REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)

civ app 316 of 91

SPARES CORNER (K) LTD. ……. APPELLANT

VERSUS

1. MARIAM NOORMOHAMED AND……..... 1ST RESPONDENT

2. ABDUL HAMID NOORMOHAMED ……. 2ND RESPONDENT

3. ISMAEL NOORMOHAMED ……... 3RD RESPONDENT

JUDGEMENT

The issue raised in this Appeal is academic but nonetheless important. It is this: Once a tenant has been evicted from Controlled premises, through a lawful Court Order, does the Tribunal cease to have jurisdiction to hear any applications re lating to the terminated tenancy or the eviction?

The facts of the case will bring the issue into focus. Spares Corner (K) Ltd who are the Appellants in this case but will be referred to as "the tenant" occupied shop premises on L.R. No. 209/136/193, Kirinyaga Road Nairobi as periodic tenants. The three Respondents own the property and will be referred to as "the landlords." It is common ground that the premises are controlled.

On 13. 8. 1990, the landlords served on the tenant a Notice under Section 4(2) of the landlord and tenant (Shops, Hotels and Catering Establishments) Act Cap 301, (the Act) terminating the tenancy on the grounds that the tenant had defaulted in paying rent for more than 2 months after it had become due and that the tenant had failed to pay accumulated rent arrears from September 1989 at Shs.15,000 per month which by August 1990 amounted to Shs.180,000. Rent increase had been effected from 1. 9. 89 by Notice dated 22. 6. 89 which the tenant did not respond to and a belated attempt to challenge it was dismissed by the Tribunal on 23. 7. 90. The Notice of termination dated 13. 8. 90 was however responded to and the tenant filed a Reference to the Tribunal under Section 6 of the Act on 30. 10. 1990. A date was then set for the hearing of the matter on 28. 2. 91 but neither the tenant nor their Advocates attended Court. The reference was dismissed and vacant possession of the premises was given to the landlord together with an order for payment of arrears totaling Shs.240,000. The landlord moved to the Resident Magistrate's Court to enforce the Tribunal's Orders and successfully executed the eviction warrants on 28. 03. 1991. A certificate was issued to that effect.

Five days later on 02. 04. 1991, the tenant went before the Tribunal and took out a Notice of Motion seeking to "rescind and/or vary the order made on 28. 2. 1991 dismissing the tenant's reference." Section 12 (1) (i) of Cap 301 was invoked. That application was heard on 23. 4. 1991 and a Ruling was delivered on 29. 11. 91 dismissing it. It is the reasons given for dismissal that provoked this Appeal filed on 23. 12.

91. The reasons given by the Tribunal were these:- “The application of the tenant was filed after the order of the Tribunal had been executed. The appl icant is already out of the suit premises following a lawful order of the Tribunal. The relationship of landlord and tenant between these parties was terminated by the order of the Tribunal dated 28. 2. 91 and executed on 28. 3. 91

There being no landlord tenant relationship between these parties since 28. 3. 91 after the tenant was evicted from the suit premises the Tribunal finds that it has no jurisdiction to entertain the Tenants application filed on 2. 4. 91 and the same is wrongly before the Tribunal” The Tribunal then refused to consider the merits of the application for lack of jurisdictional base. Twelve grounds of Appeal were set out in the Memorandum of Appeal. But Learned Counsel for the tenant Mr. Rayani confined himself to the one issue stated above which is covered in grounds 1 & 2 as follows: “1. The tribunal erred in dismissing the Appellant’s application on the ground that there was no landlord/tenant relationsh ip existing at the time of filling application.

2. The Tribunal erred in failing to appreciate that once the Tribunal is seized of a matter on a reference the tribunal’s jurisdiction remains and continues until the reference and all matters arising theref rom are finally disposed off.”

In his submissions Mr. Rayani referred to several provisions of the Act to establish that the Tribunal retains the jurisdiction to deal with matters raised between the parties even after termination of their relationship. Such provisions are Section 6(1) which allows a party to oppose a tenancy Notice if good cause is shown even where the Notice had taken effect to terminate the relationship. The Jurisdiction of the Tribunal continues. Section 12(1) (i) gives the power to vary or rescind any order made by the Tribunal and it matters not that there was no relationship of landlord/tenant. So does Section 12(1) (4) where the Tribunal may award costs of a determined reference. Finally section 13 which empowers the Tribunal to make orders relating to compensation for misrepresentation or concealment of material facts by either party. The jurisdiction may arise even after termination of the relationship.

In Mr. Rayani’s view there was a fundamental misconception in appreciating the Tribunal’s jurisdiction which was induced by the decision of Madan J (as he then was) in PRITAM VS RATILAL & ANOR [1972] E. A. 560 . In that case, the Tenant was served with a Notice of termination but did not respond to it or refer the matter to the Tribunal. The Notice therefore took effect and the tenancy came to an end. The landlord then filed a Complaint before the Tribunal when the tenant did not quit, seeking possession, and the Tribunal granted the order. The tenant subsequently went to the High Court to challenge the order on the ground that such order could only be made on a “reference” and not “a complaint.” It was held:

“(i). The High Court may investigate whether a statutory tribunal acted without jurisdiction; (ii) There must be a contr olled tenancy before the provisions of the Act can apply; (iii). The Plaintiff’s tenancy had been properly terminated; (iv). The landlord cannot make a reference to the Tribunal: this can only be made by the Tenant on whom a notice is served; (v). There was therefore no reference upon which the Tribunal could make an order for possession; (vi). A complaint may only be made when the parties are landlord and Tenant;

(vii). As the Plaintiff had ceased to be the Defendant’s Tenant, no complaint could be m ade; (viii). A power to order possession specifically given under the Act must be exercised under the provision.

(ix). An order for possession cannot be made on a complaint (dictum of SPRY, V -P in Harnam Singh vs Mistri (1) followed).”

According to Mr. Rayani the confusion arises because in that case a new matter was introduced before the Tribunal after the relationship of landlord/tenant had been severed. The Tribunal could not deal with the new matter and Madan J’s decision was therefore correct on that basis. Not so however where the Tribunal is already properly seized of a matter and has made orders on it. It can vary, set aside or rescind those orders or award costs or allow references out of time where good cause is shown. That was the tacit exposition in Harnam Singh & others vs Mistri [1971] EA 122 where the Court of Appeal agreed with the High Court in staying a suit for possession of property to allow the tenant to apply to the Tribunal for

extension of time to file a reference. The tenant had notified the landlord that he did not agree with the termination Notice but did not refer the matter to the Tribunal. On all accounts therefore, the Tribunal had the jurisdiction to deal with the Application before it and it was erroneous to find otherwise.

We did not have the benefit of other arguments from Counsel for the landlords who failed to attend Court despite being served with hearing Notice. It matters not however since in our view the issue raised poses no special complexity. The Act, (cap 301) was enacted for the protection of Tenants, primarily against evictions and exploitation. There is no dispute in this matter that there was a lawful and a controlled Tenancy between the landlords and the tenant before the commencement of the reference made to the Tribunal. That is why the landlord served Notice of termination under the Act in the first place. There was response to that notice followed by a reference filed before the Tribunal. The legal effect of that is spelt out in section 6(1) of the Act; the Notice ceases to have effect "until and subject to the determination of the reference by the Tribunal."

The view taken by the Tribunal in this matter is that it had already determined the reference and therefore the termination notice had taken effect to sever the Legal relationship of the parties before the Notice of Motion was filed by the tenant. With respect, we think such legalistic construction opens the tenants to the very danger that the Act intended to curb. One may easily visualize a situation where the tenant may well be prevented by genuine reasons from attending the hearing in a reference whereupon the landlord quickly processes the order for eviction to sever their relationship before the tenant has any opportunity to explain why there was no attendance! That would be tantamount to stealing a march on the other party. And that is why we think the provisions of section 12 (1) (i) were enacted. The section provides:

"12. (1). A Tribunal shall, in relation to its area of juris diction have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in addition to and without prejudice to the generality of the foregoing shall have power –

(i). to vary or rescind any order made by t he Tribunal under this Act."

Take this case. The tenant's reference was due for hearing on 28. 2. 1991 but when it was determined on the same day the tenant was not present. There is no indication that any notice was given to the tenant about that Exparte decision or the subsequent Orders issued for eviction by the Resident Magistrate's Court on 21. 3. 91 which was executed on 28. 3 91. The tenant's wake up call appears to have been the eviction on 28. 3. 91 when he went rushing before the Tribunal on 2. 4. 91 and obtained a temporary order for stay. To give such order, the Tribunal must have thought it had the jurisdiction to do so pending the hearing of the main application. And we think it had under section 12 (1) (i) above since it was already seized of the matter on which it had made Exparte orders. The application before the Tribunal sought to explain the absence of the tenant and/or his counsel at the hearing.

The reasons given may well have been sufficient or not at all. That is not an issue before us. But they were not considered because the Tribunal felt it had no jurisdiction to consider the application at all. We are persuaded by the arguments made by Mr. Rayani that the Tribunal was lawfully seized of the matter and was bound under the law to consider the application on its merits. It is difficult to see under what circumstances a Tribunal would be asked to vary or rescind any order made under the Act if it cannot reconsider its own orders dismissing a reference and ordering a tenant's eviction. The Act provides for it and it is in any event a fundamental principle of Justice.

We allow the Appeal and order that the matter be remitted back to the Tribunal for the hearing and determination of the tenant's application on its merits. Costs of the Appeal to the Appellant.

Signed and dated by us at Nairobi, this 26th day of

March, 2003.

R. KULOBA

JUDGE

P. N. WAKI

JUDGE