



**REPUBLIC OF KENYA**

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

**ELC APPEAL NO 10 OF 2019**

**(FORMERLY HIGH COURT CIVIL APPEAL NO. 60. OF 2018)**

**FRED RUYA ABUKI.....1<sup>ST</sup> APPELLANT**

**JOHN ABUKI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**JESSE NG'ANG'A.....RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. This appeal arises out of the Ruling and Order of Hon. S.K Onjoro S.R.M dated 15<sup>th</sup> August 2018 in Kisii CM Miscellaneous Application No. 87 of 2018.

2. The background of this appeal is that the Appellants were tenants in the premises known as KISII MUNICIPALITY/ BLOCK K111/614 where they were operating some business when they were evicted pursuant to an order dated 15<sup>th</sup> August 2018 issued in Kisii CM Misc Application No. 87 of 2018. The said order adopted the letter by the Business Premised Rent Tribunal issued on 30<sup>th</sup> July 2018 indicating that the notices issued to the Appellants under the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301 had expired without the tenants filing a reference to the Tribunal as required under section 6(1) of the Act. The said letter further stated that the said tenants were not covered by the Act and they were supposed to be evicted forthwith.

3. After adopting the said letter the court proceeded to issue an eviction order after which the Appellants were evicted. Being aggrieved by the decision of the Learned Senior Resident Magistrate, the Appellants filed this appeal raising the following grounds:

- i. The Magistrate erred in law and in fact in entering judgment as sought by the Applicant when no proper decision existed to be adopted by the Magistrate's court.
- ii. The learned Magistrate erred in law and in fact in not holding that the Business Premises Tribunal had not made a decision to be adopted by the court.
- iii. The learned Magistrate erred in law and in fact in holding that the letter by the Rent Control Inspector did (sic) and filed in court was not a decision of the Business Premises Tribunal.
- iv. The learned Magistrate erred and misdirected herself fundamentally in making a decision against the Appellants herein before affording them an opportunity to be heard.
- v. The learned Magistrate erred in law and fundamentally misdirected herself in not issuing a Notice to Show cause before eviction orders could issue.

4. The court directed that the Appeal be canvassed by way of written submissions and both parties filed and exchanged their submissions.

**ISSUES FOR DETERMINATION**

5. The main issue for determination is whether eviction order issued by the Magistrate's court was valid.

## ANALYSIS AND DETERMINATION

6. Learned counsel for the Appellants submitted that letter dated 30<sup>th</sup> July 2018 was not a decision of the Business Premises Rent Tribunal capable of enforcement. He cited the case of **Charles Dickens v Walter Achango Oloo (2015) eKLR** where the court held that a letter by the Rent Control Inspector was not an order or determination by the Tribunal. It was not certified as such and the same could not be executed by the subordinate court as provided in section 14 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.

7. The said section provides as follows:

- 1) A duly certified copy of any determination or order of the Tribunal may be filed in a competent subordinate court of the first class by any party to the proceedings before such tribunal or by the tribunal and on such party filing the same such determination or order, may subject to any right of appeal conferred by or under this Act be enforced as a decree of the court.
- 2) The Tribunal shall upon being served with a notice under subsection (1) of this section, or upon its own filing of such a copy in the court, transmit to the court its record of the proceedings before it and the same shall be filed by the court along with the certified copy of the determination.

8. On the other hand, learned counsel for the Respondent submitted that the appeal was a mere academic exercise as the Appellants were evicted from the suit premises on 17<sup>th</sup> August 2018. On whether the Magistrate's court was right in issuing the eviction order, counsel submitted that since the Appellants failed to file a reference in accordance with section 6 (1) of Cap 301 after they were served with notices of intention to terminate their tenancy, the said notice took effect and the Landlord/Tenancy relationship ceased. The Respondent's only recourse in the circumstances was to seek an eviction order from the Magistrate's court. Counsel relied on **Kisii HCCC No. 112 of 2007 Farid Armed Hassan v William Ouko Ogola** (Unreported) where Justice Musinga and Justice Makhandia held that:

*“The Notice therefore took effect on 1<sup>st</sup> November 2006. By then no reference had been filed by the Appellants. That fact was confirmed by an official letter from the Business Premises Rent Tribunal dated 19<sup>th</sup> December 2006. In view of the foregoing it is our considered opinion that having been duly and in accordance with the law served with a Notice of termination of tenancy and having failed to file a reference in the Business Premises Rent Tribunal in accordance to section 6(1) of the Act and in terms of section 10 of the said Act, the aforesaid Notice took effect thereby terminating the Appellants tenancy over the suit premises with effect from 1<sup>st</sup> November 2006. From that date there was no Landlord/Tenant relationship between the Appellants and the Respondent. The Respondent could not therefore have gone back to the Tribunal for further orders and or directions on the Notice as submitted by the appellants as the Tribunal had ceased to have jurisdiction in the absence of the Landlord and tenant relationship between the parties. All that was left for the Respondent was to move to the subordinate court to evict the appellants on the basis of the expired Notice of Termination of tenancy aforesaid. Our interpretation of the law aforesaid is not without backing from our highest court in the land, the Court of Appeal. In the case of **Jitendara Mathurdas & Others v Fish and Meat Limited C.A No. 267 of 1996 (U.R)** the said court observed as follows:*

*“From what we have said above, once a reference in accordance with section s 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 1<sup>st</sup> 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 respondent did not give to them. In these circumstances therefore, the appellants had to come to court to enforce the requirements of the Act by the Respondent in relation to the appellant's notice.*

They further held that the continued occupation of the Appellants in the suit premises amounted to a tortuous act of trespass and the Respondent was perfectly entitled to have them evicted.

9. What can be gleaned from the **Jitendara case** which is binding on this court is that once a tenant is served with a Notice of termination of tenancy, he is required to file a reference to the tribunal within the period stated in the notice in accordance with section 6(1) of Cap 301. Failure to do so results in the cessation of the Landlord/Tenancy relationship between him and his landlord who then becomes entitled to apply for an eviction order. My understanding is that in the case where the Landlord/Tenant relationship has ended, the Landlord cannot go back to the Tribunal to obtain an order and all that he can get is a letter confirming that no reference was filed.

10. In the instant appeal, there is an affidavit of service indicating that the Appellants were served. The letter from the Rent Inspector who is an officer of the Tribunal confirmed that they had not filed a reference and since the Landlord/Tenant relationship had ceased, the subordinate court went ahead to issue an eviction order and the Appellants were accordingly evicted. In the premises the appeal lacks merit and it is hereby dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED AT KISII THIS 25TH DAY OF NOVEMBER, 2021.**

**J.M ONYANGO**

**JUDGE**