REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC APPEAL NO. 415 OF 2017

(FORMALY HCCA NO. 32 OF 2015)

NJOROGE WAMUNYUA & MOSES GITONGA T/A

LIKIA GUEST HOUSE.....APPELLANTS

VERSUS

GEORGE GATHECA KINYANJUI.....RESPONDENT

(Being an appeal from the judgement of Hon. Mbichi Mboroki Chairman Business Premises Rent Tribunal delivered on the 20th February 2015 at Mombasa in BPRTC No. 29 of 2005 Njoroge Wamunyua & Moses Gitongi t/a Likia Guest House Versus George Gathece Kinyanjui)

JUDGEMENT

1. Briefly the facts are that the Appellants commenced occupation of the suit premises as a tenant sometimes in September, 2002. In February 2005 the respondent served the appellants with a notice of motion to terminate tenancy on the basis that he wanted to occupy the same. The tenants being unwilling to vacate, filed a reference at the Tribunal which reference was heard and judgment delivered on the 20th February 2015 and decreed that the tenant gives vacant possession by the 1st July 2015. The Appellant's opposition to the notice to terminate was grounded on Section 7 of Landlord and Tenant (Shops, Hotels and Catering Establishment) Act. Cap 301 that was not entitled to seek vacant possession.

2. By its determination dated 20th February 2015 the Tribunal determined the dispute between the parties and gave the Respondent vacant possession effective 1st, July 2015. That decision provoked this appeal.

3. In a Memorandum of Appeal dated 9th March 2015 the Appellants have set out the grounds of appeal as follows:-

> **"1. That the learned Chairperson erred in law and in fact in ignoring and failing to take into account the evidence adduced on behalf of the Appellants as follows;**
>
> **(a) That the respondent may have been registered as proprietor of plot No 148 Section XX on 27th July 1999 but he was not the landlord of the suit premises from July 1999 to September 2012.**
>
> **(b) That the landlord from July 1999 to September 2012 was A. G Kinyanjui as evident from the leases dated 22August 2000 and 28th March 1992.**
>
> **(c) That the respondent became the landlord by his own admission in September 2012, hence Section 7(1)(g) Cap 301 invalidated the respondent's notice to terminate dated February 2005.**
>
> **(d) That the chairman totally failed and refused to consider the appellants written submissions dated 18th February 2015 and the authority therein submitted.**
>
> **2. That the chairman grossly erred in law in ignoring and failing to implement the provisions of the landlord and tenant (Shops, Hotels are Catering Establishment Act Cap 301;**

(a) Failed to construe and apply the definition of landlord as provided under Section 2 of Cap 301;

(b) Failed to give the true meaning to Section 2 of Cap 301 and failing to appreciate that Cap 301 is a statute and all business control tenancy are regulated strictly by the provisions of Cap 301;

(c) Failed to apply Section 2 Cap 301 in considering when the relationship of landlord and tenant started between the Appellants and the Respondent.

(d) Failed to strictly apply Section 7(2) and Section 7 (i) (g) of Cap 301.

(e) That Tribunal had no jurisdiction to terminate the tenancy under Section 7(2) and 7(i) (g) of Cap 301.

(f) The Tribunal failed to adopt the ruling of the Court of Appeal case and to implement the provisions of cap 301."

4. The Appellants are seeking the following orders in this appeal;

(a) That the appeal be allowed

(b) That the respondent pay the costs of this appeal and at the tribunal.

(c) That the Honourable Court be pleased to grant any other or further relief that it may deem just and fit to issue.

5. It was agreed that the appeal do proceed by way of written submissions. This court on 7th December 2017 directed that the parties do file and exchange written submissions. A date for highlighting was set for 13th March 2017. On 13th March 2017 counsel did not wish to highlight their submissions and a date for judgment was given.

The Appellant's submissions

6. The issue for determination is whether the Tribunal failed to construe and apply the meaning of a "landlord" as provided under Section 2 of Cap 301 in light of the evidence before it. The definition is restricted to entitlement to receive rent and not ownership.

7. In the case of **Ramadhan Mohammed Ali vs Hashim Salim Ghanim [2015] eKLR:** It was held**:**

"……The Tribunal's finding at page 3 of its judgment is correct that:-

"Ownership is not an issue that is irrelevant under the landlord and tenant (Shops, Hotels and Catering Establishments) Act Cap 301."

From the Act, the tenor and interest of the word "Landlord" is one whom is entitled to collect rent and the subject existing tenant and not someone who is the owner or holds a related proprietary interest on the subject property. The Honorable tribunal failed to appreciate this, which led to failure to correctly determine when the Appellants and the respondents' tenancy relationship started.

8. Another issue is whether the Tribunal failed to correctly determine when the landlord-tenant relationship between the Appellants and the Respondents started. The Respondent became the registered proprietor of the subject property in the month of July 1999. The Appellants became tenants of the subject premises through a lease dated 23/3/199, whereby the landlord was A. G. Kinyanjui who is the Respondent's father. The lease was produced as tenant exhibit 1 (page 46 of the Record of Appeal) Lease in page 55.

Upon expiry of the lease the Appellants entered into further lease with A. G. Kinyanjuui the Respondent's father, dated 22nd August 2000 for a term of five years and two months with effect from 1st April 1997. (Tenants' exhibits on page 76 of the record of appeal) A. G. Kinyanjui continued collecting rent until the year 2002.

9. It is clear that the person who was entitled to receive rent and profits from the commencement of the lease until the month of September 2002 was A. G. Kinyanjui and not George Kinyanjui who only assumed the status upon informing the appellants that he was now the new owner.

Prior to 2002 the Respondent was not the Appellant's landlord and only became as such in the month of September 2002 when he started collecting rent.

10. As to whether the Tribunal correctly construed and applied Section 7(2) and 7(i)(g) of Cap 301 in light of when the landlord tenancy relationship between the Appellants and the Respondent commenced; The Respondent became a landlord in September 2002 and the termination notice was issued in February 2005 hence the notice was issued in contravention of Section 7(2) of Cap 301.

11. In **Battan Engineering Works v white line retreat Depot [1977] eKLR** the court in interpreting Section 7(2) of Cap 301 stated that:

"The mischief the sub section is designed to prevent is the acquisition of controlled premises by a person as landlord in order

to obtain early occupation for the purposes of a business to be carried on by him. The clear intention of a parliament was to protect a tenant from eviction by a landlord for at least five years preceding the notice seeking termination of the tenancy".

12. The notice of termination contravened Section 7(2) of Cap 301. The Tribunal erred in finding that the Respondent would terminate the tenancy on the basis of the impugned ground. The appeal has merit and ought to be allowed.

The Respondent's Submissions

13. The Appellants have limited the appeal to the interpretation of Section 7(2) of Cap 301 and nothing else. They are therefore accepting that the Respondent's request met all the other conditions for allowing the termination notice under Section 7(1)(g) of Cap 301.

14. It is not in dispute that the Respondent bought the subject premises in 1999 and the same was transferred to him on 27/7/1999. The Appellants are wrong in trying to compute the five (5) year period referred to in the said provision from the time the Respondent who is the owner of the subject premises received his first rent.

15. The Respondent further submits that the time begins to run from the time of purchase or creating of interest which is 27th July 1999.

16. That the property was purchased in 1999 eventually transferred and registered in the name of the Respondent on 27th July 1999. The notice subject of this appeal was issued on 7th February 2005 which was long after the five year period referred to. The Act does not talk of interest in premises being acquired by being given rent.

17. It talks of purchase or creation of interest. Whoever was receiving rent was a matter of their own arrangement with the previous owner who happened to be his father and the letter by the firm of Ngoiri Njoroge Advocates explained it all.

18. Further that the definition of "landlord" as given by Section 2 of Cap 301 was not intended to bar the registered owner of the premises who for whatever reason may not be receiving rent from being a landlord. It was only meant to make it easy for a person who has been allowed by the registered owner to receive rent also to be treated as landlord for purposes of the implementation and enforcement of the Act. That the definition of the "landlord" notwithstanding Section 7 (2) of Cap 301 where the Act, intended to deal with issues relating and/or emanating from registered owner in relation to the time of purchase or creation of proprietary interest. He prays that the court upholds the finding of the Tribunal and dismiss the appeal with cost.

19. I have considered the rival submissions of counsel, the relevant provisions of the law and the authorities cited. The issue for determination is whether or not the appeal has merit.

20. The main grounds on this appeal has in the interpretation of Section 7(1)(g) and (2) of the Landlord and Tenant (Shops Hotels and Catering Establishments) Act, Cap 301. Section 7(i)(g) of the Act provides;

"Subject as herein under provided, that on the termination of the tenancy, the landlord himself intended to occupy for a period of not less than one year, the premises comprised in the tenancy for the purposes or partially for the purposes of a business to be carried on by him therein, or as his residence"

Subsection (2) provides;

"The landlord shall not be entitled to oppose a reference to a tribunal on the ground specified in subsection (i) (g) of this Section if the interest of the landlord or an interest which has merged in that interest and but for the merger would be the interest of the landlord, was purchased or created within the five year period proceeding the date of the tenancy notice seeking to terminate the tenancy and at all times since such purchase or creation, the premises concerned have been occupied wholly or mainly for purposes of a shop, hotel or catering establishment."

21. As held in the **Battan Engineering Case** the clear intention of Parliament was to protect a tenant from eviction by a landlord who has not been a landlord for at least five years preceding the notice seeking termination of the tenancy.

22. Section 2 of the Act provides:

"Landlord in relation to a tenancy means the person for the time being entitled as between himself and the tenant to the rents and profits of the premises payable under the terms of the tenancy"

23. The Appellants argue that the period of computation of time under Section 7(2) of the Act runs from the time the respondent became a landlord. That is under Section 2 of the Act the definition of a landlord is restricted to collection of rent and not ownership. The appellant's case therefore is that he respondent became the landlord within the meaning of Section 2 of the Act in September 2002 when he started collecting rent. The appellants case is that the termination notice issued in February 2005 contravenes Section 7 (2) of the Act for failing to give the statutory five (5) year notice period.

24. The Respondent on the other hand argues that under Section 7(2) of the Act, time for purposes of the notice period begins to run from the time of purchase of creation of an interest. His case is that having acquired proprietary interest on 27th July 1999 the notice issued in February 2005 went over and above the statutory period requirement.

25. Faced with facts similar to this case the court in **Pentapham Limited vs Soroya Investments Limited Nairobi ECLA No 62 of 2016 [2018] eKLR** interpreted Section 7(i) (g) and 2 of the Act as follows;

> **"8. On ground three the appellant is faulting the learned Chairman that he erred by holding that the notice had met the threshold of Section 7(2) of the Act. The said Section provides as follows….**

(9) Section 7(1) (g) of the Act provides as follows….

> **"(10) From the above provisions it is clear that a landlord is only allowed to oppose a reference under Section 7 (i)(g) if he purchased the premises 5 years preceding the issuance of termination notice and if the premises had been occupied wholly or mainly for purposes of a shop, hotel or catering establishment. In the instant case the premises were purchased by the respondent from Kenya National Assurance Company Limited in 2008. The notice to terminate the tenancy was issued on 1st December 2014. As at the time of issuance of the notice, the premises were occupied as a shop which was operating as a chemist. The respondent had held the premises for more than five years and therefore was allowed to terminate the tenancy. I therefore find that the Respondent had met the requirement of Section 7(2) of the Act."**

26. I am of the view that having purchased the property in 1999 the respondent complied with the notice requirement under section 7(2) of the Act. I am of the view that the Tribunal properly analysed the facts and the law and its findings therefore cannot be faulted.

27. I find that the appeal herein lacks merit and it is dismissed with costs. The respondent shall have costs of the appeal together with those of the Tribunal.

It is so ordered.

Dated and signed in Nairobi on this……..day of ……2018

L. KOMINGOI

JUDGE

Dated and delivered at Mombasa on this 5th day of October 2018.

JUDGE