REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC APPEAL CASE NO. 5 OF 2018

KENNETH NJOROGE NDUMBI..APPELLANT

=VERSUS=

KAVORE KARIUKI..RESPONDENT

(Being an Appeal against the Ruling and Orders of the Honourable Chairperson

on the Business Premises Rent Tribunal, Hon Mbichi Mboroki dated and

***delivered on the 26th January 2018 in Thika Tribunal Case No 15 of 2016*)**

JUDGMENT

1. This is an interlocutory appeal arising from a ruling rendered by the Chairman of the Business Premises Rent Tribunal (**the Tribunal**) on 26/1/2018 on the appellant's application dated 16/5/2017 in **Thika BPRT Case No 15 of 2016**. Through the application, the appellant sought an order striking out the respondent's case on the ground of lack of jurisdiction.

2. There was common ground that parties to this appeal entered into a written tenancy agreement on 14/8/2015 pursuant to which the appellant leased to the respondent Plot Number 147/146, Ruiru BTL Phase III, to be used as a club/restaurant. Clause 3 of the lease agreement specified the period of the lease and read as follows:

> ***"3. The lease period is for 5 years commencing on 1st September 2015 and expiring on 30th September 2020"***

3. It was also not in dispute that clause 12 of the written lease contained a provision for termination of the tenancy by the tenant otherwise than for breach of a covenant, in the following verbatim terms:

> ***"12. The tenant may give the landlord two months notice in writing to terminate the tenancy"***

4. Through the application dated 16/5/2017, the appellant contended before the Tribunal that the Tribunal lacked jurisdiction to hear and determine the dispute because the lease agreement between the parties was for a period of five years and one month. The appellant further contended that the respondent was no longer his tenant, hence the Tribunal lacked jurisdiction to entertain the dispute. The Tribunal considered the appellant's application dated 16/5/2017 and made a finding that it had jurisdiction to hear and determine the dispute. The Chairman of the Tribunal rendered himself on the application thus:

> ***"The jurisdiction of the Tribunal is set out in Section 2 of Cap 301. The lease annexed by the landlord clause 3 stated that the lease was for a period of 5 years commencing from 1st September, 2015 and expiry on 30 September 2020.***
>
> ***However, even if the lease had been for more than 5 years, the lease contained clause 12 which give the tenant a period of 2 months to terminate the same for reasons other than breach of the terms and conditions of the lease.***
>
> ***The Tribunal is satisfied on the pleadings before it that it has***
>
> ***jurisdiction to hear and determine the dispute between the***

parties.

The other issue raised by the Landlord are issues of facts to be investigated and not issues of pure law"

5. Aggrieved by the above findings, the appellant brought this appeal through a memorandum of appeal dated 31/1/2018 raising the following seven (7) verbatim grounds of appeal:

i. That the Learned Chairperson erred in law and in fact in failing to appreciate that the lease relied on in the reference created a tenancy period of 5 years and 1 month and therefore the Tribunal did not have jurisdiction to hear and determine the reference.

ii. That the Learned Chairperson erred in law and in fact in finding for the respondent when it was an undisputed fact that there was nolonger a landlord-tenant relationship between the parties and, as such, the Tribunal did not have jurisdiction to entertain the reference any longer.

iii. That the Learned Chairperson erred in law and in fact in failing to acknowledge the High Court's independent finding in JR 7 of 2016 – Kiambu that the respondent was no longer in occupation and that there was already a third party in possession of the suit premises, which finding thereby ousted the Tribunal's jurisdiction.

iv. That the Learned Chairperson erred in law and in fact in failing to down the Tribunal's tools in the absence of a landlord/tenant relationship and in effect exercising the jurisdiction of a civil court.

v. That the Learned Chairperson erred in law and in fact in dismissing the appellant's application and thereby allowing the respondent to regain possession of premises which are already occupied by an innocent third party without affording the third party the right to be heard.

vi. That the Learned Chairperson erred in law and in fact in making a decision that was wholly against the weight of the evidence that had been adduced.

vii. That the Learned Magistrate[sic] erred in law and in fact by misdirecting himself and failing to consider, appreciate and uphold the appellant's affidavit evidence and submissions and subsequently dismissing the appellant's application in its entirety.

6. Ultimately, the appellant sought the following orders from this court:

a) An order setting aside the Honourable Chairperson's Ruling and orders of 26th January, 2018.

b) An order to vacate, set aside, vary and discharge the orders made by the Honourable Chairperson on 4th November, 2016.

c) An order striking out the Complaint in Tribunal Case No 15 of 2016 for want of jurisdiction

d) An order that the costs of this appeal and reference be awarded to the Appellant.

7. The appeal was canvassed through written submissions. The appellant filed written submissions dated 24/6/2020 through the firm of Gachie Mwanza & Co Advocates. Counsel for the appellant condensed the above seven (7) grounds of appeal into the following three (3) verbatim issues:

a) Whether the Tribunal had jurisdiction to entertain the issues presented before it;

b) Whether there was a landlord-tenant relationship between the parties at the time the Tribunal entertained this matter; and

c) Whether the new tenant in occupation was afforded an opportunity to be heard.

8. On the first issue, counsel for the appellant submitted that the lease agreement expressly stipulated that the tenancy was for a term of five years and one month, hence the dispute was outside the jurisdiction of the Tribunal. Counsel cited **Section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301** to support this argument.

9. On the second issue, counsel submitted that the High Court had made a finding in **Kiambu High Court Judicial Review Application No 7 of 2016** to the effect that there was no landlord-tenant relationship between the appellant and the respondent but the Tribunal chose to intentionally ignore the ruling of the High Court and proceeded to entertain the dispute.

10. On the last issue, counsel submitted that the Tribunal breached the right to a fair hearing under Articles 47 and 51 [sic] of the Constitution because it made its order without affording the new tenant a chance to be heard. Counsel urged the court to allow the appeal.

11. The respondent filed written submissions dated 25/8/2020 through the firm of Guandaru Thuita & Company Advocates. Responding to the appellant's submissions on the first issue, counsel for the respondent made reference to clause 3 of the lease and argued that the lease was for five years, hence the dispute fell within the ambit of the Tribunal. Counsel added that clause 12 of the lease contained a termination clause granting the tenant the option to terminate the lease upon giving the landlord two months' written notice. Counsel contended that the two clauses made the relationship between the parties a controlled tenancy.

12. On whether there was a landlord-tenant relationship between the parties at the time the Tribunal entertained the dispute, counsel submitted that there was a controlled tenancy relationship at the time the respondent instituted Thika Business Premises Rent Tribunal Case Nos 15 and 26 of 2016 and the appellant thereafter purported to terminate the relationship through subsequent orders obtained in **Kiambu CMCC No 407 of 2016** but that did not succeed because the High Court in **Kiambu JR No 7 of 2016** set aside the Magistrate Court's orders and reinstated the respondent to the demised premises.

13. On the third issue, counsel submitted that the identity of the alleged new tenant was unknown and the appellant had no proper basis to complain on behalf of an anonymous new tenant.

14. Counsel for the respondent further submitted that the orders sought in the memorandum of appeal, by their nature and effect, were an attempt to set aside the orders made by the High Court in the Judgment in **Kiambu High Court Judicial Review Application No 7 of 2016** directing that the orders of the Tribunal were to remain in force. Counsel added that the High Court determined the issue of jurisdiction of the Tribunal and therefore it was an abuse of the process of the court to canvass the same issue before this court. Counsel urged the court to dismiss the

appeal.

15. I have considered the grounds of appeal, the entire record of appeal, and the parties' respective submissions. In his written submissions, the appellant condensed the seven grounds of appeal into three issues and invited the court to determine the three issues. I will make brief analysis and pronouncements on the three issues in the order in which they were itemized by the appellant's advocate.

16. The first issue which the appellant has invited this court to determine in this appeal is whether the Tribunal had jurisdiction to entertain the issues presented before it. It is clear from the record of appeal that the question of jurisdiction of the Tribunal in relation to the issues before it had been canvassed before the High Court [Hon Justice Joel Ngugi] and the High Court had made a determination on it through a Judgment dated 11/5/2017. The High Court rendered itself on the issue as follows:

> ***"11. The respondent, in conceding to the Judicial Review application, has correctly stated the legal position. It is readily obvious that the tenancy created by the interested party and the ex parte applicant in their agreement dated 14/8/2015 was a controlled tenancy as defined in Section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301 of the Laws of Kenya) (Hereinafter, "Chapter 301"). Section 2(1) defines a controlled tenancy as 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 is;***
>
> ***i. is for a period not exceeding five years; or***
>
> ***ii. contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof.***

12. Under both qualifying prongs, the tenancy herein was a

> ***controlled tenancy. Indeed, that is not disputed. If so, it follows that by dint of Sections 11 and 12 of Chapter 301 that any disputes related to payment of arrears of rent or to permit the levy of distress for rent are matters that are within the exclusive jurisdiction of the Business Premises Rent Tribunal. Indeed, there are two pending suits between the ex parte applicant and the interested party before the Thika BPRT to wit BPRT No. 15 of 2016 and BPRT No. 26 of 2016. As outlined above, there are subsisting orders by the Tribunal which were still in effect by the time the interested party approached the Chief Magistrate's Court. Indeed, the parties had a hearing date of 03/11/2016 at the Tribunal."***

17. In the end, the High Court made the following verbatim orders:

> ***"22. In the end, therefore, the orders granted by this court shall be as follows:***
>
> ***a) An order of prohibition is hereby issued directed to the Chief Magistrate's Court, Kiambu, prohibiting any Magistrate there from any further hearing or determining Kiambu CMCC No 407 of 2016 (Kenneth Ndumbi Njoroge v Kavore Kariuki) or the claim therein or any other claim related to the Ex parte Applicant's tenancy, possession, and occupation of all that premises on Plot No 147/146 Ruiru BTL Phase III which the Ex parte Applicant is a controlled tenant by virtue of the agreement dated 14/8/2015.***
>
> ***b) An order of certiorari is issued bringing up to this court and quashing the order of the Kiambu Chief Magistrate's Court in Kiambu CMCC No 407 of 2016 (Kenneth Ndumbi Njoroge v Kavore Kariuki) issued on 21/10/2016 and extended on 04/11/2016.***
>
> ***c) The orders given by the Business Premises and Rent Tribunal in Thika BPRT 15 of 2016 and Thika BPRT 26 of 2016 shall remain in force unless varied or vacated by that Tribunal or are validly vacated by a court of competent jurisdiction.***

d) The Interested Party shall pay the costs of this suit."

18. It does emerge from the official stamp on the application giving rise to this appeal that four days after the High Court rendered the above Judgement, the appellant filed the application dated 16/5/2017, inviting the Tribunal to determine the same issue(s) which the High Court had conclusively determined. Without saying much, this was an abuse of the process of the Court because there is no evidence to suggest that circumstances had changed within the intervening period of four days to warrant the invitation to the Tribunal to determine the same issues. Notwithstanding the glaring abuse of the court process by the appellant, the Tribunal rendered itself on the application and came to the same finding as the High Court.

19. On my part, I would say that this court will not re-open an issue determined by the High Court through a Judgment dated 11/5/2017 in the absence of evidence of changed circumstances within the intervening period of four days. I accordingly reject the ground(s) comprised in the first issue.

20. The second issue is whether there was a landlord-tenant relationship between the parties at the time the Tribunal entertained this matter. Again, this is an issue on which the High Court had pronounced itself on 11/5/2017 as follows:

> ***" 16. The only transient legally cognizable argument that the interested party has raised in response to the jurisdictional argument is a factual one: that the exparte applicant voluntarily abandoned the tenancy and vacated the premises hence ousting the jurisdiction of the Tribunal. On a balance of probabilities, I easily find this claim patently made up. It is so implausible that I conclude that the interested party's theory cannot reasonably possibly be true. I say so because all through the legal battles the two parties fought, it was clear all along that the Ex parte Applicant was committed to remaining in possession of the premises. Indeed, immediately after the distress, the Ex parte Applicant went to the Tribunal and obtained orders that the goods be restored. He later on obtained further orders, on 3/11/2016, in the nature of a mandatory injunction permitting him to regain possession of the premises through forcible re-entry. It is simply absurd and a stretch of credulity to theorize that the Ex parte Applicant vacated the premises in the midst of all these legal interventions. It is noteworthy that at the Tribunal, the Interested Party never once made the dispositive argument that the Tribunal had been stripped of jurisdiction by the Ex Parte Applicant's Party act of vacating the premises. On the contrary the interested party unsuccessfully attempted to persuade the Tribunal to vary its orders.***

21. The High Court added thus:

> ***"20. Here the Ex Parte Applicant was forcibly removed from his tenancy in what comes closest to what I can only call "procedural impunity." A Landlord who is fully aware that there are pending matters at the Tribunal where there are interim orders in place decides to short circuit the legal process by, first, forcibly removing the tenant and then seeking to inoculate his unlawful action through an order from a court that had no jurisdiction to entertain the suit. Meanwhile, that same landlord seeks to perfect his "Procedural impunity" by installing a new tenant with dizzying speed – barely six days after illegally removing the former tenant – and fully aware that the Tribunal matter had a hearing date.***
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> ***21. It was Cockar JA who stated on appeal in the Ripples case that "a party, as far as possible, ought not to be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act." So shall it be here."***

22. It is clear from the above excerpts and from the disposal orders in the preceding High Court Judgment that the High Court rejected the appellant's attempt to irregularly end the tenancy and reinstated the Tribunal's orders.

23. There was, similarly, no fresh evidence presented to the Tribunal to suggest a change of circumstances between 11/5/2017 and 16/5/2017 to warrant the appellant's invitation to the Tribunal to re-open the issue of subsistence of the tenancy and re-adjudicate it.

24. For the above reasons, I similarly reject the grounds comprised in the second issue on which the appellant argued this appeal.

25. The last issue which the appellant invited this court to determine is whether the new tenant in occupation was afforded an opportunity to be heard. The application giving rise to this appeal was filed and canvassed by the appellant. It was not an application by the respondent. Through it, the appellant sought an order striking out the case before the Tribunal. It was not an application for joinder of the unnamed new tenant. Secondly, the question as to whether the unnamed new tenant was entitled to be heard at that point was not one of the issues canvassed in the application giving rise to this appeal. It cannot, in my view, be raised at this point as a proper ground of appeal. I therefore find no merit in that ground of appeal.

26. Lastly, the appellant prayed for an order setting aside, varying or discharging the order of the Tribunal dated 4/11/2016. This appeal arose from the ruling rendered on 26/1/2018. It did not focus on the orders made on 4/11/2016. No appeal was preferred against the order of

4/1/2016. This appeal cannot therefore be the platform for grant of an order reviewing the order made by the Tribunal on 4/11/2016.

7. The totality of the foregoing is that this interlocutory appeal is devoid of any merit. The same is dismissed. The appellant shall bear costs of the appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4TH DAY OF MAY 2021.

B M EBOSO

JUDGE

In the Presence of: -

Ms Wanjiku holding brief for Mr Gachie for the Appellant

Mr Makhandia Brian holding brief for Mr Thuita for the Respondent

Court Assistant: June Nafula