



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. E033 OF 2020**

**COTTON ROOTS FASHIONS LTD.....PLAINTIFF**

**VERSUS**

**VEERAL SHAH & ROMA WADHWA**

**(Sued as the Administrators of the Estate of the late Ramesh Kumar Gupta).....DEFENDANTS**

**RULING**

The Defendants filed the application dated 16/3/2021 seeking to have the suit struck out for want of jurisdiction on the grounds that the lease which forms the subject matter of this dispute is a controlled tenancy and that this court therefore lacks jurisdiction to determine the dispute. The application was made on the grounds that the Plaintiff had defaulted in paying rent for the ground floor space and the first floor of the building erected on land reference number 209/2527/2 in Nairobi (the suit premises) and sought the protection of the court while claiming that it should not pay rent for alleged improvements to the suit premises.

The Defendants relied on clause 8.1 of the lease agreement dated 15/11/2016 provided for termination of the lease through re-entry into the suit premises. It also relied on clause 8.2 of the lease on the right of termination and argued that these two clauses made the tenancy a controlled one and divested the court of jurisdiction to hear the dispute. The Defendants added that a controlled tenancy was defined at Section 2 (1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act as the tenancy of a shop, hotel or catering establishment which had been reduced into writing and which contained provisions for termination, otherwise than for breach of covenant within 5 years from the commencement of the tenancy. The Defendants argued that there was nothing in the tenancy agreement which could be interpreted to mean that a termination notice could not be issued within the first 5 years by either party to the lease. It argued that it did not matter that no such notice was given by either party. The Defendants contended that where there was a clear procedure for redress for any particular grievance by the law, that procedure should be strictly followed. It urged that this suit should be struck out with costs because the court had no jurisdiction to transfer it to the suitable forum.

The application was supported by the affidavit of Veeral Shah sworn on 16/3/2021. The deponent attached a copy of the lease dated 15/11/2016.

Farooq Mohammad, a director of the Plaintiff swore the affidavit in opposition to the application. He deponed that through their advocates, the Defendants issued a notice dated 1/7/2020 demanding that the Plaintiff vacate the suit premises and remove all fixtures and fittings and restore the suit premises to the original state by 15/7/2020. The Plaintiff's advocate responded on 8/7/2020. The Plaintiff filed suit on 24/7/2020 seeking several orders. It pointed out that the Defendant had not filed a defence.

The Plaintiff averred that the Defendants filed a notice of motion dated 5/8/2020 in which they admitted the jurisdiction of this court at paragraphs 33 and 34 of the supporting affidavit hence they are now estopped from attempting to delay the hearing of the dispute. He averred that on 19/8/2020 the court referred parties to court annexed mediation which did not yield any fruits. The Plaintiff pointed out that the lease over the suit premises was for a period of 5 years and 3 months. He urged that it was an implied term of the lease that the Plaintiff was to undertake certain improvements to the suit premises and that the Defendants' representatives or agents were actively involved in the supervision of all construction works and improvement of the premises. The Plaintiff contended that there was an implied term that the Defendants would reimburse or compensate the Plaintiff for the cost of construction and improvement of the suit premises. He averred that the costs amounted to Kshs. 34,106,460/=. He added that the Plaintiff's affiliate company, Royal Palm Restaurant Limited occupied the ground and first floors of the premises with the consent of the Defendants.

The Plaintiff contended that clauses 8.1 and 8.2 of the lease only provided for the option of re-entry and termination in case of breach of covenant, bankruptcy or liquidation, appointment of receiver, distress and any breach which is not remedied by notice. He urged that the Business Premises Rent Tribunal (BPR) did not have jurisdiction because the Act specified that its jurisdiction only applied where provision for termination was otherwise than for breach of covenant which was not the case.

Parties filed submissions. The Defendants submitted that clauses 8.1 and 8.2 of the lease agreement made the tenancy a controlled one and therefore the court had no jurisdiction to deal with the dispute. They relied on Section 2 (1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act on the definition of a controlled tenancy. The Defendants contended that the suit should be struck out with costs since this court did not have jurisdiction to transfer it to the BPRT. They submitted that the Plaintiffs ought to have exhausted the available remedy through the BPRT before invoking the jurisdiction of this court and relied on several decisions on the issue of jurisdiction and exhausting available remedies.

The Plaintiff submitted that the dispute between the parties was more than rent default and that it could only be determined through a full trial. It added that clauses 8.1 and 8.2 of the lease dated 15/11/2016 provide the option of re-entry and termination which were both in the case of breach of covenant and that the lease in this dispute could not be construed as a controlled tenancy. The Plaintiff relied on **Republic v Chairman Business Premises Rent Tribunal & 2 Others, Ex Parte Abdul Kadir Hubess [2017] eKLR** which it was held that mere termination clauses did not make a tenancy a controlled one under the jurisdiction of the BPRT. It argued that the jurisdiction of the BPRT under Section 2 of the Act only applied where the provisions for termination in the lease was otherwise than for breach of covenant. The Plaintiff urged the court to dismiss the application with costs.

The issue for determination is whether this court has jurisdiction to hear and determine the dispute between the Plaintiff and the Defendant. The Defendant reiterated the importance of a determination being made first as to whether or not the court is clothed with the requisite jurisdiction to hear the dispute before it.

**In Samuel Kamau Macharia & Another v Kenya commercial Bank & 2 Others, [2012] eKLR**, the Supreme Court stated thus at paragraph 68:

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”

The Environment and Land Court derives its jurisdiction from Article 162 (2) (b) of the Constitution of Kenya 2010 and the Environment and Land Court Act, 2011.

Both parties are in agreement that the dispute arises out of an existing landlord and tenant relationship between the Plaintiff and the Defendants created by the lease agreements dated 15/11/2016 being leases for the ground and 1<sup>st</sup> floor space of the building erected on L.R. No. 209/2527/2 Nairobi for a term of 5 years and 3 months commencing the rent commencement date which was on 01/01/2017.

The prayers sought in the plaint include a permanent injunction to restrain the Defendants from interfering with the Plaintiff’s occupation of the suit premises or permitting a third party to enter into possession of the suit premises; special and general damages; declaration of a constructive trust; and specific performance. The court agrees with the Plaintiff that the orders sought by the Plaintiff are orders that the court has powers to grant under Section 13 (7) of the ELC Act.

The Defendants argued that the leases dated 15/11/2016 give rise to a controlled tenancy under Section 2 (1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301. That even though the lease is for 5 years and 3 months, clauses 8.1 and 8.2 are termination clauses that offer a “break clause” bringing the leases under the jurisdiction of the BPRT.

BPRT’s jurisdiction was aptly discussed in **Republic v Business Premises Rent Tribunal & Another, Ex- Parte Albert Kigera Karume [2015] eKLR** which cited with approval the case of **Re Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195** where the Court stated as follows:

“The tribunal is a creature of statute and derives its powers from the statute that creates it. Its jurisdiction being limited by statute it can only do those things, which the statute has empowered it to do since its powers are expressed and cannot be implied.... .... The powers of the tribunal are contained in section 12(1) of the Act and anything not spelled out to be done by the tribunal is outside its area of jurisdiction. It has no jurisdiction except for the additional matters listed under section 12(1)(a) to (n). The Act was passed so as to protect tenants of certain premises from eviction and exploitation by the landlords and with that in mind the area of jurisdiction of the tribunal is to hear and determine references made to it under section 6 of the Act. Section 9 of the Act does not give any powers to the tribunal, but merely states what the tribunal may do within its area of jurisdiction..... It would be erroneous to think that section 12(4) confers on the tribunal any extra jurisdiction to that given by and under the Act elsewhere. For example it is not within the tribunal’s jurisdiction to deal with criminal acts committed in relation to any tenancy nor is it within its jurisdiction to entertain an action for damages for trespass. These are matters for the courts and the tribunal cannot by way of a complaint to it by the landlord or tenant purport to deal with such matters. Section 12(4) of the Act must be read together with the rest of the Act and, when this is done it becomes apparent that the complaint must be about a matter the tribunal has jurisdiction to deal with under the Act and that is why the complaint has to relate to a controlled tenancy.... The Act uses the words “any complaint” and the only qualification is that it must be “relating to a controlled tenancy”.

On the face of it a lease for 5 years and 3 months would be found to fall outside the jurisdiction of the BPRT. Under Section 12 (1) (a) the BPRT has power to determine whether or not any tenancy is a controlled tenancy falling within its jurisdiction. Section 2 (1) of the Act defines a controlled tenancy as a tenancy of a shop, hotel or catering establishment which has not been reduced into writing; or which has been reduced into writing and which is for a period not exceeding five years; or contains a provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or which relates to premises of a class specified under subsection (2) of this section

Counsel for the Defendant submitted that the lease herein is a controlled tenancy by dint of section 2 (1) (b) (ii) and urged that even though the lease is for a term exceeding five years, the same contains provisions for termination otherwise than for breach of covenant, within five years from the commencement thereof.

A close reading and interpretation of clauses 8.1 and 8.2 of the leases that the Defendants relied upon as termination clauses will however reveal a position that is contrary to that taken by the Defendant.

Clause 8.1 of the lease provides for the landlord's right of re-entry into the demised premises in the event that certain events occur, including the rent remaining unpaid for a period of one month, breach by the tenant of any covenant or other express or implied terms of the lease, the tenant becoming bankrupt, or the company enters into liquidation or if the tenant enters into any arrangement for the benefit of its creditors or if the tenant has any distress or execution levied on its goods.

The clause further provides that if any of the events under that clause occur

"the Landlord may upon serving a notice of intention to terminate the lease of not less than fourteen (14) days in writing (The Termination Notice) to the Tenant re-enter the premises (or any part of them in the name of the whole) upon the expiry of the Termination Notice (and even if any previous right of re-entry has been waived) and then the term will absolutely cease but without prejudice to any rights or remedies which may have accrued to the Landlord against the Tenant in respect of any breach of covenant or other terms of this lease (including the breach of which re-entry is made).

Clause 8.2 provides for the tenant's right of termination is couched in the following terms;

"If and whenever during the term the Landlord shall be in breach of any of the terms of this lease, the Tenant may upon serving a notice of intention to terminate the lease of not more than thirty (30) days in writing to the Landlord, terminate the lease upon the expiry of the Termination Notice the term will absolutely cease but without prejudice to any rights or remedies which may have accrued to the Tenant against the Landlord in respect of any breach of covenant or other terms of this lease."

In this court's view, the interpretation to be given to the two clauses is that if the appropriate notices are given as provided in the said clauses the parties have given to themselves the right to terminate the leases before the expiry of the lease terms. It is the events that listed under clause 8.1 of the lease that may trigger the issuance of a notice of intention to terminate by the Landlord are events of breach of terms of the lease.

Under clause 8.2 of the lease, the tenant can only exercise its right of termination of the lease if the landlord is in breach of any of the terms of the lease. The inevitable conclusion is that in the absence of the events of breach of terms of the leases outlined in clauses 8.1 and 8.2, the parties have no right to terminate the leases and are bound by the same for the full term.

It is therefore clear that the leases dated 15/11/2016 do not conform to the requirements of Section 2 (1) (b) (ii) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301 as the termination clauses are for breach of covenant and not as envisaged by the provisions of that section or as argued by the Defendants.

Counsel for the Defendants submitted that the court had no jurisdiction to deal with matters pertaining to controlled tenancies where the available remedies have not been exhausted. Further, that this court did not have jurisdiction to transfer the suit to the BPRT should the court find that it has no jurisdiction. Having found that the court has jurisdiction to hear and determine this suit the other issues raised do not fall for determination.

The BPRT has no jurisdiction to hear and determine the dispute between the Plaintiff and the Defendants in this suit. Consequently, the proper forum for hearing this dispute is the Environment and Land Court.

The application dated 16<sup>th</sup> March 2021 lacks merit and is hereby dismissed with costs to the Plaintiff.

**DELIVERED VIRTUALLY AT NAIROBI THIS 5<sup>TH</sup> DAY OF JULY 2021**

**K. BOR**

**JUDGE**

**In the presence of: -**

Mrs. Shabana Osman for the Plaintiff

Ms. C. Rono holding brief for Mr. A. Waigwa for the Defendants

Mr. V. Owuor- Court Assistant