



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT MILIMANI
ELC APPEAL NO.10 OF 2017

INTERCOUNTRIES IMPORTERS AND EXPORTERS LTD.....APPELLANT

=VERSUS=

- TOTAL SECURITY LIMITED.....1ST RESPONDENT**
- LEMOLOK LIMITED.....2ND RESPONDENT**
- TELEPOSTA PENSION SCHEME**
- REGISTERED TRUSTEES.....3RD RESPONDENT**
- COMMISSIONER OF LANDS.....4TH RESPONDENT**
- THE ATTORNEY GENERAL5TH RESPONDENT**
- PARK AVENUE INVESTMENTS LIMITED.....7TH RESPONDENT**
- TRUST BANK LIMITED (IN LIQUIDATION).....8TH RESPONDENT**

*(being an Appeal from Business Premises Rent Tribunal Reference No. 902 & 903 (consolidated) of 2016 at Nairobi
given by Mbichi Mboroki Chairman, Business Premises Tribunal on the 10th day of February 2017)*

BETWEEN

- TOTAL SECURITY LIMITED.....1ST APPLICANT**
- LEMOLOK LIMITED2ND APPLICANT**

=VERSUS=

- TELEPOSTA PENSION SCHEME REGISTERED**
- TRUSTEES.....1ST RESPONDENT**
- INTERCOUNTRIES IMPORTERS AND**
- EXPORTERS LTD.....2ND RESPONDENT**
- THE ATTORNEY GENERAL.....3RD RESPONDENT**
- JUBILEE INSUARANCE COMPANY LIMITED.....4TH RESPONDENT**

JUDGEMENT

1. The origin of this appeal can be traced to events which took place over two decades ago. The subject matter of the dispute giving rise to this appeal is LR No.209/13238 (original number LR 209/2397) situate at Muchai Road off Ngong Road Nairobi (suit property). The suit property was originally owned by East African Community Common Services which later became East African External Telecommunications Company Limited. The suit property subsequently vested in the Kenya Posts and Telecommunications Corporation.

2. On 11th March 1988, the Minister for Transport and Communications published a Gazette Supplement vide Legal Notice Number 133 of 1988 in which all movable and immovable properties which were owned by East African External Telecommunications Company Limited as at 3rd June 1982 were vested on Kenya Posts and Telecommunications Corporation.

3. In 2001, the Minister for Finance through Gazette Notice of 14th September 2001 vested the properties of Kenya Posts and Telecommunications Corporation on the 3rd Respondent to enable the 3rd Respondent discharge the pension liability of its members.

4. In 1966, the Commissioner of Lands allocated the suit property to the 7th Respondent vide letter of allotment dated 30th April 1996. The suit property was subsequently registered in the 7th Respondent's name. The 7th Respondent took a loan of Kshs.40,000,000/= from the 8th Respondent and offered the suit property as security . The 7th Respondent was unable to repay the loan. The 8th Respondent sold the suit property to the Appellant which charged it to the 6th Respondent.

5. In 2004, the 3rd Respondent filed a suit ELC 1400 of 2004 against the Appellant, the 4th Respondent, the Attorney General, the 6th Respondent and the 7th Respondent. The 7th Respondent filed a counter-claim in which it named the 3rd Respondent and 8th Respondent as Defendants. The Appellant also raised its counter-claim. In a Judgement delivered on 27th July 2016, the court held that the suit property belonged to the Appellant which was an innocent purchaser.

6. As the ownership dispute in ELC 1400 of 2004 was going on, the 3rd Respondent entered into lease agreements with the 1st and 2nd Respondents for 9 years and 3 months with effect from 1st December 2006. The leases were to terminate on 31st October 2016. However, before the initial lease could expire, there arose a dispute between the 1st and 2nd Respondents on the one hand and the 3rd Respondent on the other. The two parties negotiated fresh tenancy agreements which were for two years with effect from 1st July 2013 to 30th June 2015. When these tenancies terminated, fresh ones were signed for two years with effect from 1st July 2015 to 30th June 2017.

7. The 3rd Respondent being aggrieved by the judgment in ELC 1400 of 2004 moved for the Court of Appeal vide Civil Application No. 203 of 2016 seeking stay of execution. This application was compromised vide a consent recorded on 27th September, 2016. This consent has since been set aside following an application by the Appellant.

8. On 4th November, 2016, the 1st and 2nd Respondents filed two separate references before the Business Premises Rent Tribunal (BPRT) following threats from the Appellant who wanted to bring in a new tenant following a consent which had been filed in the Court of Appeal. The Tribunal granted an order restraining the Appellant and the 3rd Respondent from evicting them from the suit property. This is what prompted the Appellant to file an Application dated 23rd November, 2016 before the Tribunal seeking the following orders: -

- 1) That this matter be heard ex-parte in the first instance and directions given on inter parties hearing.***
- 2) That this matter be certified urgent and heard immediately or as the Tribunal may deem fit.***
- 3) That Reference No. 902 of 2016 by Total Security Ltd and Reference No.903 of 2016 by Le Molok Ltd, be consolidated.***
- 4) That the order given on 4th November 2016 in favour of total security ltd and Le Molok Ltd, the Tenants, be set aside.***
- 5) That the Reference by the Tenants before the Tribunal be struck out or dismissed.***
- 6) That the 3rd to 8th Respondents be enjoined to these proceedings.***
- 7) That costs of this application and the Reference be awarded to the Applicant.***

9. The Appellant's application before the Tribunal was heard and it was dismissed vide ruling delivered by the Tribunal Chairman on 10th February 2017. It is this ruling which is the subject of the appeal in which the Appellant has raised the following grounds of Appeal: -

- 1) That the Tribunal erred in failing to find that the Court of Appeal, in Civil Application No. 203 of 2016 in the consent Order dated 27th September 2016, and the High Court in Civil Suit No.1400 of 2004 in the Judgement given on 27th July 2016, had substantively dealt with the subject matter of the References filed by the 1st and 2nd Respondents.***

2) *That the Tribunal erred in failing to find the References before it were sub-judice.*

3) *That the Tribunal erred in failing to uphold and enforce the Court of Appeal consent Order in Civil Application No. 203 of 2016 between the Appellant and the 3rd, 4th, 5th, 6th, 7th, 8th Respondents dated 27th September 2016.*

4) *That the Tribunal erred in failing to find under the doctrine of lis-pendens the 3rd Respondent could not enter into protected tenancies with the 1st and 3rd Respondents. At the date of entry into the tenancies in 2015, the 1st, 2nd and 3rd Respondents were all aware that there was a dispute over the ownership of the suit property pending before the High Court in Civil Suit No.1400 of 2004 between the 3rd Respondent and the Appellant and 5 others.*

5) *That the Tribunal erred in failing to find the 1st and 2nd Respondents were non-existent entities.*

6) *That the Tribunal erred in failing to consider the evidence and the material placed before it.*

7) *That the Tribunal erred in failing to find that it had no jurisdiction over the subject matter of the dispute.*

8) *That the Tribunal erred in finding that the 1st and 2nd Respondents were protected Tenants and that it had jurisdiction to deal with the Reference filed before it.*

9) *That the Tribunal erred in failing to find that the Reference before it were filed in abuse of court process.*

10. The parties were directed to dispose of the Appeal by way of written submissions. The Appellant filed its submissions on 20th September, 2019. The 1st and 2nd Respondents filed their submissions on 14th November, 2019. The 3rd Respondent filed its submissions on 23rd October, 2019. The Appellant filed its further submissions on 10th December, 2019. The counsel for the Appellant, the 1st, 2nd and 3rd Respondent's highlighted their submissions on 22nd October, 2020.

11. I have carefully considered the submissions by the Appellant as well as the submissions by the 1st, 2nd and 3rd Respondents. As a first Appellate court my duty is to evaluate the proceedings before the BPRT and reach my own conclusion. As can be seen from the background which has been given above, this is an appeal from an interlocutory application. The two references which were filed before the Tribunal are still pending.

12. From the application which triggered this appeal, it is clear that the fundamental issue for determination in this appeal is whether the Tribunal Chairperson had jurisdiction to entertain the references which were before him. The other grounds raised boil down to jurisdiction. This for instance whether the suit premises was for residential use or business use; whether the 3rd respondent had capacity to enter into tenancy agreement with the 1st and 2nd Respondents and whether the chairperson was under obligation to implement the consent which had been filed in the Court of Appeal.

13. A look at the two references which were filed before the tribunal that is Tribunal case No. 902 and 903 of 2016 shows that they were filed based on tenancy agreements which were both for two years with effect from 1st July, 2015 to 30th June, 2017. There were previous tenancy agreements which were for two years with effect from 1st July, 2013 to 30th June, 2015 which had expired. The subsisting tenancies were for two years and contained termination clauses. The tribunal therefore had jurisdiction to deal with the matters before it.

14. The tenancy between the 2nd Respondent and the 3rd Respondent was not executed. Legally, this document is not recognized. Non execution left the parties without any document to rely on. However the position remained that the 2nd Respondent was operating its business from the suit premises. In this case the 2nd Respondent was a protected tenant as per the provisions of Cap 301. Even in a case where a document is not executed by all parties, the court has to look at the nature of business carried out by the tenant to determine whether there was a tenancy or a licence. See the case of **BP Nairobi Service Station Ltd Vs BP Kenya Ltd (1989) KLR**. In the instant case, the 2nd Respondent was a tenant.

15. There was an argument by the Appellant that the leases were not stamped and cannot therefore be used in evidence. This is an argument which was not raised before the Tribunal. It was first raised before this court which is dealing with the appeal by the Appellant. In any case, it is clear that an unregistered lease or tenancy agreement can operate as a contract between the parties which can be enforced. See **Sousa Figueiredo Vs Moorings Hotel Co.Ltd (1960) EA 926**.

16. There is evidence that when the matter had gone to the Court of Appeal, the Court of Appeal was shown leases which were for 9 years and 3 months with effect from 1st December, 2016 to 31st October, 2016. These leases were never placed before the Tribunal when the 1st and 2nd Respondents appeared before it on 4th November, 2016. There is, therefore, no way the Tribunal would have addressed the issue of the leases of 9 years and 3 months when the affidavits before the Tribunal disclosed that the 9 years 3 months leases had been superceded by the two year tenancy agreements which were in force and which were within the jurisdiction of the Tribunal.

17. When the appellant filed the Notice of Motion dated 23rd November, 2016, the prayers were that the application be certified urgent and that the two references be consolidated by the Tribunal. The Tribunal Chairperson declined to allow the setting aside of the orders he granted on 4th November, 2016 as he found that he had jurisdiction to hear the reference.

18. The prayer for joinder of the 3rd and 8th Respondents was declined because the Chairperson found that their joinder was unnecessary as

what was before the Tribunal did not concern the parties as there was no landlord/Tenant relationship between them and the 1st and 2nd Respondents. Of course the Tribunal Chairperson did not address himself to the prayer for striking out the reference as he had found that he had jurisdiction to hear the same and the references had not been heard.

19. What was before the Tribunal were references filed by the 1st and 2nd Respondents. The Tribunal Chairperson was under no obligation to implement the consent which had been filed in the Court of Appeal. The Tribunal chairperson made an observation that the consent was made without regard to the fact that the 1st and 2nd Respondents were protected tenants. The Tribunal Chairperson's observations were vindicated later when the said consent was set aside by the Court of Appeal in a ruling delivered on 22nd September, 2019. One of the grounds for setting aside the consent is that there was misrepresentation in that the 3rd Respondent had not disclosed before the Court of Appeal that there were other tenancies which the Tribunal had been shown but which were not placed before the Court of Appeal.

20. The proceedings before the High Court in ELC 1400 of 2004 and the Court of Appeal did not include the 1st and 2nd Respondents though the evidence before the two courts recognized the fact that there were tenants in the suit property. The argument by the Appellant that the 1st and 2nd Respondents were put on notice about the Pendency of a suit in the High Court has no basis. The letters which appear on page 170 and 172 of the record of appeal were addressed to Total Security Surveillance Ltd and Multi Options Motors Ltd, respectively and these were not the entities which were before the Tribunal.

21. The issue of jurisdiction of a Tribunal is deduced from the facts put before the Tribunal. In the instance case, there were tenancy agreements which were before the Tribunal. In my view, the fact that the entities before the Tribunal were not registered did not matter. What mattered is the business which the entities were carrying out. Equally, it does not matter that the premises from where the entities were carrying on business was meant for use as residential. It was common knowledge, that the title to the suit property indicated that the premises were for residential use but what was going on there was not residential use. The Appellant itself had sourced for a tenant a firm called Femtech Ltd whom they wanted to put in to use it for commercial purposes. It is therefore, ironical for the Appellant to argue that the tenancies were illegal as there was no change of user to commercial purposes.

22. From the history of the suit property as given herein above, and from the proceedings in ELC 1400 of 2004, the court had directed that the property be preserved. The appellant was barred from interfering with the business of the 3rd Respondent or its agents. The orders lapsed in 2005. The appellant did not take possession though it had title. The title held by the Appellant is actively in contention. The matter is before the Court of Appeal. There was nothing to stop the 3rd Respondent from letting out the suit property which it had been occupying since the same was vested on it. The issue of *lis-pendens* does not therefore arise. The litigation before the Tribunal is also not sub-judice what is before the Court of Appeal as the issue before the Tribunal is quite different from that which is before the Court of Appeal.

23. From the above analysis, it is clear that the Appellant's appeal lacks merit. The same is dismissed with costs to the 1st, 2nd and 3rd Respondents.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF FEBRUARY 2021.

E.O.OBAGA

JUDGE

In the Virtual presence of:-

M/s Kethi Kilonzo for Appellant

Mr Karani for M/s Kamau for 1st and 2nd Respondents

M/s Mathenge for 3rd Respondent

Court Assistant: John

E.O.OBAGA

JUDGE