



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL APPEAL NO 54 OF 2019

KANJI K. PATEL.....1ST APPELLANT

DHANBHAI K. PATEL.....2ND APPELLANT

SIMON KIBUE T/A

RESTORERS CONSULT AUCTIONEERS.....3RD APPELLANT

=VERSUS=

STEELMAKERS LIMITED.....RESPONDENT

(Being an appeal from the whole of the decision, Ruling and orders of Hon. Mbichi Mboroki (Mr.) the Honourable Chairperson of the Business Premises Rent Tribunal delivered on 5th July 2019 at Nairobi BPRT Case No 873 of 2018)

JUDGEMENT

1. This matter arises out of the Ruling of Honourable Mbichi Mboroki (the Hon. Chairperson of the Business Premises Rent Tribunal delivered on 5th July 2019 at Nairobi in Nairobi BPRT Case No 873 of 2018).

The Honourable Chairperson made the following orders:-

“1. The tenancy between the parties to this reference is a controlled tenancy within the meaning of section 2 of Cap 301 and the rent payable is the rent which was in force at the expiry of the lease dated 31st July 2019.

2. Prayer 5 of the Notice of Motion dated 29th October 2018 is granted on the following terms:-

(a) The landlord shall supply the tenant/applicant with a statement of account for all the rent paid from 1st August 2014 based on the rent payable for the godowns and the offices as at 31st July 2014 within fourteen (14) days from the date of this ruling.

(b) The tenant/applicant shall prepare a counter statement if any, within fourteen (14) days from the date hereof.

3. The landlord’s application dated 22nd January 2018 is dismissed with no orders as to costs.

4. The costs of the tenants’ application dated 29th October 2019 shall abide the outcome of the accounts between the parties as per order 2(a) and (b) above.

5. Interim orders shall remain in force.

6. This matter shall be mentioned for compliance on 5th August 2019.”

2. The Appellant being dissatisfied with the said ruling, filed an appeal dated 2nd August 2019 to this court on the following grounds:-

(a) That the honourable Chairperson erred in law and in fact in failing to properly appreciate the fact that though the lease between the parties expired on 31st July 2014, the Tenant had deliberately declined to execute the renewal of the said lease.

(b) That honourable Chairperson erred in law and in fact when he failed to appreciate or take into account the binding authorities from the High Court to the effect that upon the expiry of an earlier lease, and even though a new lease is not executed, it can still be inferred from the exchange of correspondence between the parties.

(c) That the Honourable Chairperson made the impugned decision based on a non-existent law.

(d) That the honourable Chairperson erred in law and in fact in determining that even though the Appellants had a right to levy distress, the respondent had a right to approach the Tribunal for protection.

(e) That the honourable Chairperson erred in law and in fact in holding that the respondent had established a prima facie case which warranted the grant of the orders made.

(f) That the honourable Chairperson erred in law and fact in granting a prayer for the 1st and 2nd appellants to provide the respondent with a statement of accounts for the go-downs and offices as at 31st July 2014 which prayer was not sought by the respondent.

(g) That the honourable Chairperson erred in law and in fact in failing to recognize the fact that the respondent having issued a notice to terminate the tenancy had no right to challenge any action of the appellants before the Tribunal.

(h) That the honourable Chairperson erred in law in dismissing the appellants' application dated 22nd November 2018.

(i) That by ordering that the interim orders issued to the respondent remain in force, the honourable Chairperson failed to appreciate the fact that the respondent had already moved out of the suit premises and the said orders were only meant to punish the 1st and 2nd appellants who had been and continue being denied the much needed revenue from the premises since the reference was instituted.

(j) That the honourable Chairperson did not appreciate and consider the weight of evidence tendered by the Appellants and in the process giving a decision, and/or orders that were one sided.

(k) That the learned honourable Chairperson was completely biased in so far as he only relied entirely on evidence and submissions tendered by the Respondents.

3. REASONS WHEREFORE:-

(a) The ruling of the Honourable Chaiman of the Tribunal delivered on 5th July 2019 and the subsequent order of the Tribunal be set aside and be substituted with an order dismissing the application of the respondent dated 29th October 2018 with costs to the Appellants.

(b) That the costs hereof be to the appellants.

4. Together with the Memorandum of Appeal, the appellants' filed a notice of motion dated 2nd August 2019. The same was abandoned and the parties opted to have the appeal heard.

5. On the 19th February 2020, the court, with the consent of the parties directed that the appeal be canvassed by way of written submissions.

The Appellants' Submissions

6. They are not dated but filed on 17th September 2020. The Honourable Mbichi Mboroki, Chairperson of the Business Premises Rent held that he had jurisdiction to handle this matter despite the fact that the respondent herein had willfully refused to execute a new lease upon the expiry of the initial lease on the 31st July 2014. The Honourable Chair agreed to the fact that the lease agreement between the parties herein was not one that created a controlled tenancy.

7. On ground (a) and (b) of the memorandum of appeal, the issue as put by the Appellants is whether the lease agreement executed on the 19th May 2008 remained in force despite its lapse on the 31st July 2014 and the respondent unlawfully refusing to execute a new lease. It is stated on the 1st and 2nd appellants' replying affidavit (page 38 of the Record of Appeal) that the respondent entered into a lease agreement with the appellants in 2002 for the grant of a lease on go-downs no 2 and 3 and office space measuring 18,11049 square feet all situated on LR No 209/20258 and 209/20259 which lease was renewed by a lease agreement dated 19th May 2008. The respondent then requested for and continued to lease additional office space of 3,090.92 square feet on the same property.

8. The respondent willfully refused to execute a renewal of the lease despite several attempts by the appellants and their lawyers for them to do so. All these leases have been exhibited in the appellants' affidavits (page 38 to 129 of the Record of Appeal). The correspondences are at (pages 95 – 99) of the Record of Appeal showing various attempts by the appellants to have the lease executed. The respondent upon the expiry of the executed lease confirmed to be in occupation of the leased property despite not having the appellants' express consent to do so.

The respondent was in rent arrears to the amount of Kshs.16,695,352.29 as at November 2018 warranting the appellants to distress for rent.

9. They rely on Section 60 of the Land Act, 2012. The respondent herein unlawfully refused to execute a new lease and in the same vein refused to pay rent. The honourable chair in his ruling delivered on 5th July 2019 misdirected himself when he deemed the respondent to be a periodic tenant upon lapse of the lease agreement. For the respondent to have been deemed a periodic tenant, there must have been express consent from the appellants to the respondent to continue occupying the leased property. They have put forward the case of **National Oil Corporation of Kenya vs Robert Obegi Ongera & Another [2014] eKLR**.

10. Upon the expiry of the lease the respondent made every effort to defeat the renewal of the said lease in an attempt to create a protected tenancy. This honourable court should look at the intention of the parties and infer to the correspondence exchanged between the parties post expiry of the initial executed lease. They have put forward the cases of **Spannerright Auto Limited vs Shell & BP (Malindi) Kenya Limited [2008] eKLR; KCB Ltd vs Popatlal Madhavji & Another [2019] eKLR**. This court should hold that the appellants' and respondent's agreement is not a controlled tenancy and the reference at the Business Premises Rent Tribunal ought to be dismissed.

11. As regards to ground No C the Appellants submit that there exist no statute under our laws as the Landlord Act, 2010. The landlord and tenant (Shops Hotels and Catering Establishments Act) which governs the Tribunal that does not provide for the provisions captured by the honourable Chair in his ruling of 5th July 2018.

12. The application before the Business Premises Rent Tribunal sought for the equitable remedy of injunction. The respondent failed to fulfil the conditions for granting an injunction as set out in the case of **Giella vs Cassman Brown & Co. Ltd**. A person who makes an ex parte application has a duty to disclose all material facts to the fountain of justice. In the event that a court of law comes to the realization that there was non-material disclosure on the point of the ex parte hearing; the remedy is to discharge the interim orders. They have put forward the case of Uhuru **Highway Development Ltd vs Central Bank of Kenya & 2 Others [1995] eKLR**. The appellants continue to suffer irreparable loss as they are owed Kshs.18,671,495.56 in rent arrears. The respondent indeed approached the tribunal with unclean hands.

13. By the time of approaching the Business Premises Rent Tribunal, the respondent had already issued the appellants with a notice to vacate the leased premises as a result of the outstanding rent (page 107 of the Record of Appeal). A party that has issued a notice to vacate cannot approach the Business Premises Rent Tribunal as there no longer exists a landlord and tenant relationship. As at the time of the ruling of 5th July 2019, the respondent had already vacated the leased property and the ruling delivered by the honourable Chairman was an exercise in vain as he acted without jurisdiction. They have put forward the case of **Republic vs The Chairman BPRT Ex parte Velji Prencard Shah [2012] eKLR**.

14. The honourable Chair upon arriving at his decision delivered on 5th July 2019 failed to examine and analyse all the evidence presented before him in its entirety. The appellants filed a very detailed replying affidavit dated 28th November 2018 (page 38-129 of the Record of Appeal) together with the application dated 22nd November 2018 (page 130-138 of the Record of Appeal) essentially to discharge the interim orders enjoyed by the respondent. The honourable Chair of the Business Premises Rent Tribunal misdirected himself when he held that the respondent herein is a periodic tenant in the lease property. They pray that the appeal be allowed and the orders of 5th July 2019 by the Business Premises Rent Tribunal be set aside.

The Respondent's Submissions

15. They are dated 31st July 2020 Sections 60(1) and (2) of the Land Act, No. 6 of 2012 are clear. The terms of the expired lease can only remain in force if the lessee remains in possession of the property without the consent of the lessor. The respondent herein remained a tenant on the premises for a further period of five (5) years and with the appellant's express consent. The reference as filed by the respondent is still alive in the Business Premises Rent Tribunal and the ruling appealed from is but just that, a ruling. It is not a final determination of the unlawful distress complained about by the respondent and the demand for unpaid rent and interest as complained about by the appellant.

16. The respondent leased two premises from the appellants and though co located within the same complex off Mombasa Road Nairobi, the premises were subject to different agreement and terms. Go-downs B2 and B3; the respondent was in occupation for almost 20 years and its formal lease expired on 31st July 2014. The respondent vacated the premises on 21st March 2019. Office space – no lease was in force and the respondent vacated the premises on 21st March 2019. There were no leases in force by the time the respondent, a business entity sought the tribunal's protection thus the respondent rightfully so relied on the provisions of Cap 301 to lodge its reference as against the appellants. As a protected periodic tenant, the respondent was only responsible for paying rent at the rate that was in force when the lease expired. This being the case it was well within the respondent's right to pray for an account taking of the sums owing to the appellants and taking the "protected" status of the respondent into account. It has put forward the case of **Michael Chole Lugalia vs Jonathan Ligure Ayodi [2016] eKLR**.

The tribunal was correct in its finding that the respondent is a protected tenant.

17. Even in the absence of a lease the respondent continued to pay rent for several years. It has put forward the case of **David Mungai & 2 Others vs Registered Trustees of Teleposta Pension Scheme [2012] eKLR**. The letter of offer alluded to over the office space must suffer the same fate as unexecuted leases. The appellants never compelled the respondent to execute the leases.

18. The reference by the honourable Chair of the Business Premises Rent Tribunal to clause 2 of the (Landlord Act) was a mere typographical error. A contextual reading of the relevant section of the ruling reveals that the honourable Chair sought to refer to the Land Act.

19. On the strength of the documents tabled by the respondent, the honourable tribunal applied the principles for the consideration of an injunction and saw it fit to grant one. It has put forward the case of **Said Ahmed vs Manasseh Denga & Another [2019] eKLR**. The hon

Chair did not err in fact nor in law in finding that the appellant had made out a prima facie case.

20. A notice to vacate, whether issued under duress or not cannot oust the jurisdiction of the tribunal such ouster can only take place once a tenant has vacated the premises and all pending matters before the tribunal are resolved.

21. The appellants accepted rent from the respondent for several years even after the lease had expired. It prays that the appellants appeal be dismissed for want of substance with costs to the respondent.

22. I have considered the grounds of appeal, the response, the written submissions filed on behalf of the parties and the authorities cited. I will consider grounds (a) and (b) together.

23. It is not in dispute that the lease agreement executed on 19th May 2008 expired on 31st July 2014. On the 29th October 2018, the respondent filed tribunal case No 873 of 2018 against the appellants. It is also filed a notice of motion dated 29th October 2018 which sought orders of injunction against the appellants herein it from evicting it from the same premises or levying distress.

24. The lease between the appellants and the respondent is dated 19th May 2008. The same expired on 31st July 2014. Under clause 3:11 of the said lease agreement; it is stated;

“3.11 Option to Renew

3.11.1 The lessor will on the written request of the lessee, who shall have the first option to renew as against anyone else, served on the lessor not less than three (3) months and not more than six (6) months before the expiration of the term and if there shall not at the time of such service of such request be any existing breach or non observance of any of the covenants on the part of lessee hereinbefore contained grant to the lessee a lease of the demised premises for the further term of six (6) years from the expiration of the term at such revised rent at 7.5% increment per year containing like covenants and provisos as are herein contained with the exception of the present covenant for renewal.”

25. By a letter dated 14th August 2018, M/S Arwa & Change Advocates wrote to the respondent herein:-

“Ref AA/LIT/180/2018

24th March 2018

Steel makers Limited

Mombasa Road

P. O. Box 44574,

NAIROBI

RE: LEASE OF GODOWNS 2&3 AND OFFICE SPACE ON LR NO 209/20258

The above matter refers.

We act for Kanji Patel & Dhunbai Kanji Patel who are the owners of Go-down number 2 and 3 and office space situated on LR Number 20258 in Nairobi.

Our clients have instructed us to prepare a lease for the above property for execution by yourselves. Please find enclosed a lease in triplicate for that purpose.

We wait to receive the duly executed lease from you for our further action.

Yours faithfully,

EUNICE O. ARWA

ARWA & CHANGE ADVOCATES LLP”

There are several correspondences between the parties running from (pages 96 – 99, 108-117 of the Record of Appeal). The subject is renewal of the lease and rent arrears. On the 23rd October 2018, someone named Bobby on behalf of the respondent wrote to the appellants intimating that they would vacate the go-downs on 30th November 2018 and the office block by 28th February 2018. It also promised to clear the outstanding rent before the notice period ends. By a letter dated 25th October 2018 by M/S Arwa Change Advocates, for appellants to the respondent confirms the respondent was in rent arrears and had declined to renew the lease.

26. Section 57 and 60 of the Land Act No 6 of 2012 provides that:-

Section 57 provides that

1. If in any lease—

(a) the term of the lease is not specified and no provision is made for the giving of notice to terminate the tenancy, the lease shall be deemed to be a periodic lease;

(b) the term is from week to week, month to month, year to year or any other periodic basis to which the rent is payable in relation to agricultural land the periodic lease shall be for six months; 41 No. 6 Land 2012

(c) the lessee remains in possession of land with the consent of the lessor after the term of the lease has expired, then—

(i) unless the lessor and lessee have agreed, expressly or by implication, that the continuing possession shall be for some other period, the lease shall be deemed to be a periodic one; and

(ii) all the terms and conditions of the lease that are consistent with the provisions of sub-paragraph (i) shall continue in force until the lease is terminated in accordance with this section.

(2) If the owner of land permits the exclusive occupation of the land or any part of it by any person at a rent but without any agreement in writing, that occupation shall be deemed to constitute a periodic tenancy.

Section 60 provides that:-

(1) If a lessee remains in possession of land without the consent of the lessor after the lease has been terminated or the term of the lease has expired, all the obligations of the lessee under the lease continue in force until such time as the lessee ceases to be in possession of the land.

(2) A lessor who accepts rent in respect of any period after the lease has been terminated or the term of the lease has expired, shall not, by reason of that fact, be deemed to have consented to the lessee remaining in possession of the land, or as having given up on any of the rights or remedies of the lessor against the lessee for breach of a covenant or condition of the lease, and if the lessor continues to accept rent from a tenant who remains in possession for two months, after the termination of the lease, a periodic lease from month to month shall be deemed to have come into force.

27. According to Blacks' Law Dictionary; 'periodic tenancy' means:

"A tenancy that automatically continues for successive period usually month to month or year to year unless terminated at the end of a period by notice....."

Section 2 of the Landlord and Tenant (Shops, Hotels, and Catering Establishments) Act Cap 301 defines a controlled tenancy to mean:-

"A shop, hotel or catering establishment-

(a) Which has not been reduced into writing

(b) Which has been reduced into writing and which –

(i) Is for a period not exceeding five years; or

(ii) contains provisions for termination, otherwise than for breach of covenant, within five years, from the commencement thereof; or

(iii) relates to premises of a class specified under subsection (2) of this section;

Provided that no tenancy to which the government, the community, or a local authority is a party whether as landlord or as a tenant, shall be a controlled tenancy".

28. From the correspondences between the 1st and 2nd appellants and the respondent, it is not in dispute that the respondent was in rent arrears from as early as the year 2017. It can therefore not be said that the appellants continued to accept rent from the respondent after expiry of the lease. No material has been placed before this court by the respondent to show that the appellant had accepted rent after 31st July 2014. The respondent has also not placed any material before this court that they remained on the demised premises with the consent of the 1st and 2nd appellants. To this extent I find that the honorable Chair of the tribunal erred in finding that the respondent was entitled to protection under Cap 301 Laws of Kenya.

29. Furthermore the respondent had intimated through a letter dated 23rd October 2018 that it would be vacating the suit premises go-downs on 30th November 2018 and the office space on 28th February 2018. I find that henceforth there existed no landlord and tenant relationship between the respondent and the appellants. I find that the respondent herein obtained orders of injunction from the tribunal without disclosing material facts. Had the tribunal been aware of these facts then it would not have granted the orders of injunction. The 1st and 2nd appellants had a right to levy distress for rent arrears which the respondent admits. It was in rent arrears.

30. The 1st and 2nd appellants therefore had a right to levy distress. The honourable Chair of the Business Premises Rent Tribunal erred in granting an injunction against the 1st and 2nd appellants as sought by the respondent. I agree with the appellants' submissions that as at 5th July 2019 there existed no landlord and tenant relationship between the parties as the respondent had vacated the premises on 21st March 2019.

31. All in all I find merit in this appeal and the same is allowed in the following terms:-

(a) That the appeal is allowed.

(b) That the ruling of the honourable Chairman of the tribunal delivered on 5th July 2019 and the subsequent order is hereby set aside and the same is substituted with an order dismissing the respondent's application dated 29th October 2018 with costs to the appellants.

(c) Each party do bear their/its own costs in this appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 29TH DAY OF APRIL 2021.

.....

L. KOMINGOI

JUDGE

In the presence of:-

Mr. Omondi for the Appellants

Mr. Owino for the Respondent

Phyllis – Court Assistant