



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL APP NO. 18 OF 2000

DYNAMIC INSTITUTE OF MANAGEMENT AND ACCOUNTANCY (DIMA) LTD
..... APPELLANT

VERSUS

APOLLO INSURANCE COMPANY LTD RESPONDENT

JUDGMENT

This is an appeal from a decision of the Business Premises Rent Tribunal. The matters leading to the appeal are as follows. The Respondent offered to let to the Appellant certain premises on its property known as Mepalux Plaza for a period of six years with an option to renew on terms. By a letter of offer dated 10th November, 1998 issued by the Respondent's agent, Regent Management Limited, the following were some of the terms and conditions of the lease:

- (a) The lease was to commence on 1 st December, 1998 (Clause 5);
- (b) Possession was to be granted on delivery of an executed lease and compliance with the terms of the letter of offer (Clause 15);
- (c) The lease was to be on terms of the Landlord's standard lease (Clause 17). That clause further stated as follows: "A copy of the standard lease which includes all the terms referred to in this letter in addition to the standard clauses set out therein, which shall be deemed to have been accepted as provided herein, is available for inspection in our (the Respondent's agent's) offices;
- (d) Clause 20 of the letter of offer dealt with acceptance and provided as follows: "By accepting the terms of this letter of offer, the tenant (Appellant) is deemed to approve the standard form of lease and agrees to execute and return the lease promptly when it is submitted to the tenant"

The Appellant executed the letter of offer on 13th November, 1998. It is not disputed that the Appellant took possession of the demised premises on 1st December, 1998. The lease was in the event not executed. The Appellant felt aggrieved by certain matters and filed a complaint in the Tribunal which was stated to be in accordance with Section 12 (4) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301) (hereinafter referred to as "the Act"). The complaint was as follows: "1. In November 1998, we made an agreement to enter into a lease

for six years in respect of the premises known as Mepalux Plaza and took possession but the lease drawn up by the said landlord (Respondent) has not been executed by us because we have disagreed as to terms under which the premises should be let to us in view of the landlord's breach of the conditions implied in every lease, and it is imperative that the tribunal decides, under Section 12 (1) (a) of the Act, whether or not our tenancy is a controlled tenancy. 2. After we took possession of the premises on December 1, 1998 the landlord failed to provide facilities for connecting telephone www.kenyalawreports.or.ke 3 services to the five floors we have let and as a result, we did not have telephone between December, 1998 and June 30, 1999; since then, the landlord has failed to provide working lifts for the five floors which are let to us in the said Mepalux Plaza; the landlord has not finished work on the floors which have many potholes and cracks, making the premises unsafe; in addition to (1) above, we have a dispute with the landlord as to - (a) what rent, if any, is payable to the landlord which is in breach of its obligations as regards provision of working lifts and providing safe and complete floors; (b) whether any rent was due from us between December 1998 and June 30, 1999 when we did not have telephone facility, no working lifts and the floors were unfinished; if the answer is in the affirmative, what the rent payable is; (c) as to the procedure which governs termination of the tenancy and when, if at all, the landlord may levy distress.

3. The landlord is threatening to levy distress against us and also possibly evict us without recourse to us. We need the protection of the tribunal." The Respondent appeared to have raised a question as to the jurisdiction of the Tribunal to entertain the Complaint and the Tribunal decided to hear that question as a preliminary issue. As it happened, the Appellant called its Managing Director, Mr Mundia Njeru Geteria who testified on its behalf. I will summarize his testimony as follows.

The Appellant is a Commercial College offering courses in Accountancy, Computers, Tours and Travel, Clearing and Forwarding and Hotel Management. It does that from the demised premises. How did the Appellant come to be the Respondent's tenant? Mr Geteria saw an advertisement in the press that the premises in issue were available for leasing. He called the Respondent's agents and arrangements were made and he went and viewed them. He was interested and desired to rent four floors of the premises. Later, he was interested in more space and this was also given to him.

The lease was initially scheduled to commence on 1st November, 1998 but this was delayed for a month to allow for some works which the Appellant says the Respondent never undertook. This forced it to undertake the works by itself. There were also some problems with the building which prevented the Appellant from fitting telephones. This was resolved on 30th June, 1999. As was seen earlier, the offer was executed on 13th November, 1998. In his testimony, Mr Geteria said that the main lease was sent to him on 25th November, 1998. However, the Appellant took possession before executing that lease. The Appellant also complained about the condition of the lifts which Mr Geteria said used to break down frequently. The Appellant had initially been provided with parking facilities but these were withdrawn for a while and restored later.

Mr Kibet, who appeared for the Respondent both in the Tribunal and before this Court, took issue with the complaint on the ground that it was not a matter within the jurisdiction of the Tribunal as the premises let were not subject to Cap 301 because of the purpose for which they were let and the nature of the tenancy. According to him, the Appellant ran a school in the premises and the lease was one in writing for a period exceeding five years and the same was, therefore, not subject to Cap 301. After hearing the rival submissions of Counsel for the contending parties the Learned Chairman of the Tribunal (Mr G K Mwaura) dismissed the Appellant's complaint holding that the Tribunal did not have jurisdiction to hear it. How did the Learned Chairman deliver himself in that respect? After going through the testimony of the Appellant's Managing Director, which I have myself set out earlier, the Chairman was of the view that the tenancy between the parties was not a controlled one since it was in writing and for a period exceeding five years and also because the Appellant carried on an enterprise on the demised premises which disqualified the tenancy from being a controlled one.

The Appellant was aggrieved by the decision of the Tribunal and moved to this court, hence this appeal. The Appeal is based on 14 Grounds of Appeal set out in the Memorandum of Appeal as follows:

1. The Learned Tribunal erred in holding that the Tribunal had no jurisdiction over the dispute before it

2. The Learned Tribunal erred in holding that a commercial college is not a shop within the meaning of ... (Cap 301)
3. The Learned Tribunal erred in not holding that the premises used as a commercial college are not used for a trade within the meaning of ... (Cap 301)
4. The Learned Tribunal erred in holding that the Premises were let for a period of six years
5. The Learned Tribunal erred in not holding that the agreement signed on November 13, 1998 was varied by the parties conduct having found as a fact that the possession was not given to the tenant in accordance with it and that the said agreement did not contain all the terms of the alleged tenancy
6. The Learned Tribunal erred in not holding that the agreement signed on November 13, 1998 was incompetent
7. The Learned Tribunal erred in not holding that the terms of the alleged tenancy were uncertain
8. The Learned Tribunal erred in not applying the test of certainty of terms laid down by the Court of Appeal in *Bidco Clothing Factory Ltd vs Kenya Puleen Ltd* Court of Appeal, Civil Appeal No Nairobi of 1994
9. The Learned Tribunal erred in not applying the test of a controlled tenancy applied in *Bidco Clothing Factory Ltd vs Kenya Puleen Ltd*, supra
10. The Learned Tribunal erred in not holding that the oral and documentary evidence established uncertainty of the terms of the alleged controlled tenancy
11. The Learned Tribunal erred in not acting on the only evidence on record of the tenant
12. The Learned Tribunal erred in holding that the tenant's commercial college was not different from the school in *Technical Institute vs L. S. Shah & Others*, Nairobi HCCC No 190 of 1982
13. The Learned Tribunal erred in not following the liberal interpretations of premises and business by the High Court of Kenya
14. The Learned Tribunal erred in not following the only authority holding a commercial college to be a trade, namely *Brighton College vs Marriot* (1952) 1 KB 312.

At the hearing of the Appeal Ms Ndegwa, for the Appellant, argued grounds 4, 5, 6, 7, 8, 9, 10 and 11 together and grounds 1, 2, 3, 12 and 13 together. Ground 14 was argued on its own.

As was argued before the Tribunal, the Appellant maintained before me that the terms of the letter of offer were uncertain so that there was in fact no written lease. According to Ms Ndegwa, this resulted in a lease of month to month hence the same was a controlled tenancy. According to her, uncertainty arose from the fact that possession of the demised premises was granted to the Appellant contrary to the letter of offer. This, she said, amounted to a variation of the terms of the letter of offer. To support this contention, she referred the court to a number of authorities which included *Bidco Clothing Factory* case supra, *Chitty on Contracts*, (Twenty-sixth Edition) (Volume 1) (General Principles at page 90); *East African Power and Lighting Co Ltd vs the Attorney General* (1978) KLR 217, and *Batchelor's Bakery Ltd vs Westlands Securities Ltd* Civil Appeal No 2691 of 1975.

Referring to the case of *Brighton College* supra Ms Ndegwa urged that the Appellant carried on a trade and was, therefore, included in the definition of a shop as set out in Section 2 of Cap 301. Finally, Ms Ndegwa referred me to the case of *Kenya Cold Storage (1964) Ltd vs Kenya National Properties Ltd* HCCC 1556 of 1976 and urged me to give a "liberal interpretation" to the provisions of the Act and find in her client's favour.

Mr Kibet, for the Respondent, on his part argued that since the Appellant's Managing Director had admitted in his testimony that the Appellant carried on the business of a school on the premises, the same could not be a controlled tenancy. He relied on the Technical Institute case. He further argued that since the Appellant had signed the letter of offer, the same amounted to a Written Agreement for a period of more than 5 years which excluded the tenancy from the purview of Cap 301.

Mr Kibet also took a swipe at the competency of the appeal arguing that no appeal lay from the decision of the Tribunal on a complaint. He referred me to the case of *Machenje vs Kibarabara* (1973) E A 481. Finally he argued that the Appellant was in breach of its obligations and ought not to be assisted by the court.

I have carefully considered the submissions of both Counsel and considered the record of the Tribunal and I take the following view of the matter. To begin with, I must agree with Mr Kibet that this appeal does not lie. The only right of appeal to this court from matters emanating from the Tribunal is donated by Section 15 (1) of Cap 301. That subsection provides as follows:

“Any party to a reference aggrieved by any determination or order of the Tribunal made therein may ... appeal to the High Court ...” References to the Tribunal are provided for by Section 6 (1) of Cap 301 while complaints, as seen earlier, are provided for under Section 12 (4) of the same Act. The two matters are different and where the same Act expressly provides for appeal in respect of one and not the other, it follows that the other not provided for is not appealable as of right. I am not alone in this view. That position was taken by this court way back in the 1970s (See *Machenje* case cited by Mr Kibet. That case itself followed the case of *Choitram vs Mystery Model Hair Salon* (1972) E A 525). The above finding is sufficient to dispose of the appeal. However, the parties and their Counsel pursued this case from the beginning with great zeal and in fairness to the great energy they put in the case and, hopefully, for the development of the jurisprudence in this area of law I must comment further as follows. The Appellant signed a letter of offer which clearly defined the term of the tenancy and which was for a period of more than 5 years. In the letter of www.kenyalawreports.or.ke 10 offer, it undertook to execute the formal lease when it was submitted to it. Clause 17 of the letter of offer shows that the formal lease was available and the Appellant was at liberty to inspect the same. However, when the lease was forwarded to it, the Appellant refused to execute it. The reason given by its Counsel that the terms of the lease had not been agreed to is therefore completely out of line, and untenable.

In my view, although the parties had agreed to execute a formal lease which was not in fact executed, the letter of offer aforesaid constituted an agreement for lease and by extension a written tenancy for a period exceeding 5 years which excluded it from being a controlled tenancy in terms of Section 2 (1) of Cap 301. The terms of the tenancy had been agreed and possession and payment of rents were given and made thereunder. This proposition is supported by the case of *Batchelor's Bakery Ltd* which was cited with approval before the Tribunal. This case distinguished the earlier case of *Rogan-Kamper vs Lord Grosvenor (No 2)* (1977) KLR 123 which had created confusion in the profession on the position where no leases had been executed. *LAW, J A* was of the view that that case was based entirely on an un-executed lease and not on an agreement for lease as was the case before them while *MADAN, J A* (as he then was) was of the view that that case was “decided on its own particular facts”, and was “best laid to rest.” That case is, therefore, no longer good law as great doubt has been expressed as to its rectitude and it cannot, therefore, assist the Appellant's case before me. The same, therefore, applies to the case of *East African Power & Lighting Company Limited* and others which appeared to follow it.

Ms Ndegwa's assertion that the agreement between the parties was uncertain cannot hold water either. As the Tribunal said, and I agree with it entirely, a written document must be read in its entirety to determine its true meaning. Uncertainty cannot be decided by reading only certain terms. The fact that the letter was varied to allow the Appellant possession before execution of the lease does not to my mind result in uncertainty in the circumstances as was urged by the Appellant's Counsel. The case of *Bidco and Chitty on Contracts* are, therefore not relevant to this case.

The Appellant took possession of the premises in dispute on the basis of the agreement in the letter of offer. Its Managing Director conceded that rents were paid on the basis of the letter of offer – in fact,

everything was done on the basis of that same letter of offer only that the Appellant refused to execute the letter of offer contrary to its undertaking. As if that was not enough, the Appellant then sought to found its case on a breach occasioned by it. That it cannot do. As was said in *Alghussein Establishment vs Eton College* (1991) 1 All ER 267 a party cannot rely on its own wrong to found a legal right.

All said and done, I am of the view that the parties before me intended to enter into a written lease of more than 5 years and although the formal lease was not in fact executed, the letter of offer executed by the Appellant on 13th November, 1998 constituted a written tenancy between it and the Respondent. Since the same was for a period of more than 5 years, it is not subject to the provisions of Cap 301 and is, therefore, not a controlled tenancy.

Finally, I would like to say that in deciding whether the business carried on on a premise would constitute the tenancy a controlled one or not, one has to consider each case on its facts.

As the preamble to the Act suggests, the main design of Cap 301 was to protect tenants of certain premises from eviction or exploitation and related matters. In my view, the name the parties give to their business may not have any magic in deciding whether the same is controlled or not. The court must in each case investigate all circumstances to decide for itself whether the tenancy was a controlled one or not. I think that should be a matter of judicial discretion and not the subject of strict definition. I say this because some of the names given to businesses today may not necessarily be appropriate and to use such name in deciding the rights of parties may result into injustice which Cap 301 intended to remedy. Having said this, I am of the view that the Technical Institute case was decided on its special facts and may not lay any general law on these matters. That case may also be distinguished on the fact that the question whether the tenant was a school was agreed and was not subject to investigation. Where there is a dispute as in this case the court must investigate the facts and decide for itself whether the business is one which qualifies the tenancy to be a controlled tenancy. From the facts of this case the testimony of the Appellant's own witness and the nature and scope of the Appellant's business, I do not think that the business carried on by it would qualify the tenancy in issue to be a controlled one.

In the circumstances, I do not see any basis upon which to interfere with the decision of the Tribunal. I, consequently, dismiss this appeal with costs to the Respondent.

Dated and delivered at Nairobi this 20th day of September, 2004.

ALNASHIR VISRAM

JUDGE