence'

27. It is the appellants case that the landlord had not proved her firm intention to occupy the premises as her family residence. It was contended the reasons given were not genuine since the landlords intention had always been to evict the appellant since September 2016. Enumerating the history of all notices issued by the appellant, the grounds thereof including the subdivision and lease to one Hannah Gatundu Counsel pointed that the tribunal failed to consider the relevancy of this history vis a vis the appellants intention to terminate. The burden of proof was upon the landlord to prove her intention to occupy the suit premises for the purpose that was stated in the notice.

28. The landlord in her witness statement dated April 22, 2021 adopted as her testimony in response to the tenants reference dated January 12, 2021 reiterated that with regard to this notice that she urgently required vacant possession for indefinite occupation and use for her and family. Her testimony is that she lived in the premises with her immediate family before she let it out to relocate to Naivasha. That this was after their family company Matalai Ltd clinched a management consultancy with Notaresha Ltd to manage a wildlife conservancy. Within the conservancy was a guest house Mundui Estate which they were also allowed to operate under a shortterm lease with effect from March 1, 2017 upto October 4, 2020. That the nature of the arrangements required their presence onsite including their daughter who was attending day school in Naivasha. The landlord also told the court in her witness statement that in April 2020 Notaresha limited sold the conservancy and the Mundui estate and required vacant possession inevitably they entered a mutual agreement to terminate the lease in respect of the guest house dated April 7, 2020 effective October 4, 2020. It was her evidence that since the effective date following the tenants refusal to vacate the suit premises her family has been living as licensees of the buyers of the conservancy following a delay of the completion agreements until December 31, 2020. That aware of the tribunal proceedings and in anticipation of a favorable decision the stay was again extended to March 31, 2021 effective which date they proceeded to notify potential clients that that they would not be accepting new bookings. That since then though they have been living thereon it was at the mercy of the new owners and they could be evicted anytime. She further stated that like any other business the guest house was affected by the corona virus pandemic yet it was their source of income. As such they had depleted their savings and could not afford to lease a new family home and reiterated her genuine intention to go back to their original family home, the suit premises. In proof and relevant to these the tenant produced Certificate of Incorporation of Matalai Ltd the family company and CR 12 dated April 23, 2021 in respect of its beneficial owners and which confirmed the Landlord and her husband as Directors/Shareholder and having been incorporated in 2009 , Lease and supervisory agreement between Noratesa Limited and Matalai Ltd dated March 1, 2017, The Mutual

Lease Termination Agreement dated April 7, 2020, email correspondence between Mr Hartley and the owners of Mundui estate over termination of the lease and the termination notice to tenant on the suit premises dated November 24, 2020. My understanding of section 7(1)(g) requires the landlord to prove intention that he required to use the suit premises as her family residence. Having considered the documents produced herein as evidence to me they suffice for proof of such intention as there was no reason to keep them in Naivasha anymore the core reason having been the Management contract for the conservancy which was no more. While it is stated that the Landlord did not confirm that she had received an eviction notice from the new owners for me the test would be that of a reasonable man who would be expected to be proactive and not wait to be given an eviction notice or even assume that the new owners would want to retain them. What other evidence would one be required to furnish to prove their intention to occupy the premises for their own residence. All the facts were backed by documentation. I saw nothing peculiar in the documents which imputed ill motive on the part of the landlord. The tenant's case is that the reason was not genuine. At paragraph 93 the tribunal states I saw the Landlord testify and her demenour revealed a witness who is truthful and honest is (sic) her evidence.' Consequently, this court cautions itself against going into the issue of genuiness when the court did not have the benefit of interacting with the witness during the viva voce hearing. I'm also persuaded by Khamoni J in Lavington Green Vs John Njoroge Kinuthia in this regard.

29. This court did also not come across any evidence furnished to counter the landlord's intention by the tenant in proof of the allegations that she had alternative homes she could go to. To me the landlord demonstrated her connection and attachment to Diani where she gave evidence that Diani is where she met the tenant in the first place. Indeed, there were several notices and references that were issued before the notice in issue. The question that I pose is how far back or how long was the landlord answerable for its previous decisions to terminate the tenancy. Did it mean then this would run with the landlord as long as the present tenant remained their client and stopped her from raising any other reasons even if they were genuine. In fact the tribunal at paragraph 88 stated thus; -

> 'In any event the circumstances obtaining in respect of the Landlord and her family then as opposed to now have been clearly demonstrated to have adversely and substantially changed.The reasons given for wanting vacant possession by the landlord are those obtaining then and there is nothing wrong for her to bring to fore any other reason for requiring possession different from the previous ones'

30. In my view it was important that the tribunal confined itself to the notice at hand and I think this is why there is available the period of 12 months that is provided for before another notice is issued. This not only cushioned the tenant as per the objectives for which the Act was legislated but in my view also allowed for closure on previous notices. I agree with the tribunal that new circumstances had emerged which ought to have been considered in the present circumstances and with profound respect disagree with the proposal that the tribunal ought to have considered the history surrounding the previous notices imputing malafides on the part of the landlord. I make a finding that the landlord had proved on a balance of probability her intention to occupy the premises for own use and I see no reason for overturning the tribunals decision in this regard.

Whether the Tribunal erred in upholding the respondents notice of termination dated November 24, 2020

31. The notice dated November 24, 2020 it is submitted was invalid and defective on two grounds. These are that the reason for termination is unknown and the notice given for termination offended the provisions of section 4(4) and 9 of the Act. I have noted that the tribunal in its judgement analyzed the notice herein in terms of its conformity with the applicable provisions of the Act namely sections 4(2),

7(1)(g) , 4(4) and 4(5). The tribunal found that the notice was compliant to the extent that a tenancy can be terminated by notice, the ground given was among those envisaged under the Act (the landlord required to use the same as her residence) and which notice was to take effect not less than two (2) months and that it gave the tenant the opportunity to within 1 month give feedback on whether they intended to comply or not – See paragraph 67 – 71 of the judgment

32. I will deal briefly with the tenant's contention that the reason given for termination is not known in law. This is dealt with at paragraph 85 of the judgement where the tribunal makes a finding that section 7(1)(g) is clear that a Landlord can terminate a tenancy where he intends to use the premises as a residence which was the reason given in the notice and thus valid. I however note that there was a typographical error in the version of the Act used by all the parties including the one quoted in Eldomart Holdings Limited Vs The Ticket Company Limited. The word 'at' immediately preceding the word residence should have read 'as' otherwise it would not make sense that one would do business at both the premises and his residence. The residence can only be an option/alternative in view of the words in the section 'partly for the purposes.' The correct wording extracted from the 2010 version reads as follows;-

> 7(g) 'Subject as hereinafter provided that on termination of the tenancy, the Landlord himself intends to occupy for a period of not less than one year, the premises comprised in the tenancy for the purposes or partly for the purposes of a business so to be carried on by him therein or as his residence'

33. My reading of the said section in addition to my aforesaid analysis did not reveal to me a different interpretation from that given by the tribunal in its judgement. A landlord can as well require to use the premises as his residence. I have read the decision in Eldomart Holdings Limited Vs The Ticket Company Limited and noted that the reason that was given for the termination was because the landlord wanted the premises for its own business use and not to occupy it as his residence.

34. However it is stated by the tenant that the notice did not meet the statutory timeline of 2 months required under section 4(4) of the Act. I agree with counsel for the tenant that the tribunal did not review this aspect of the notice. Counsel for the tenant submitted that the notice was dated on November 24, 2020 and served on November 26, 2020. Counsel then discounted the recess days under Order 50 rule 4 of the Civil Procedure Rules bringing the days to forty-two (42). Counsel for the landlord's submission is that these provisions do not apply in computation of time for the notice but in execution of the tribunals orders and appeal of the tribunals decision to the ELC by dint of sec 14(1) and (2) and 15(4) of the Act.

35. My understanding of section 4(4) is that the period of two months stated therein refers to when time starts running for purposes of the effective date for the tenant to vacate. It is not in dispute that the notice was received by the recipient tenant on November 26, 2020. My reading of the notice states that it is to take effect on February 1, 2021. The tenant must have their two months and not less. The tenant says it was 42 days after discounting recess days. Order 50 rule 4 provides for when time does not run as follows; -

> 'Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any act.'

36. My reading of the above provisions is that the acts envisaged for purposes of this order are amending, delivering or filing of any pleading or the doing of any act. The doing of any other act in my view must

be read ejusdem generis amending, delivering or filing of pleading and the act herein is not in tandem with the same since the notice is not a pleading.

37. In addition it was stated that the said notice offended the provisions of Sec 9 of Cap 301 with regard to the requirement that no notice can be issued before 12 months of a determination. Section 9 (3) provides that;

> 'Where a Tribunal has made a determination upon a reference, no further tenancy notice shall be given in respect of the premises concerned, which is based on any of the matters affected by the determination—
>
> (a) In the case of an assessment of rent, until after the expiration of two years; or
>
> (b) In any other case, until after the expiration of twelve months, after the date of the determination, unless the Tribunal, at the time of the determination, specifies some shorter period.'

38. The relevant subsection for the purpose of this case is in bold above. The tribunal pronounced itself on these objections at paragraph 71 – 77 of the judgement. The tribunal observed that

> 'The ruling and judgement from which the said appeals arose were delivered on November 10, 2017 and November 16, 2018 respectively by the Tribunal. Through the said judgement, the Tribunal dismissed the Tenants reference dated April 7, 2017 but allowed prayers 1 and 2 of the notice of motion of even date until when the tenancy shall be determined by the Tribunal or by mutual consent of the parties.
>
> The said order therefore meant that the Landlord was at liberty to move the Tribunal under the Act to determine the tenancy without being caught by section 9 thereof.
>
> I have looked at the judgement of the Environment and Land Court and noted that the Landlords appeal was basically on the holding that the relationship between the landlord and the tenant was a controlled tenancy. It also related to the indefinite order of injunction against the Landlord.
>
> In the premises I find and hold that section 9 of cap 301 Laws of Kenya has not been offended by the termination notice more so given the fact that the reference appealed from was determined by the tribunal more than 12 months before the notice was issued. I further hold that had the legislature intended that no termination notice could be issued in the pendency of an appeal, nothing would have been easier than to provide so under section 9 of the Act. The notice is therefore not invalid or defective.'

39. My understanding or interpretation of section 9 of the Act, is that it refers to a determination of the tribunal and not any other determination, such that the judgement delivered by Justice Yano in my view cannot be used as the reference point for computation of the 12 months. I agree with reference to the 12 months period it is the date of the tribunal's determination. In addition, the Act is silent on appeal and I find no fault in the argument that the legislature should have provided so had it intended. Maybe it was to avoid abuse.

Whether the Tribunal erred in directing the Appellant to immediately vacate the premises.

40. I will not belabour on this point. For me while I would not fault the tribunal for ordering repossession however the order for immediate possession was in my view unrealistic considering a tenant whose

business was still a going concern and who had been in the premises for over 6 years. In any event the Act itself envisaged a period of not less than two months, for me two months would be the irreducible minimum if I may say. This definitely without saying much would allow for proper transition or exit. I respectfully disagree with counsel that the tenant does not deserve more from this court in this regard following enough grace period by dint of the stay of the execution of the tribunals order. This has nothing to do with the orders of stay execution herein.

41. It was urged on behalf of the tenant that the tribunal in its judgement failed to consider the import of the pending cases ELC 257 of 2017 filed by the Landlord seeking a declaration that the lease agreement expired by effluxion of time and Tribunal case No 68 of 2020 filed by the tenant seeking restraining orders against the landlord from interfering/evicting the appellant from the premises following his leasing the suit property to a 3rd party which was aimed at evicting the tenant. That in view of the pending cases the notice to terminate was therefore a clear abuse of the tribunal process. The tribunal at page 78 -81 in my view considered the import of Tribunal Case No 68 of 2020 where the tribunal made a finding that the pendency did not prevent the Landlord from issuing notice herein since the subject dispute in issue was different and that it would be a travesty of justice were it to be held that as long as there was a pending litigation no notice should issue. In any case this court has already rendered itself and made a finding that the tribunal was right to confine itself to the current reference in respect of the notice dated November 24, 2020 and as long as it complied with the requirements of the Act which I have also made a finding was compliant.

42. I need to render myself on the ground that the tribunal erred in reopening and considering the issue of whether or not the tenancy was controlled. It is contended that the tribunal despite being aware that there was a controlled tenancy which was also upheld by the ELC court made observations that were at variance and contradictory to its own rulings. That the tribunal misapprehended the law regarding controlled tenancy. Upon consideration of paragraphs 90,98 ,99 and 100 of the judgment cited in this regard I noted that the tribunal was very clear that there existed a controlled tenancy and went ahead to state additional reasons based on the circumstances of the case not to extend the tenancy. Indeed, each case must be decided upon its own circumstances. In my view the tribunal exercised its discretion which was legally conferred upon it to extend or not where there was no consent of the parties. I don't think given the protracted tensions between the parties a consent was forthcoming anyway. In any case the respondent had this far benefited beyond the 2 years. Who would fault the use of discretion in such circumstances? Is not justice a double-edged sword.

43. For me looking at the totality of this case this is a matter that I would in the interests of justice not hesitate to uphold the latest reference. The tenant in my view has had the optimal benefits of the objective of Cap 301, that is protection of the tenant. He has enjoyed the suit premises for over 5 years courtesy of the Act. On the other hand the landlord has had to contend with little control over the suit premises for this period and I think in the interests of justice she also has a right to enjoy her property after this period. To deny them to have it as hers and family residence would be an injustice in my view given the circumstances of this case. Relations have completely soured and to force a tenant on landlord would be in my view unfair. I agree with the courts dictum in *Kasturi Limited vs. Nyeri wholesalers (2014)eKLR* cited by the Landlord where the court of appeal stated thus

> 'It is the duty of the courts to ensure that no individual is prevented from taking possession and or enjoying their property. A tenant cannot impose or force him/herself/itself on a landlord. In the instant case, when the lease between the parties expired, it was incumbent upon the appellant to give vacant possession'

Let justice be done devoid of any further technicalities in this matter. In addition to the reasons given in my earlier analysis, this court chooses to uphold the decision and judgement of the tribunal except the order for immediate vacation.

Alternative Remedy

44. I note that Counsel for the landlord in its submission submitted on alternative remedy on a without prejudice basis should this court be inclined to allow the appeal. It is clear from the foregoing discussions that the court is not going to allow the appeal. I will therefore not dwell on this submission.

Recovery of possession of suit property and award of mesne profits

45. Counsel for the Landlord has invited this court to grant the landlord mesne profits at the rate of USD 5000 per month in respect of outstanding monthly rents for the suit premises with effect from May 1, 2017 upto the date of delivery of the suit property in vacant possession to the landlord. Additionally, that the funds so far deposited by the tenant in court as security be released to the landlord. That costs of the appeal be to the landlord. From the response and pleadings filed with regard to this appeal by the Landlord I have not come across a cross appeal where the claim for mesne profits would have been made. I respectfully agree with counsel for the tenant that this prayer should not be entertained. It is trite that mesne profits must be specifically pleaded and proved being special damages. A party is bound by its pleadings and I decline to grant the request for mesne profit. It is however noteworthy that during the ruling herein on the appellants application for stay of execution this court granted conditional orders of stay of execution and directed that the appellant pays to the respondent the monthly rent outstanding at the rate of Kshs 50,000 from May 1, 2017 to November 5, 2021. This amount was deposited in court and belongs to the Landlord. There is the rent that has not been collected from the November 5, 2021 to the date of this judgement. I'm aware that there was no further agreement on the new rent payable since the Landlord was not desirous of continuing with the arrangements and therefore the same monthly rate shall apply for this period and payable to the landlord respondent

46. The upshot of the foregoing is that the appeal is dismissed with costs to the respondent. There shall issue the following further orders; -

    i. 'That the appellant tenant shall vacate the suit premises within 90 days of the date of this judgement failure to which the Landlord respondent shall be at liberty to undertake the said eviction.

    ii. That the rent deposited in court shall be released to the respondent landlord.

    iii. That the Appellant tenant shall pay to the respondent landlord the rent payable from November 6, 2021 upto the date of delivery of the suit property in vacant possession to the landlord.

    iv. Interest at court rates.'

Orders accordingly.

DELIVERED AND DATED AT KWALE THIS 9TH DAY OF DECEMBER, 2022.

A.E. DENA

JUDGE

Judgment delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Wainana for the Appellant

Mr. Muthama for the Respondent

Mr. Mwakina Dennis - Court Assistant.