REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC APPEAL NO. 3 OF 2017

NUR SHEIKH MOHAMED.....APPELLANT

-VERSUS-

MOHAMED IMANI.....RESPONDENT

(Appeal from the ruling of Hon. L.T. Lewa, Senior Resident Magistrate

dated 3 March 2017 in Mombasa CMCC No. 1745 of 2014)

JUDGMENT

(Appellant as landlord having filed suit before the Magistrate's Court seeking vacant possession and rent arrears; appellant claiming to have issued a termination notice of the tenancy without the respondent filing any reference contesting the notice before the Business Premises Rent Tribunal; appellant filing application for summary judgment and a subsequent application for striking out defence; trial Magistrate holding that she had no jurisdiction as it was only the Tribunal which had jurisdiction; appellant filing appeal to this Court to set aside the order; Court of Appeal having decided that where there was a notice terminating the tenancy, and the tenant fails to refer the matter to the Tribunal, then the tenancy ends and there would be nothing to refer to the Tribunal; court bound through the doctrine of stare decisis; appeal allowed; applications remitted back to the Magistrate's Court for determination)

1. This is an appeal arising from the ruling of Hon. L.T. Lewa, Senior Resident Magistrate, in Mombasa CMCC No. 1745 of 2014, dated 3 March 2017, dismissing two applications, that the appellant had filed seeking judgment to be entered against the respondent, alongside the whole of the appellant's suit, with costs to the respondent.

2. The background is that, the appellant, as plaintiff, commenced the suit, Mombasa CMCC No. 1745 of 2014, vide a plaint filed on 5 September 2014. The appellant averred to be the landlord of the respondent in premises situated on the land parcel Mombasa/Block/ XVII/682 (hereinafter referred to as, 'the suit premises'). He pleaded that the respondent had been in occupation of the said premises as a tenant, paying a monthly rent of Kshs. 14,000/=. It was his case that sometime in June 2013, he served the respondent with a notice, in accordance with Section 4 of the Landlord and Tenant (Shops, Hotels & Catering Establishments) Act, Cap 301, Laws of Kenya, (the Act), terminating the respondent's tenancy with effect from 1 September 2013. The appellant pleaded that the respondent, upon being served with the aforesaid notice, failed to comply with the requirements of Section 6 of the Act, and by virtue of Section 10 thereof, the tenancy stood terminated as at 1 September 2013. The appellant further contended that the respondent was in arrears of rent up to 31 August 2013 totaling Kshs. 315,500/= and claimed mesne profits at Kshs. 14,300/= with effect from 1 September 2013 till delivery of possession. In his plaint, the appellant thus sought vacant possession of the suit premises, rent arrears and mesne profits.

3. The respondent entered appearance on 23 September 2014 and subsequently filed defence on 12 November 2014. That defence was not however served, and on 3 March 2015, the appellant, not being seized with knowledge that a defence had been filed, lodged an application dated 9 February 2015, seeking the entry of summary judgment pursuant inter alia to the provisions of Order 36 Rule 1, which allows a plaintiff to seek summary judgment where a defendant has appeared but has not filed defence. It is after this application was filed that the respondent served his defence on 20 May 2015, which was certainly way of the 14 days period required for serving a defence under Order 7 Rule 1 of the Civil Procedure Rules, 2010. This prompted the appellant to file an application dated 16 June 2015, inter alia under Order 2 Rule 15 (1) (b) (c) and (d) and Order 10 Rule 3, seeking orders to have the defence struck out for having been filed and served out of time, and for being frivolous, for according to the appellant, the same did not raise any triable issues worthy of going for trial. In addition, the appellant sought orders to have the application dated 9 February 2015 heard together with the application dated 16 June 2015. In essence, the appellant wished to cover all grounds, so that if his application dated 9 February 2015 could not be entertained, for reason that there was a defence on record, then he would proceed to argue for the striking out of the defence, for not having been served within time (under Order 10 Rule 3), or for not raising any triable issue (under Order 2 Rule 15), and as a result, have judgment summarily entered in his favour.

4. To oppose the two applications, the respondent filed a replying affidavit where he inter alia asked the court to be lenient to him as he was acting in person when he filed the Memorandum of Appearance and Defence. He pleaded with the court not to dismiss his defence on a

technicality and alluded to willingness to pay thrown away costs to the appellant for his applications.

5. The two applications were heard by Hon. L.T Lewa. In her ruling, the Honourable Magistrate concentrated on whether she had jurisdiction in the matter, given that the parties had an earlier dispute before the Business Premises Rent Tribunal (the Tribunal) (which was settled by consent) as the tenancy was a controlled tenancy. Her conclusion was that she did not have jurisdiction in the matter and that it was the Tribunal which had jurisdiction because the tenancy was a controlled tenancy. She thus proceeded to dismiss the two applications and the entire suit with costs to the respondent.

6. Aggrieved, the appellant filed this appeal and has raised the following grounds :-

> *i. That the learned magistrate erred in law and in fact in failing to appreciate the effect of Section 10 of the Landlord & Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301 on the tenancy relationship between the parties and thereby held that the jurisdiction to try the matter lay with the Tribunal establishment under the Act.*
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> *ii. That on the uncontested facts, the learned magistrate erred in law in departing from the principles of stare decisis as to the effect of Section 10 of the Act aforesaid in the absence of a Section 6 reference pursuant to a notice of termination of tenancy issued under Section 4 of the said Act.*
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> *iii. That the learned magistrate erred in failing to reach the conclusion that on the facts before her it had been established that a valid Section 4 notice under the Act had been served upon the defendant who was thereby obliged to file a reference in accordance with Section 6 and that having failed to do so Section 10 of the Act had since come into effect and the controlled tenancy hitherto subsisting terminated as at the effective date of notice so that the Tribunal established thereunder no longer had jurisdiction over the tenancy.*
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> *iv. That the magistrate erred in failing to appreciate that on the facts before her the reliefs sought by the plaintiff/appellant were beyond contest and/or that there was no defence to the suit or any triable issues that deserve to go to trial.*
>
> *v. That on the whole the magistrate erred in dismissing both the application before her and the suit for want of jurisdiction.*

7. The appellant has asked for orders to have the ruling of 3 March 2017 set aside, and in lieu thereof, an order be made allowing his two applications with costs.

8. The appeal was canvased by way of written submissions.

9. In his submissions, Mr. Mwakisha, learned counsel for the appellant, referred me to the Court of Appeal decision in *Jitendra Mathurdas Kanabar & 2 Others vs. Fish & Meat Ltd, Court of Appeal at Mombasa, Civil Appeal No. 267 of 1996 (1997)eKLR*. He submitted that in that case it was established that once a notice of termination of controlled tenancy had been served in accordance with Section 4 of the Act, the tenant, if he wished to oppose the notice, was required to file a reference to the Tribunal following the provisions of Section 6 of the Act. Counsel submitted that where no reference was filed, then the termination notice, by virtue of Section 10 of the Act, took effect, resulting in no landlord and tenant relationship tenable under the Act as would clothe the Tribunal with jurisdiction. Mr. Mwakisha further submitted that it was held in the *Jitendra case (supra)*, that once Section 10 of the Act took effect, then the landlord was at liberty to file an action for possession before the ordinary courts. He buttressed his submissions by also referring me to another Court of Appeal decision, that of *Syedna Mohamed Burhannudin Saheb vs Mohamedally Hassanally, Court of Appeal at Nairobi, Civil Appeal No. 28 of 1980*. Mr. Mwakisha urged that the notice was effectively served upon the defendant. On the question of whether there were triable issues, counsel submitted that under the provisions of Section 2 of the Act, the appellant was the landlord, and the respondent had acknowledged this when he executed a consent in BPRT 180 of 2011. Counsel finally submitted that the appellant was justified to receive mesne profits of Kshs. 14,300/= and rent arrears of Kshs. 315,500/=.

10. Opposing the appeal, Mr. Were, leaned counsel for the respondent, submitted that the appeal was not well merited. He submitted that the same was bad in law and therefore ought to be dismissed because it does not raise any triable issues in the circumstances. He further submitted that the learned magistrate was correct in holding that it was the Tribunal which had jurisdiction to hear and determine the matter, as outlined in Section 14 of the Act.

11. I have considered the record, the rival submissions, and the principles of law relied upon by the parties in support of their opposing positions. In my view, the issue that falls for my determination is only one, namely, whether the trial Magistrate was correct in holding that she had no jurisdiction in the matter.

12. I observe that at the hearing of the two applications before the trial Magistrate, Mr. Mwakisha did refer the trial court to the Court of Appeal decision in the *Jitendra case (supra).* I have read that decision. The facts in that case are not too dissimilar to those in the present case. In that case, the respondent was tenant of the appellant. The appellant, as landlord, gave notice under Section 4(2) of Cap 301, terminating the tenancy on grounds of persistent default in paying rent. The tenant did not file any reference to the Tribunal and the appellant filed suit at the High Court seeking vacant possession, rent arrears and mesne profits. The appellant subsequently filed an application for summary judgment. A preliminary objection was raised that the High Court did not have jurisdiction and that jurisdiction lay with the Tribunal. The preliminary objection was upheld with the High Court Judge holding that since this was a controlled tenancy, it was only the Tribunal which could determine the issues at hand and proceeded to dismiss the application for summary judgment. The landlord appealed to the Court of Appeal. On the issue of jurisdiction, the Court of Appeal held as follows :-

> *"From what we have said above, once a reference in accordance with section 6(1) of the Act has not been made to the Tribunal and a tenancy notice to terminate the tenancy has taken effect from the date specified therein in terms of section 10 of the Act, the landlord/tenant relationship comes to an end. Thereafter, one can no longer talk of the existence of a controlled tenancy in terms of*

section 2 of the Act without which the Tribunal under the Act has no jurisdiction. In the instant appeal, the respondent's failure to refer the appellant's tenancy notice to the Tribunal in accordance with section 6 (1) of the Act resulted in the cessation of its tenancy of the appellant's godown/warehouse with effect from 1st June 1995 in terms of section 10 of the Act. Henceforth, there was no controlled tenancy to talk about in regard to the said godown/warehouse and the appellants became entitled to possession of the same which the respondent did not give to them. In these circumstances therefore, the appellants had to come to court to enforce their rights to their property. It is on account of the foregoing that we think the learned judge was in error when he held that the Tribunal under the Act had jurisdiction to deal with the respondent's tenancy of the appellants' godown/warehouse notwithstanding the non-compliance with the requirements of the Act by the respondent in relation to the appellant's tenancy notice and thereby upholding the respondent's preliminary objection referred to earlier in this judgment with the resultant dismissal with costs of the appellants' application for summary judgment."

13. It will be seen from the foregoing, that the interpretation given by the Court of Appeal is that once a landlord has issued a termination notice under Section 4 (2) of the Act (Cap 301) and the tenant does not oppose such notice by making a reference to the Tribunal under Section 6 (1) of the Act, then the notice will take effect, meaning that the tenancy will be terminated and since there will be no tenancy in existence, then the Tribunal would no longer have any jurisdiction. No contrary decision was provided by counsel for the respondent and I think the trial Magistrate went into error in not following the doctrine of stare decisis. She indeed did not refer to the Court of Appeal decision in her ruling and gave no reason for not following the said decision despite the same being referred to by counsel for the appellant.

14. Even within this appeal, Mr. Were has not referred this court to any contrary interpretation, and I am also bound by the Court of Appeal decision. It is thus apparent that the Honourable trial Magistrate erred in finding that she had no jurisdiction in the matter and erred in holding that it was the Tribunal which had jurisdiction. The ruling of the trial Magistrate must thus be set aside and it is hereby set aside. The effect is that the suit at the Magistrate's Court is hereby reinstated and so too the two applications dated 9 February 2015 and 16 June 2015.

15. What then should I do with the two applications ? The two applications were never heard by the trial Magistrate as she held that she had no jurisdiction. Now that I have reinstated them, the most prudent thing is to have the Magistrate's Court pronounce itself on the same. Any party aggrieved can then approach this court on appeal. That is indeed the path that the Court of Appeal took in the *Jitendra case (supra).* My directions therefore are for the parties to go back to the Magistrate's Court for the determination of the two applications.

16. The only issue left is costs. Costs will follow the event. The appellant shall thus have the costs of this appeal.

17. Judgment accordingly.

DATED AND DELIVERED THIS 5TH DAY OF MAY 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA