Patel & another v Wonderpac Industries Limited (Environment and Land Appeal E016 of 2023) [2023] KEELC 18785 (KLR) (6 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18785 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL E016 OF 2023

EK WABWOTO, J

JULY 6, 2023

BETWEEN

KANJI KUNVERJI PATEL ..... 1ST APPELLANT

KAY CONSTRUCTION COMPANY LTD ..... 2ND APPELLANT

AND

WONDERPAC INDUSTRIES LIMITED ..... RESPONDENT

JUDGMENT

1. This is an appeal arising from the ruling of Hon. Cyprian Mugambi Chairperson of the Business Premises Rent Tribunal (BPRT) delivered on the 27th day of January 2023 in respect to Nairobi (BPRT Case No E815 of 2022.) The Appellants had moved the Tribunal vide a Preliminary Objection dated September 29, 2022. The Preliminary Objection was premised on the grounds that:

    a. That the Tribunal divested of the requisite jurisdiction to hear and determine the Tenant's application pursuant to clause 3.9 of the tenancy agreement entered into between the 1st Respondent and the Tenant herein in 2017.

    b. That the agreement between the parties is for a period of six (6) years and as such does not fall within the meaning of a controlled tenancy as per section 2(b) (1) of *cap 301*.

2. The Tribunal upon considering the Preliminary Objection, did hold that the tenancy between the parties herein is a controlled tenancy within the meaning of section 2(1) (6) of *cap 301* and proceeded to dismiss the notice of Preliminary Objection dated September 29, 2022 with costs.

3. The Appellants being aggrieved by the said decision lodged the present appeal through a Memorandum of Appeal dated February 21, 2023. The Appellants raised the following grounds of appeal:

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 July 31, 2004, the Tenant had deliberately declined to execute the renewal of subsequent lease agreements.

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 there being no consensus between parties, no lease agreement had been entered.

e. That the Honourable Chairperson erred in law and in fact in holding that an unsigned lease agreement is not binding.

f. That the honourable chairperson erred in law and fact in holding that the tenancy between the Tenant/Applicant and the Respondents is a controlled tenancy.

g. That the honourable chairperson erred in law in dismissing the appellants' Preliminary Objection dated September 29, 2022 and failing to refer parties to arbitration.

h. That by dismissing the Appellants Preliminary Objection and giving effect to a 2004 lease agreement, the honourable Chairperson failed to appreciate the fact the suit premises had since changed ownership from the 1st Appellant to the 3rd Appellant.

i. 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.

j. That the Learned honourable chairperson was completely biased in so far as he only relied entirely on evidence and submissions tendered by the Respondents.

4. Ultimately, the Appellants sought the following orders from this court;

a. The said ruling and all consequential orders be set aside.

b. That the 2017 lease agreement be deemed as validly executed.

c. The parties be referred to arbitration by virtue of section 3.9 of the 2017 agreement.

d. The Respondent to bear the costs of this Appeal.

5. The Appeal was contested and the same was canvassed through written submissions. The Appellants filed their written submissions dated March 9, 2023 through Okwach & Co. Advocates while the Respondent filed written submissions dated April 11, 2023 through Shabana Osman & Associates.

6. The Appellants outlines two issues for determination by the court. The first issue being whether the 2017 lease agreement is a valid, binding and enforceable agreement as inferred from the parties correspondences and conduct of parties herein and the second issue being whether the dispute between the Appellants and the Respondent should be referred to arbitration as stipulated in clause 39 of the 2017 lease agreement.

7. On the first issue, it was submitted that the Respondent had intimated to the Tribunal that it had been a tenant for a period of 5 years. It was also submitted that the Tribunal had made a finding in

the Respondent's favour stating that the tenancy between parties herein is a controlled tenancy with reference to a 2004 lease agreement that had so long been terminated, with no reference to any decided authority or law to support the said finding.

8. It was also submitted that the Respondent made every effort to defeat subsequent renewal of their lease over the suit property over the years.

9. Counsel also submitted that the Tribunal at paragraph 17 of the ruling dated January 21, 2023, had admitted that the 2009 agreement was a valid agreement and the same subsisted for 6 years.

10. The Appellants faulted the Tribunal for basing its decision on a non- existent law and the 2004 impugned lease agreement, which according to the Appellants amounted to re-writing the contract of the parties. The Appellants also submitted that in dismissing their Preliminary Objection, the Tribunal failed to appreciate the fact that the suit premises had since changed ownership from 1st Appellant to the 2nd Appellant as evidenced by the title deed attached at page 57 to 61 of the Appellants Record of Appeal. Reliance was made to in the cases of *Feba Radio (Kenya) Limited t/a Feba Radio v Ikiyu Enterprises Limited* (2017) eKLR, *Kenya Commercial Bank Limited –vs- Popatlal Madhavji & another* (2019) eKLR, *Kanji K. Patel & 2 others v Steel Marks Limited* (2021) eKLR, *Spameright Auto Limited & Shell & BP (Malindi) Kenya Limited* (208) eKLR among others which this court has duly considered.

11. On whether the dispute between the Appellants and Respondent should be referred to arbitration, the Appellants submitted that clause 3.9 of the 2017 lease agreement stipulates that any dispute arising of the agreement between the parties should be referred to arbitration. The cases of *Nyutu Agrovet Limited v Airtel Networks Ltd*(2015) and *Eunice Soko Mlagui v Suresh Parmar & 4 others* (2017) eKLR were cited in support.

12. The Appellant also urged this court to allow the appeal with costs.

13. The Respondent filed written submissions dated April 11, 2023, through the law firm of Shabana Osman & Associates. The Respondent began the said submissions by outlining the background of the dispute. The Respondent also submitted on the following four aspects; court's jurisdiction; whether an agreement imposed by a Landlord upon a tenant can be binding; whether change in ownership can be a ground to vary and demand execution of lease and whether this court can refer the dispute between the parties to Arbitration.

14. On jurisdiction it was submitted that the original tenancy agreement between the parties was for a period of 5 years commencing in 2000 and which was superseded by a tenancy on October 29, 2002 for a period of 3 years commencing November 2004 and no subsequent tenancy agreement was executed between the parties. It was also submitted that pursuant to section 2 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* cap 301 prescribes whether the tenancy subsisting between the parties in a tenancy is a controlled tenancy or otherwise. The provision defines controlled tenancy as: -

> " a tenancy.....(a) which has not been reduced into writing and which (i) is for a period not exceeding five years.
>
> (ii) contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof.
>
> (iii) Relates to premises specified under subsection (2) of this section."

15. It was supported that from the evidence that was availed at the Tribunal, the tenancy agreement between the parties was a controlled tenancy and the Tribunal had jurisdiction.

16. On whether an agreement imposed by the Landlord can be binding, it was submitted that it is a cardinal principle of law that a party cannot be compelled to execute an agreement nor its refusal by a party to execute an agreement deemed as a basis to impose unilateral terms of lease between a Landlord and a tenant. Reliance was placed to the dictum in *National Fund for the Disabled of Kenya Registered Trustee v Esquire Limited* (2017) eKLR.

17. In respect to whether change in ownership is a ground to vary and demand execution of lease, Counsel submitted that bearing in mind that there is no subsisting executed lease agreement for a period over and above 5 years 3 months and the last duly executed agreement between the parties was for a period of 3 years which was in October 2004 hence the 1st Appellant must comply with the requirement as contained in section 4(5) of *cap 301* which provides *inter alia*;

> " A tenancy notice shall not be effective for any of the purposes of this Act unless it specifies the grounds upon which the requesting party seeks the termination, alteration or reassessment concerned and requires the receiving party to notify the requesting party in writing, within one month after the date of receipt of the notice whether or not he agrees to comply with the notice."

18. It was further submitted that the Appellants had refused to recognize the Respondent as a controlled tenant and has therefore not served the Respondent with any notice to vary the terms of the tenancy and has been demanding for huge rent arrears and has in its statements as pleaded by the Respondent been changing backdated rent which rent was not agreed upon and which matter is in dispute and shall be determined by the Tribunal once the complaint filed proceeds to full hearing.

19. On whether this court should refer the dispute between the parties to arbitration, it was submitted that the purported clause 3.9 of the lease agreement of 2017 under which the Appellant is seeking for orders for the dispute to be referred to arbitration is based on an un-executed lease which parties have never agreed on and or inferred to in their dealings and hence the same cannot be granted by this court.

20. The Respondent urged the court to dismiss the Appeal with costs.

21. I have considered the entire record of the Appeal. I have also considered the parties' respective submission in this appeal. The Appellants itemized 10 grounds of appeal. In determining the issues raised in the Appeal, and as submitted by the Respondents in their submissions, this court is cognizant of its duty on a first appeal as set out in the case of *Selle & another v Associated Motor Boat Co. Ltd & others* (1968) EA 123, cited with approval in *China Zhongxing Construction Company Ltd v Ann Akuru Sophia* (2020) eKLR.

22. In my humble view, the following issues stand out as key issues for determination which can dispose the appeal;

    i. Whether the Tribunal has jurisdiction to hear the complaint filed before it.

    ii. What are the appropriate reliefs to issue herein.

23. I will now proceed to analyze the two issues sequentially.

24. In the instant Appeal, the Appellants argued that the Tribunal did not have jurisdiction for the reasons that the tenancy agreement between the parties was for a period of 6 years and it does not fall within

the meaning of a controlled tenancy and further that clause 3.9 of the said agreement directs parties to refer any dispute between the parties to arbitration.

25. Having reviewed the evidence that was submitted to the Tribunal, it is clear that the purported tenancy agreement of 2017 had not been executed between the parties herein. The evidence on record shows that the initial tenancy agreement between the parties was for a period of five years commencing in the year 2000 and which was superseded by a tenancy thereafter on October 29, 2022 for a period of three (3) years commencing November 2004 and no subsequent tenancy agreement has been executed between the parties since then.

26. A Controlled Tenancy is defined under section 2(1) (a) of the Act as follows:

    i. Which has not been reduced into writing; or

    ii. Which has been reduced to writing and which:-

        a. is for a period not exceeding five years; or

        b. contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or

        c. Relates to premises of a class specified under subsection (2) of this section.

27. The purpose for the enactment of *cap 301* is that it is:

> " An Act of Parliament to make provision with respect to certain premises for the protection of tenants of such premises from eviction or from exploitation and for matters connected therewith and incidental thereto."

28. From the record there was no evidence of any executed lease and as such the lease continuant to be a periodic lease pursuant to section 57 and 60 of *Land Act*. In view of the foregoing the Tribunal cannot be faulted for finding that the tenancy between the parties was a controlled tenancy pursuant to Section 2(1) (6) of *cap 301*. Keeping the spirit and letter of the provisions of *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* cap 301, I find that the Tribunal did not err in finding that it had jurisdiction to entertain the issue.

29. In respect to whether this court ought to refer the dispute to arbitration as submitted by the Appellants, it is worth noting that the Appellants in fronting this argument argued on tenancy agreement which had not been executed by the parties and in view of the foregoing, I have no basis to grant such a request.

30. On the issue of costs, having found that the Tribunal has jurisdiction to hear the complaint filed herein and further being aware that this matter shall be referred back to the Tribunal for full hearing, it is not necessary to impose costs on either party. In view of the foregoing, I direct each party to bear own costs of this Appeal.

31. In conclusion, I do not find any merit in the appeal and I hereby make the following orders:

    a. The Appeal is devoid of merit and is dismissed.

    b. Each party to bear own costs of the Appeal.

    Judgment accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF JULY, 2023.

E.K. WABWOTO

JUDGE

In the presence of:

Mr. Okwach for Appellant.

No appearance for Respondent.

Court Assistant – Caroline Nafuna.