



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC CASE NO. E005 OF 2020**

**MARTIN ZAKAYO MBANDU.....PLAINTIFF**

**-VERSUS-**

**TRISHUL V. CHOCHAN.....1<sup>ST</sup> DEFENDANT**

**KISUMU COUNTY.....2<sup>ND</sup> DEFENDANT**

**RULING**

**Plaintiffs Claim**

The facts of this case are that Martin Zakayo Mbandu, the Plaintiff herein is the Landlord of Trishul V. Chohan the first defendant herein. He claims that he is the owner of the suit property known as KISUMU MUNICIPALITY/BLOCK 4/757 and KISUMU MUNICIPALITY/BLOCK 4/758 (hereinafter known as the suit property). According to the plaintiff, on the 2<sup>nd</sup> day of January 2013, the Plaintiff granted a lease over the suit property to the 1<sup>st</sup> Defendant for a term of two years only and the said lease expired on the 1<sup>st</sup> day of January 2015. The time the lease expired the 1<sup>st</sup> Defendant was paying rent in the amount of Kshs. 100,000/=.

The time of expiration of the lease the 1<sup>st</sup> Defendant was obligated to surrender the suit premise to the Plaintiff as provided in paragraph 1q of the said lease.

The said lease further provided in paragraph 5 that if the 1<sup>st</sup> Defendant was desirous of extending the lease he would have to notify the Plaintiff 3 months prior to the expiration of the lease of his intentions to extend the lease but the 1<sup>st</sup> Defendant never notified the Plaintiff. At the expiry of the lease the 1<sup>st</sup> Defendant refused to move out of the suit property and continues with such refusal.

The 1<sup>st</sup> Defendant without consent of the plaintiff applied for change of user of the suit property from residential to commercial use. All negotiations to have the 1<sup>st</sup> Defendant move out of the suit property have failed as he has completely refused to move out claiming that he has established a good business centre for his business and it will be detrimental for his business if he were to relocate.

The Plaintiff has made all attempts to have the 1<sup>st</sup> Defendant move out by filing the following matters at the Business Premises Rent Tribunal (hereinafter known as the BPRT);

- i. BPRT cause No. 51 of 2015 which was dismissed by the Tribunal with costs to the 1<sup>st</sup> Defendant herein;**
- ii. BPRT Cause No. 31 of 2016 which was dismissed for non-attendance; the 1<sup>st</sup> Defendant has filed an application to reinstate it but we are objecting to the reinstatement as the tribunal has no jurisdiction to handle this matter.**
- iii. BPRT Cause No. 39 of 2017 which was dismissed for non-attendance.**
- iv. BORT Cause No. 10 of 2020 which we have filed a Notice to withdraw for the fact that the Tribunal has no jurisdiction to entertain the matter.**

According to the plaintiff, the BPRT does not have jurisdiction over the suit premises as the suit premises is not a shop, hotel or catering establishment.

The Plaintiff verily believes that since the lease expired, the 1<sup>st</sup> Defendant ought to leave the suit property and since he has voluntarily refused to vacate the suit property there is need for the 1<sup>st</sup> Defendant to be evicted by an order of this Honourable Court.

Further, the Plaintiff states that the 1<sup>st</sup> Defendant is abusing his stay by making applications to the 2<sup>nd</sup> Defendant to put up structures that the Plaintiff has not approved of thus putting the suit property to waste and thus the need to have the 1<sup>st</sup> Defendant evicted forthwith.

The Plaintiff states that the 1<sup>st</sup> Defendant has resisted all attempts to have the rent increased thus causing the plaintiff loss of increased rental income.

That due to the actions of the 1<sup>st</sup> Defendant, the Plaintiff has suffered loss and damage such as denial of his right to deal with his property as he pleases; Denial of full and unrestricted enjoyment of the suit property; Denial of right to develop the suit property; Threat that the 1<sup>st</sup> Defendant may deal with the suit property as he feels like thus putting the suit property to waste; Denial of the Plaintiff's constitutional right to freely own and hold land and have it not taken away without due process; Loss of enhanced rental income.

The Plaintiff's claim against the 1<sup>st</sup> Defendant thereby is for the 1<sup>st</sup> Defendant to be evicted from the suit property, an order of Permanent injunction be issued against the 1<sup>st</sup> Defendant from occupying the suit premises. The Plaintiff's claim against the 2<sup>nd</sup> Defendant is for the 2<sup>nd</sup> Defendant to revert the user of the suit premises from commercial to residential use.

### **Defence by 1<sup>st</sup> Defendant**

The Defendant filed defence claiming that failure to vacate was due to on-going cases. He further states that the suit premises were to be used for commercial purposes only. The Defendant states that the structures being constructed on the property are done within the premises of the lease agreement. The Defendant aver in the defence that the suit is incompetent, non-starter and an abuse of the process of court as this court lacks jurisdiction to hear and determine the same.

### **Preliminary Objection**

On the 18/1/2021, the defendant filed a notice of Preliminary Objection that this court lacks jurisdiction to hear the suit and therefore the suit ought to be struck out. That the suit is fatally defective and incurably defective, incompetent and a non-starter as it has been instituted in the wrong forum thereby flaunting the mandatory provisions of Section 4 of the Landlord and Tenant (Shop, Hotels and Catering Establishment) Act which provides that termination of controlled tenancy shall be done in accordance with the Act.

### **Defendants Submission on Preliminary Objection**

On the preliminary objection, the defendant submits that the Plaintiff and the 1<sup>st</sup> Defendant herein entered into a lease agreement for lease of the suit parcels of land to the 1<sup>st</sup> Defendant for a period of 2 years commencing 2<sup>nd</sup> January 2013 to 1<sup>st</sup> January 2015. The said agreement was reduced to writing and executed by both parties. The 1<sup>st</sup> Defendant used the suit property for his business operating in the name and style of Auto Extreme Limited mainly dealing with repair and service of motor vehicle.

Moreover, the defendant submits that the nature of the lease agreement between parties herein gives rise to controlled tenancy since the agreement was for a period of 2 years. Additionally, the purpose which the premises is used for falls within the meaning of 'shop' in section 2 of the Act which provides that the premises occupied should mainly be for purposes of rendering services for money or money's worth.

That by virtue of section 4 of the act, the Plaintiff was required to give Notice to Termination of the tenancy. The Plaintiff did issue such notices and they gave rise to several cases at the Business Premises Rent Tribunal being Kisumu BPRT Case No. 51/2015, 31/2016, 39/2017 and 19/2020. The said cases were decided in his favour save for Kisumu BPRT Cause No. 31 of 2016 which is still pending for determination at the tribunal. The 1<sup>st</sup> Defendant cannot vacate the premises as prayed because according to section 6 of the Act, the notices issued have no effect until after the determination of the Reference.

### **Plaintiffs Submissions**

The plaintiff on his part submits that the 1<sup>st</sup> defendant has been accused by the plaintiff of fraud by making applications to the 2<sup>nd</sup> Defendant purporting himself to be the Landlord so that certain approvals can be given. This is plain fraud as the defendant is on the suit premises courtesy of the Plaintiff who is his Landlord.

The defendant has also been accused of making an application for change of user of the suit property from residential to commercial without the consent and written approval of the plaintiff.

According to the plaintiff, under the Physical and land use Planning Act, it is the Land Lord who is authorized to make any application about any development on his land as provided or under section 58 (4) of the Act which provides that, **"Where an applicant is not the registered owner of the land for which development permission is being sought, that applicant shall obtain the written consent of the registered owner of that land and the applicant shall provide that written consent to the respective county executive committee member at the time of applying for development permission."**

He argues that Section 57 (1) of the physical and Land Use Planning Act states that, **"A person shall not carry out development within a county without a development permission granted by the respective county executive committee member."**

He contends that the developments carried out by the 1<sup>st</sup> defendant were not obtained by the Landlord and thus the permission given to the Tenant to carry out any developments on the suit property is null and void ab initio.

The plaintiff refers to Subsection 2 of Section 57 that states, “**A person who commences any development without obtaining development permission commits an offence and is liable on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding two months or to both.**”

On jurisdiction, the plaintiff submits that the Environment and Land Court is established under Article 162 (2) (b) of the Constitution of Kenya which mandated Parliament to establish courts with the status of the High Court to hear and determine disputes relating to among others, the environment, use and occupation of land and title to land. It is pursuant to this mandate that Parliament enacted the environment and land Court Act No. 9 of 2011.

#### **DETERMINATION**

***Section 2(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301 of the Laws of Kenya 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.***

I have considered the preliminary objection and do find that the issue before court in the main suit revolves on the expiry of the lease of land in respect of KISUMU MUNICIPALITY/BLOCK 4/757 and KISUMU MUNICIPALITY/BLOCK 4/758 and the question is whether the 1<sup>st</sup> defendant should be evicted from the suit premises. It is evident that the lease term was two years commencing 2<sup>nd</sup> day of January 2013 and was to expire on the 1<sup>st</sup> January 2015 and that the 1<sup>st</sup> defendant if desirous of extending the lease was to give three months’ notice before the expiry but he did not do so. The 1<sup>st</sup> defendant was to move out of the property upon the expiry of the lease as per the terms of the agreement but he did not do so. There are allegations that the 1<sup>st</sup> defendant went ahead and applied for the change of user of the suit properties from residential to commercial without the consent of the plaintiff.

I have perused the lease agreement between the plaintiff and the first defendant and do find that clause 2 of the agreement describes the premises as a residential house including gardens and other facilities thereof and therefore the allegation that the premises could not have been for commercial purposes and use without the change of user can only be determined by this court. It is clear that the premises do not fall within section 4 of the Landlord and Tenant (Shop, Hotels and Catering establishment) Act that provides for the termination of the tenancy for such premises.

This dispute goes beyond the mandate of the Business Premises Rent Tribunal as there are allegations of illegalities and infringement to the Physical and land use Planning Act. The preliminary objection is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 16<sup>th</sup> DAY OF JULY, 2021**

**ANTONY OMBWAYO**

**JUDGE**

*This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2019.*

**ANTONY OMBWAYO**

**JUDGE**