



**REPUBLIC OF KENYA**

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

**ELC APPEAL NO. 23 OF 2015**

**ADIEL NTHUNI MAIMBU.....APPELLANT**

**=VERSUS=**

**MUGO J. KIRIKA.....RESPONDENT**

**JUDGMENT**

At all material times the respondent was the registered proprietor of all that parcel of land known as Thika Municipality Block 10/158 (hereinafter referred to as “the suit property”). By a written lease dated 11<sup>th</sup> February, 2008 made between the appellant and the respondent, the respondent let to the appellant the suit property for a term of 5 years and 3 months with effect from 1<sup>st</sup> March, 2008 on terms and conditions that were set out in the said lease. The said lease provided among others as follows;

1. The appellant was to pay a monthly rent of Kshs. 30,000/= payable in advance not later than 5<sup>th</sup> day of each succeeding month to the respondent or his appointed agent.
2. The appellant was to use the suit property for the purposes of lawful business except as a church or a mosque.
3. The appellant was to erect and construct a gate to the suit property at his own cost and the same was to remain part of the suit property after the termination of the lease.
4. The appellant was to erect on the suit property temporary structures suitable for his business and was to remove the same upon the termination of the lease.

The lease between the appellant and the respondent expired by effluxion of time on 1<sup>st</sup> May, 2013. The appellant however remained in occupation and continued paying rent to the respondent which rent was received by the respondent without protest. On 29<sup>th</sup> August, 2014, the respondent filed a reference at the Business Premises Rent Tribunal (hereinafter referred to only as “the tribunal”) in Nairobi Tribunal Case No. 547 of 2014. In his reference that was brought under section 12 (4) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301 Laws of Kenya, the respondent complained against the appellant over three issues namely;

1. That the appellant had interfered with the suit property by putting up illegal and unauthorized structures in violation of his terms of tenancy.
2. That the appellant had invited sub-tenants in the suit property without the respondent’s consent to sublet.
3. That the appellant had through his sub-tenants started M-pesa, butchery, bar/pub and other business without the knowledge and consent of the respondent in total violation of the terms of his tenancy which was restricted only to selling of cars.

That the respondent asked the tribunal to investigate the said complaints and to make necessary orders with costs. The respondent’s reference was supported by an affidavit sworn by the respondent on 28<sup>th</sup> August, 2014. The respondent averred that he let the suit property to appellant at a monthly rent of Kshs. 30,000/= and that the property was vacant. The respondent averred that the appellant was to carry out on the suit property the business of buying and selling of cars. The respondent averred that on diverse dates without his knowledge and/or consent, the appellant erected and put up illegal and unauthorized structures on the suit property that was meant for buying and selling cars only thereby breaching the agreed terms of the lease. The respondent averred that the appellant also invited and sublet the suit property to other tenants whose particulars were given as follows;

(a) Quidе Konnеct – Mpеса

(b) Dew Mathew Sound Productions

(c) Butchery Business

(d) Adson Pub

(e) Carwash

The respondent averred that the appellant had not sought his permission to sublet the suit property to the above mentioned sub-tenants. The respondent averred that the tribunal had power to investigate his complaints and make a finding that the appellant was in breach of the implied terms and conditions of the tenancy between the parties and to make other orders as it deemed fit and just to grant. The respondent annexed to his affidavit in support of the reference several photographs said to have been taken on the suit property showing the structures that the appellant had put up thereon and the various business being run on the property by the appellant's subtenants.

The appellant opposed the reference through a replying affidavit sworn on 17<sup>th</sup> September, 2014. In the affidavit, the appellant averred that he had not put up any illegal or unauthorized structures on the suit property. The appellant averred that all the businesses on the suit property complained of by the respondent were put up by the appellant in accordance with the terms of the lease between the parties. The appellant averred that the lease entered into between him and the respondent did not limit the business that he was to undertake on the suit property to the sale of cars. The appellant averred that the prayers sought by the respondent were ambiguous and mischievous and were likely to embarrass the tribunal. The appellant averred that the respondent had made allegations without tendering any proof in support thereof and that it was clear that the respondent's intention was to interfere with his peaceful and quiet enjoyment of the suit property.

The appellant averred that he did not require any consent from the respondent to put up the structures that he had put up on the suit property since the lease between the parties was clear on what he was to do on the property. The appellant averred that the respondent's complaint was baseless and urged the tribunal to dismiss the same. The appellant annexed to his affidavit in opposition to reference a copy of the lease dated 11<sup>th</sup> February, 2008 between him and the respondent.

On 23<sup>rd</sup> October, 2014, the tribunal directed the Rent Inspector of the tribunal to visit the suit property and;

1. Ascertain if there were subtenants on the suit property and,
2. To prepare a list of such subtenants and take appropriate photographs.

Pursuant to that order, the tribunal's Rent Inspector one, R. Okello visited the suit property and prepared a report that was filed at the tribunal. In his report that was not dated, the Rent Inspector stated as follows:

*"The premises is an open yard approximately one acre. There are several businesses. A bar by the name of Aldel Pub, Nyama Choma Shade, M-pesa Shop, Tyre Shop and Car Wash. The tenant showed a copy of trading licence. I enclose herewith Bar/membership Club indicating it has been licensed. Car wash has been inserted."*

In conclusion the rent Inspect stated that:

*"From the licence only the bar and car wash have been licensed. I leave the matter to court to give directions."*

After the Rent Inspector's report was filed in court, the respondent's reference was heard through viva voce evidence. In his evidence, the respondent told the tribunal that the appellant was his tenant on the suit property from 2008 and that his lease expired on 30<sup>th</sup> November, 2013. The respondent told the tribunal that the appellant had sublet the premises to several subtenants among them, George Mungai who was running a butchery and one, Gerald who was running a business under the name Muwa Multi Enterprises on the suit property. The respondent stated that there were also an M-pesa shop, a tyre shop and a car wash on the suit property. He stated that he had let the suit property to the appellant to buy and sell cars. He told the court that the appellant was in breach of the terms and conditions of the tenancy between them and that he wanted vacant possession of the suit property. The respondent produced in evidence copies of a single business permit for a business known as Muwa Multi Enterprises as exhibit 1 and a single business permit bill dated 10<sup>th</sup> September 2014, in the sum of Kshs. 12,540/= for Adson Pub as exhibit 2.

In his evidence, the appellant told the tribunal that he had been the respondent's tenant for more than 6 years and that they had a written lease which he produced as his exhibit 1. He told the tribunal that the said lease only barred him from running a business of a church or a mosque on the suit property. He stated that he had the following businesses on the suit property;

1. Car wash.
2. M-pesa Shop.
3. Pub.
4. Butchery.

The appellant stated that occasionally he was also parking and selling cars on the suit property. He stated that all the businesses that he was carrying out on the suit property were all lawful and that he had not erected a church or a mosque on the property. The appellant told the tribunal that when the suit property was let to him, there were no developments or structures of any nature on the premises and that he was

the one who put up all the structures on the suit property which he was allowed to do under clause 1(e) of the lease between the parties. He stated that the temporary structures he had put up on the suit property were consistent with the businesses that he was carrying out. He stated that he had not put up any illegal structure and was not carrying out any illegal business on the suit property. He stated that all the people who were operating from the suit property were his employees and that he had not sublet the suit property to anyone. He stated that when the Rent Inspector from the tribunal visited the suit property he found the appellant and the respondent in the premises. He stated that the structures he had put up on the suit property were in accordance with the terms of the lease. He stated that the respondent's intention was to exhort more rent from him and that he wanted to evict him from the premises.

After the close of evidence before the tribunal, the parties filed written submissions. The appellant filed his submissions on 25<sup>th</sup> February, 2015 while the respondent filed his submissions on 11<sup>th</sup> February, 2015. The tribunal considered the evidence that was adduced by the parties before it and the submissions and rendered its judgment on 17<sup>th</sup> April, 2014. In the judgment, the tribunal considered each ground on which the reference was brought by the respondent. On the first ground, the tribunal held that the respondent's complaint that the appellant had put up illegal and unauthorized structures on the suit property was baseless and had no merit. The tribunal held that clause 1 (e) of the lease agreement between the parties allowed the appellant to erect temporary structures on the suit property suitable for his business purposes and to remove them upon determination of the lease. The tribunal held that it was satisfied that the structures on the suit property were erected by the appellant pursuant to the terms of the lease between the parties.

On ground two of the reference in which the respondent had claimed that the appellant had invited subtenants to the suit property without his consent, the tribunal found that there was overwhelming evidence that there were several businesses on the suit property run by the appellant. The tribunal held that the appellant failed to produce documents to show that all those businesses belonged to him. The tribunal held that it was satisfied on a balance of probabilities that the appellant had sublet the suit property to several subtenants without the respondent's consent. The tribunal held that the lease agreement between the parties did not provide for subletting and that in any event, the relationship between the parties was governed by section 7(1) (c) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301 Laws of Kenya (Cap. 301) which prohibited subletting without consent of the landlord. The tribunal concluded that the respondent had proved on a balance of probabilities that the appellant had sublet the suit property to several subtenants without the respondent's consent.

On ground three of the reference in which the respondent had complained that the appellant was engaged in other businesses apart from that of buying and selling of cars in respect of which the premises were let to him, the tribunal held that it was satisfied that the appellant was not engaged only in the business of selling cars. In conclusion the tribunal held that the respondent had established grounds 2 and 3 of the reference and that it was entitled to an order for recovery of possession of the suit property from the appellant under section 12 (1) (e) of Cap. 301. The tribunal ordered the appellant to vacate and deliver possession of the suit property to the respondent on or before 31<sup>st</sup> July, 2015 in default of which an eviction order was to issue without any further reference to the tribunal. The tribunal made a further order that the appellant was to remove all the temporary structures he had constructed on the suit property and was to reinstate the suit property to its original condition. The appellant was also ordered to pay the costs of the reference to be agreed upon between the parties failure to which the same to be assessed by the tribunal.

It is against that judgment of the tribunal that the present appeal was preferred by the appellant on 15<sup>th</sup> May, 2015. The appellant challenged the decision of the tribunal on nine grounds set out in his memorandum of appeal dated 15<sup>th</sup> May, 2015. In his grounds of appeal, the appellant contended as follows;

1. That the tribunal erred in law and fact in making its decision on unpleaded issues.
2. That the tribunal erred in law and fact in disregarding the rent inspector's report and in failing to opine that the said report was silent on whether or not there were subtenants on the premises.
3. That the tribunal erred in law by shifting the burden of proof to the appellant by opining that the appellant was unable to produce document to show that all the businesses in the premises belonged to the appellant.
4. That the tribunal erred in law and fact by opining that the appellant had sublet the premises without any scintilla of proof being proffered by the respondent.
5. That the tribunal erred in law and fact by opining that the guiding terms of the tenancy were the expired lease dated 11<sup>th</sup> February, 2008 and in failing to opine that the said lease was silent on the prerequisite of a consent being needed for the appellant to allegedly sub-let the premises.
6. That the tribunal erred in law and fact by opining that the tenancy between the parties was governed by section 7(1) (c) of Cap. 301 without elucidating on how the appellant was in breach thereof.
7. That the tribunal erred in fact and law by opining that there was evidence on record to show that the appellant was only to engage in the business of selling cars whilst the lease aforesaid and the evidence from both parties was that the only business the appellant was precluded from conducting was that of a church and a mosque.
8. That the tribunal erred in law and fact by opining that the respondent was entitled to an order for recovery of possession of the premises under section 12 (1) (e) of Cap. 301.
9. That the tribunal erred in law and fact by finding in favour of the respondent against the weight of evidence.

The appellant urged the court to allow the appeal and set aside the decision of the tribunal. The appeal was heard by way of written

submissions. The appellant filed his submissions on 19<sup>th</sup> March, 2019 while the respondent filed his submissions in reply on 10<sup>th</sup> June, 2019.

In his submissions, the appellant argued that in his reference, the respondent did not seek or pray for recovery of possession of the suit property which he was granted by the tribunal. The appellant submitted further that the respondent did not seek an order that the appellant does remove all the temporary structures from the suit property and reinstate the suit property to its original condition which order was also given by the tribunal. The appellant submitted that the parties were bound by their pleadings and as such the tribunal erred in law and fact in granting orders that were neither pleaded nor sought. The appellant submitted further that the respondent's prayer to the tribunal was for it to investigate his complaint and make a finding that the appellant had breached the implied terms and conditions of the controlled tenancy. The appellant submitted that the respondent did not even remotely suggest that it required possession of the suit property.

The appellant submitted further that the tribunal's finding that the suit property was let to the appellant for the purposes only of buying and selling cars was contrary to Clause 1 (c) of the lease which allowed the appellant to use the suit property for the purposes of any lawful business except as a church or a mosque. On the issue of subletting, the appellant submitted that the respondent tendered no evidence that the appellant had sublet the suit property. The appellant took issue with the tribunal's finding that the appellant had failed to prove that all the businesses on the suit property belonged to him. The appellant submitted that the burden of proof was upon the respondent who had claimed that the appellant had sublet the suit property. The appellant submitted that the tribunal erred in shifting the burden of proof to the appellant contrary to the probation of Section 107 to 109 of the Evidence Act, Chapter 80 Laws of Kenya. The appellant urged the court to set aside the decision of the tribunal and vacate the orders it had issued.

In his submissions in reply, the respondent raised a preliminary objection to the appeal by the appellant. The respondent submitted that the appeal was incompetent, bad in law and amounted to an abuse of the process of the court. The respondent submitted that what was before the tribunal was a complaint brought under section 12 (4) of Cap. 301. The respondent submitted that no appeal lies to this court from a decision made by the tribunal on a complaint.

In support of this submission the respondent referred to the case of Re Hebatulla Properties Ltd. (1976 – 1980) KLR 1195. He submitted that in that case, the court held that appeal does not lie to this court from an order of the tribunal made on a complaint. The respondent urged this court to strike out the appeal as incompetent. Without prejudice to that submission, the respondent argued that ground one of appeal had no merit. The respondent submitted that the issues that were dealt with by the tribunal were raised in the reference and the affidavit filed in support thereof. The appellant submitted that it was not correct that the tribunal made a decision on unpleaded issues. On grounds three and four of appeal, the respondent submitted that the tribunal found overwhelming evidence that the appellant had sublet the suit property. On grounds six, seven, eight and nine of appeal, the respondent submitted that the tribunal after careful consideration of the evidence by both parties and the documents produced as exhibits was entitled to grant the reliefs or orders the subject of this appeal.

I have considered the submissions by counsels on the appeal before me and the authorities cited in support thereof. Before considering the appeal on merit, I wish to dispose of the preliminary issue that was raised by the respondent on the competence of the appeal. As I have already mentioned above, the respondent contended that the appeal is incompetent on the ground that no appeal lies to this court from a decision of the tribunal made on a complaint under Section 12 (4) of Cap. 301.

I find no merit in the respondent's preliminary objection to the appeal. As was observed in the case of Re-Hebatulla Properties Ltd.(supra) that was cited by the respondent in support of its preliminary objection, a complaint under section 12 (4) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301 Laws of Kenya (Cap. 301) is normally restricted to minor matters. I have observed from the reference that was filed by the respondent at the tribunal that the issues that were purportedly raised by the respondent as complaints were serious and formed grounds for termination of the appellant's tenancy and that although the tribunal was not called upon to terminate the tenancy, it proceeded to do so.

I am of the view that when a tribunal is moved through a complaint to terminate a tenancy, which itself is irregular and proceeds to make such order, an aggrieved tenant should have the liberty to appeal against the decision as if the same was made pursuant to a reference filed under section 4 of Cap. 301. It would not have been the intention of the legislature to leave a tenant without a remedy of appeal in the circumstances having regard to the fact that Cap. 301 was enacted with the object of protecting tenants. It follows therefore that the respondent having moved the tribunal by way of a complaint rather through a notice under Section 4 of Cap. 301 and raised grounds that would warrant a termination of a tenancy and succeeded in obtaining a termination of a tenancy cannot be heard to say that what was before the tribunal was a minor matter under section 12 (4) of Cap. 301 and such a tenant has no right of appeal.

I am also not in agreement with the respondent that no appeal lies to this court from a decision made on a complaint under section 12 (4) of Cap. 301. I had an occasion to deal with this issue in a two (2) judge bench in the case of Transallied Limited v Sakai Trading Limited [2016] eKLR. In that case we stated as follows:

*“On the first issue, the Respondent had submitted that an appeal does not lie to this court on a determination of a complaint by the tribunal. In support of this submission, Mr. Kibe cited the decision of **Simpson J.** in the case of **Re Hebatulla Properties Ltd. (1979 – 1980) KLR 96** in which he stated that the right of appeal to the High Court conferred by Section 15 (1) of the Act does not extend to an order of the tribunal made on a complaint.*

*The Respondent submitted that since the order of the tribunal which is the subject of this appeal arose from a complaint, the same is not appealable to this court and as such the appeal before us incompetent. We find no merit in this objection for a number of reasons. First, we have noted from the record that the issue as to whether an appeal lies to this court on complaint was raised by the Respondent by way of a preliminary objection dated 20th July 2011 which objection was heard by Angawa J. and was dismissed on 28th July 2011. The decision of Angawa J. on the issue has neither been reviewed nor set aside. The issue having been raised before this court, considered and conclusively determined between the parties herein, the same cannot be re-opened before this court for another determination.*

*Independently of the decision of Angawa J, we have also considered the issue. With due difference to the decision of Simpson J. in the case of **Re Hebatulla Properties Ltd. (Supra)**, we do not agree with the restricted interpretation which he gave to the word “reference” in Section 15(1) of the Act. The term reference is defined in Section 2 of the Act to mean “reference to a Tribunal under Section 6 of the Act.” For appeal purposes, we do not think that the term reference can be restricted only to reference to the tribunal under Section 6 of the Act. We are of the view that if that was the intention of the legislature, it would have stated so expressly in section 15(1) of the Act. Looking at the Act as a whole together with the regulations made thereunder, we have observed that reference can be made to the tribunal under section 6(1) of the said Act or under Section 12 (4) of the Act and the forms for instituting a reference in both cases are provided for in the regulations. See, Regulation 5 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Tribunal Forms and Procedure Regulations. Under Regulation 5 aforesaid as read together with Form C in the Schedule to the said Regulations, a complaint by a landlord or a tenant is lodged in the tribunal as a “reference.” A party to a complaint is therefore a party to a “reference” and should be covered under Section 15(1) of the Act. The Act having expressly given a right of appeal to “any party” to a reference, we can find no reason why we should restrict such parties only to those whose reference was brought pursuant to Section 6 of the Act in the absence of express provisions to that effect.*

*This being a superior court, its jurisdiction cannot be ousted by implication. In the case of **Gatimu Kinguru Vs. Muya Gathangi (1976 – 80) I KLR 317**, Madan J. stated as follows at page 331;*

***“In interpreting a statute, in the absence of an express provision to that effect, it is always wrong for the court to whittle down the rights and privileges, of the subject. The Court’s task is to protect the rights and privileges of the people, not to chip and shear them.”***

*In the case of **East African Railways Corporation vs. Anthony Sefu Dar –es- Salaam, (HCCA No. 19 of 1971) (1983) E. A 327**, it was held that:-*

***“A statute cannot be construed to oust the jurisdiction of a superior court in the absence of clear and unambiguous language to that effect.”***

*For the foregoing reasons, it is our finding that a determination of a complaint referred to the tribunal under Section 12 (4) of the Act is appealable to this court under Section 15 (1) of the Act. In this regard, we are in agreement with the decision of Anyara Emukule J. in the case of **Ruth K. Wachira t/a Amigirl Beauty Parlour vs. Chairman Business Rent Tribunal (supra)**. The foregoing being our view on the matter, the Respondents objection to the appeal herein on the ground that the Appellant did not have a right of appeal is overruled.*

I still share the same view. For the foregoing reasons, the objection by the respondent to the present appeal is accordingly overruled. Having disposed of that preliminary issue, I will now consider the appellant’s appeal on merit. On ground one of appeal, I am in agreement with the appellant that the tribunal granted reliefs that were never sought by the respondent. As, I have mentioned above, what was before the tribunal was a complaint and what the tribunal was called upon to do was to investigate the complaint and make appropriate orders.

I am of the view that it was not the intention of the legislature that a tenancy under Cap. 301 be terminated through a complaint under section 12 (4) of Cap. 301. Section 4 of Cap. 301 is very clear. It provides that any termination or variation on the terms of a controlled tenancy must be carried out in accordance with that section. I am of the view that it was not open to the tribunal to grant an order of termination of a tenancy under section 12 (4) of Cap. 301. The tribunal was not called upon either in the reference or the affidavit filed in support thereof to terminate the appellant’s tenancy. I am in agreement with the appellant that the issue of termination of the appellant’s tenancy was not pleaded and as such the tribunal could not make a determination based on the same since the appellant was not given an opportunity to respond to the same. I therefore find merit in ground one of appeal.

On grounds two, three, four and five of appeal, I am in agreement with the appellant that there was no evidence before the tribunal that the appellant had sublet the suit property. The appellant led evidence that the suit property was let to him as an open ground. According to the evidence that was adduced before the tribunal, the suit property had no structures of any nature and in fact even a gate had to be installed by the appellant. There is no indication in the lease pursuant to which the appellant took possession of the suit property that the appellant was to carry out any particular business. The only encumbrance that was placed upon the appellant in the lease was that it was not to carry out a business of running a church or a mosque. It follows therefore that it was open to the appellant to carry out whatever business it wished to carry out on the suit property. The appellant was also given permission to put up whatever structure he wished to put up for the purposes of a business he wished to carry out on the suit property provided that the structures were temporary in nature. It was common ground that there were several businesses being carried out on the suit property. The appellant led evidence that all those businesses belonged to him and were being run by him. It was the respondent who had contended that the appellant had sublet the suit property to several persons who were running various businesses.

I am in agreement with the appellant that the burden of proof was on the respondent to demonstrate that indeed the appellant had sublet the suit property. I am in agreement with the appellant that the tribunal erred by shifting the burden of proof to the appellant to prove that all the businesses that were being conducted on the suit property belonged to him. As I have mentioned earlier in this judgment, the tribunal had ordered its rent inspector to visit the suit property to ascertain if there were subtenants on the property. I had referred to the said inspector’s report earlier in this judgment. There is nothing in that report to the effect that the appellant had sublet the suit property. The tribunal did not refer to this report by its own rent inspector. I am of the view that the respondent did not place any evidence before the tribunal showing that the appellant had sublet the suit property and that it was erroneous for the tribunal to shift that burden to the appellant. For the foregoing reasons I find merit in the said grounds of appeal.

In view of what I have stated above, nothing arises under ground six of appeal. With regard to ground seven of appeal, once again, I am in agreement with the appellant that the tribunal erred in making a finding that the appellant was engaged in other businesses on the suit property other than the businesses for which the premises were let to him. The appellant led evidence and produced before the tribunal a lease pursuant to which he took possession of the suit property from the respondent. It is clear from that lease that the appellant was free to

carry out any business he wished to conduct on the suit property save for running of a church or a mosque. The tribunal therefore erred in its finding that the appellant was only supposed to run a business of buying and selling cars on the suit property.

### Conclusion

In conclusion it is my finding that the appellant's appeal has merit. I therefore make the following orders:

1. The judgment and orders made by the Business Premises Rent Tribunal on 17<sup>th</sup> April, 2015 are hereby set aside and replaced with an order dismissing the respondent's reference dated 28<sup>th</sup> August, 2014 that was filed at the tribunal on 29<sup>th</sup> August, 2014 in Tribunal Case No. 544 of 2014.
2. The appellant shall have the costs of this appeal and of the proceedings before the tribunal.

**Delivered and dated this 30<sup>th</sup> Day of January 2020**

**S. OKONG'O**

**JUDGE**

**Judgment read in open court in the presence of:**

Mr. Mboha for the Appellant

Mr. Mikwa h/b for Mr. Githinji for the Respondent

C. Nyokabi-Court Assistant