REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELCA CASE NO. 22 OF 2018

NV LUNAR PARK MAMBA VILLAGE.....APPELLANT/APPLICANT

VERSUS

BEATRICE MURIITHI T/A REDROCK PIZZERA.....RESPONDENT

JUDGMENT

The appellant, NV Lunar Park Mamba Village being dissatisfied with the judgment delivered by the Chairman of the Premises Rent Tribunal Honourable Mr. Mbichi Mboroki on 16th November 2018 Business Premises Rent Tribunal Number 40 of 2017, Beatrice Muriithi T/a Red Rock Pizzeria –v- NV Lunar Park Mamba Village preferred an appeal to the Environment and Land Court against the whole of the said judgment and sets forth the following grounds of appeal: -

1. The Honourable Chairman erred in law and in concluding that the appellant refunds the respondents the amount of Kenya Shillings Two Hundred and Fifty Thousand (Kshs.250,000.00) being goodwill amount which should never be charged and the same is not applicable at all in the care herein.

2. The Honourable Chairman misdirected himself in law and in concluding that the Appellant refunds the respondents the amount of Kenya Shilling Two Hundred and Fifty Thousand (Kshs.250,000.00) being goodwill amount without regard to the fact that the appellant has no intention of operating a similar business in future since the respondent took possession of the premises for his own use.

3. The Honourable Chairman erred in law and in fact in failing to take judicial notice of the fact that the Tenant/Respondent was in possession and occupation of the premises since 1st October, 2014 and only handed over vacant possession of the premises on 14th November 2018.

4. The Honourable Chairman erred in law and in fact in failing to take Judicial notice of the fact the Tenancy Agreement was still running and only expired when the tenant surrendered vacant possession to the landlord on 14th November, 2018 meaning the tenant was liable to pay rent and service charge to the landlord up to the time vacant possession was given.

5. The Honourable Chairman erred and in law in fact in failing to take judicial notice of the fact that the respondent maliciously locked the appellant's premises on 1st June 2017 thus denying the appellant rental income from the premises for a period of more than one (1) year when the Tribunal made an observation of the same during the site visit that was conducted on 7th November, 2018.

6. The Honourable Chairman erred in law and in fact in failing to take judicial notice of the fact that the respondent after maliciously closing the appellants premises and failing to handover vacant possession had pending rent arrears, electricity bills and service charges seen as follows:-

a. Rent Kshs.35,000.00 x 16) = Kshs.560,000.00

b. Service charge (Kshs.10,000 x 16)= Kshs.160,000.00; and

c. Electricity (Kshs.5,000.00 x 16) = Kshs. 80,000.00

Total Kshs.800,000.00

7. The Honourable Chairman erred in law and in fact in failing to consider the orders sought by the appellant in the replying affidavit sworn on 3rd November, 2017 and the further affidavit sworn on 15th May 2017 by Peter Machira Kinyanjui which were adopted as Evidence of the Appellant in the Tribunal;

8. The Honourable Chairman erred in law and in fact in finding that the respondent proved its case on a balance of probability.

9. The Honourable Chairman erred in law and in fact in failing to take into account the written submissions of the appellant and the authorities therein:

10. The Honourable Chairman erred in law and in fact in failing to consider the documentary evidence produced by the appellant witness during hearing.

11. The Honourable Chairman erred in law and in fact in failing to consider the prayers and written submissions dated 15th November 2018 filed by the appellant;

12. The Honourable Chairman erred in law and in fact in awarding the costs of the reference at Kenya Shillings Fifty Thousand (Kshs.50,000.00) to the respondent; and

13. In all the circumstances of the case, the findings of the Honourable Chairman are insupportable in Law or on the basis of the evidence adduced.

The appellant prays for;

a) That this appeal be allowed with costs; and

b) The judgment of the Honourable Chairman delivered on 16th November 2018 be set aside and the reference be dismissed as prayed in the replying affidavit and further affidavit sworn on 15th May 2017 sworn by Peter Kinyanjui Macharia.

The respondent submitted that Section 12 (1) (1) clothes the tribunal with the powers to grant the respondent's prayer for refund of the goodwill paid and states as follows;

"A tribunal shall in relation to its area of jurisdiction 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 generally of the foregoing shall have power-

To award compensation for any loss incurred by a tenant on termination of a controlled tenancy in respect of goodwill and improvements carried out by the tenant with the landlord' consent."

The court in Alfred Kihoro –v- Joseph Gitau Gacheru & Another (2017)eKLR in affirming the tribunal's decision observed that;

"I am unable to fault the tribunal for awarding the appellant nothing more than the sum of Kshs.100,000.00 which the appellant had paid as goodwill when the appellant agreed to become the respondents' subtenant."

That the appellant alleges that the Kshs.250,000.00 paid by the respondent was for renovation of the premises. Which allegations was unsubstantiated. There was no evidence tendered before the tribunal to show what the appellant did not renovate the suit premises. That it was agreed by the parties at the commencement of the tenancy, that the appellant would alter, customize and renovate the premises at its own expense to fit a pizzeria place. Which agreement, as earlier submitted, the appellant reneged by failing to renovate the premises forcing the respondent to carry out the renovations at her own expense costing approximately Kshs.300,000.00. Costs which were proven by production of documentation marked BM1 and BM 2 (page 85 to 92 of the record). The respondent's contention that the sum of Kshs. 250,000.00 was paid as goodwill as the respondent appreciated the fact that the appellant had already leased the premises to a previous owner who operated a bar and restaurant and so the premises' 'goodwill' would be an attraction for her market base.

That the appellant by unlawfully locking up the appellant's business premises brought dishonour and notoriety to the respondent's own reputation and as such as she lost any market base she had earned over the years. That it was the Chairman's finding that the tribunal could not on the evidence on record determined the purpose of the payment of the sum of Kshs.250,000.00. The tribunal was however satisfied that the appellant was unable to explain the purpose for which the sum was paid and that the amount was paid for a considerations which had totally failed. The proceedings at the tribunal originated and or were brought upon by the appellant's illegal and unlawful action of locking up the respondent's premises with her tools of trade inside on the 13th March 2017, only two days after the respondent had paid Kshs.34,000 with acknowledged arrears of only Kshs. 1,000 paralyzing the respondent's business operations. In addition to locking up the respondents premises, the appellant proceeded to pin a proclamation notice on the door of the respondents premises alleging rent arrears of Kshs.175,000.00 prompting the filing of the reference and application under certificate at the tribunal. It is only then that the respondent's premises were unlocked and she was able to vacate the premises. That the landlord' claim for arrears is untenable and against public policy premised on the fact that the respondent's business from 13th March 2017 was paralyzed by the appellant's unlawful act of locking up the premises.

After parties recorded a consent on 7th November, 2018, the only outstanding issues that were left for the tribunal to determine were the issues raised in the reference. The electricity and service charges that the appellant is alleging to be arrears are charges calculated using sums not initially agreed upon by both parties. They are charges which were unilaterally levied, making the illegal. They pray that the appeal be

dismissed with costs to the respondent.

This court has considered the appeal and the submissions therein. The appeal was canvassed by way of written submissions. It is not in dispute that the Appellant and the Respondent entered into a tenancy agreement which was never reduced into writing. The rent was to be kshs.35,000/= per month and the tenant paid a deposit of kshs.250,000/= of which the purpose is in dispute in this matter. The Tribunal by a ruling delivered on 27th July 2018 held that the tenancy agreement between the parties was controlled tenancy that can only be terminated or altered on accordance with Section 4 (2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. That the appellant had not initiated any legal process to alter or terminate the tenancy and therefore the Tenant is entitled to quiet enjoyment of the premises. That the closure of the business premised by the appellant was unlawful. (pages 29-30of the record). By a final ruling dated 16th November 2018 the Tribunal held that;

> *" 1. The Landlord/Respondent shall refund to the Tenant a sum of Kshs. 250,000/= in default execution shall issue under section 14(1) of cap 301.*
>
> *2. The Landlord/Respondent shall pay the Tenant the costs of the reference assessed at Kshs. 50,000/= all inclusive.*
>
> *3. Costs shall be paid on or before 15th December 2018*"

Section 2(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301) Laws of Kenya defines *"Controlled Tenancy" to mean, "a tenancy of a shop, hotel or catering establishment –*

> *(a) which has not been reduced into writing; or*
>
> *(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…"*

I concur that this was a controlled tenancy. Being a controlled tenancy, the appellants were obligated to comply with the prerequisites set out in sections **4(1), (2), (4) & (5**) of the Act if they desired to terminate the tenancy. These provide:

> *"4. Termination of and alteration of terms and conditions in, controlled tenancy.*
>
> *(1) Notwithstanding, the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be terminated, and no term or conditions or right or service enjoyed by the tenant of any such tenancy shall be altered, other than in accordance with the following provisions of this Act.*
>
> .....
>
> *(2) A landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the tenant, any term or condition in, or right or service enjoyed by the tenant under, such a tenancy, shall give notice in that behalf to the tenant on the prescribed form.*
>
> ....."
>
> *(4). No tenancy notice shall take effect until such date, not being less than two months after the receipt thereof by the receiving party as shall be specified therein.……*
>
> *(5) 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."*

The Appellant submitted that the respondent maliciously closed the appellant's premises and failed to handover vacant possession and had pending rent arrears, electricity bills and service charges. The rent arrears were for 16 months from March 2017 to November 2018 (Rent Kshs.35,000.00 x 16) = Kshs.560,000.00. however from the evidence on record it is clear the Appellant also locked the premises and denied the Respondent entry without giving any notice to her to vacate. The agreement was never reduced into writing as earlier stated and hence it is difficult if not impossible to determine what was paid or not paid in terms of service charge and electricity costs. Hence the Service charge (Kshs.10,000 x 16)= Kshs.160,000.00 and Electricity (Kshs.5,000.00 x 16) = Kshs. 80,000.00 has not been established. On the refund of Kshs. 250,000/= to the Respondent by the Tribunal, the Appellant stated that this was money used to partition the space as agreed with the Respondent. However, no evidence was adduced to prove it was used for the same. The Respondent insists it was goodwill which was refundable. Indeed she adduced documentary evidence to show how she renovated the premises to suit her business. I find that in the absence of any evidence to the contrary this money was a deposit and hence refundable. In the case of **Raichand Khimji & Co., vs Attorney General (1997) EA. 536**, the Court held that;

> ***"... The High Court has power to quash a decision of a statutory tribunal for want or excess of jurisdiction, breach of rules of natural justice, error of law on the face of the record, fraud or collusion."***

Upon my evaluation of the proceedings before the tribunal I find that the Tribunal did not in law and in fact in arriving at the decision.

The Appellant submitted that the Honourable Chairman erred in law and in fact in awarding the costs of the reference at Kenya Shillings Fifty Thousand (Kshs.50,000.00) to the respondent. It is not pointed out what error the Chairman made in making an assessment of costs at Kshs. 50,000/= and neither is there any proposal on what ought to have been the correct amount as costs. There was no submission of any law that contradicts the Chairman's assessment on costs. Without any such submissions, I am unable to set aside the Chairman's discretion for it has not been demonstrated to me that it was made in error or that it was an unfair exercise of discretion. For those reasons I find this appeal lacks merit and I dismiss it with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 9TH NOVEMBER 2021.

N.A. MATHEKA

JUDGE