



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CIVIL APPEAL CASE NO. 4 OF 2016

MARIE STOPES (K) LIMITED.....APPELLANT

VERSUS

CECILIA KIHARA.....RESPONDENT

JUDGMENT

INTRODUCTION

1. The Appeal herein arises from the ruling of Honourable J. Kitutu, Principal Magistrate in **Mombasa CMCC No.1589 of 2014** delivered on 21st April 2015.

2. The Respondent had by a Complaint dated 15th August 2014 sued the Appellant claiming that the Appellant was the Respondent's tenant at the premises on parcel of land known as SUBDIVISION NO.3821 (ORIGINAL NO.3792) SECTION VI MAINLAND NORTH, MOMBASA. The Respondent stated that the lease agreement provided, inter alia, that the term of the tenancy would be 10 years and 3 months commencing from 1st November 2006. The Respondent averred that the Appellant was in breach of the terms of the lease agreement by purporting to terminate the lease before the contractual date. The Respondent averred that the Appellant in further breach of the terms of the lease purported to illegally and procedurally vacate the leased premises in total disregard of the provisions of the lease agreement. The Respondent further averred that the Appellant was in breach of the terms of the lease agreement and had fallen into arrears and continues to be in such arrears. The Respondent prayed for judgment against the appellant for a declaration that the appellant was in breach of its contractual obligation under the lease agreement and an order for payment of Kshs.3,339,169/= to the plaintiff as well as interest and costs.

3. The Appellant filed its defence on 10th October 2014 in which it denied the Respondent's claim and raised a Preliminary Objection on the ground that the Chief Magistrate's Court lacked jurisdiction to hear and determine the suit, arguing that the lease was a controlled tenancy which are matters reserved for the Business Premises Rent Tribunal.

4. The Preliminary objection was heard by Honourable Justus Kituku, Principal Magistrate, who vide a ruling delivered on 21st April 2015 dismissed the said Preliminary Objection. The Appellant was dissatisfied with the said ruling and filed the present appeal on the following grounds:

1. That the learned Magistrate erred in law and in fact by failing to consider and uphold the failure to register the lease dated 1st day of November, 2006 divest and oust the jurisdiction of the Chief Magistrate's Court to hear and determine the dispute.

2. That the learned Magistrate erred in law and in fact by failing to consider the weight of the preliminary objection premised on jurisdiction that the unregistered lease reduced to the tenancy between the plaintiff/landlord and the Applicant/Tenant to a periodic tenancy of a quarterly basis and as such all disputes on the lease could only be determined by the Business Premises Rent Tribunal.

3. That the learned Magistrate erred in law and in fact by failing to consider adequately or at all the submissions by the Appellant and in particular the authorities cited and statutes law provisions relating to unregistered lease and controlled tenancy.

4. That the learned Magistrate erred in law in failing to uphold the doctrine of precedent and to be bound by the principle of stare decisis.

5. That the learned Magistrate erred in law and in fact by holding that since the Appellant had moved out of the property

known as SUB-DIVISION NO.3821 SECTION VI MAINLAND NORTH, MOMBASA the contractual obligation in terms of rent arrears under the unregistered lease dated 1st day of November, 2006 mutated to a civil debt to be tried by Chief Magistrate Court.

6. That the learned Magistrate erred in law in fact by not recognizing that the plaint extensively referred to the Lease dated 1st November, 2006 as the core document of reference and if the intention of the respondent was to move it outside the ambit of the Business Rent Tribunal then the lease must be registered.

5. The Appellant prays that the ruling of the subordinate court be set aside and the Preliminary Objection upheld and for the dismissal of the respondent's suit in the subordinate court as well as costs.

SUBMISSIONS

6. The appeal was canvassed by way of written submissions which were duly filed by both parties and also highlighted by their respective advocates. Mr. Onyony learned Counsel for the Appellant submitted that a lease for a period of more than one year must be registered as required by Section 4 of Registration of Documents Act to be legally enforceable and to attract a remedy of strict performance. That since the lease agreement dated 1st November 2006 was not registered; it was reduced to a periodic tenancy which thereafter created a controlled tenancy as described in Section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap, 301 of the Laws of Kenya. Mr. Onyony also cited Section 18 of the Registration of Documents Act, Cap 285 Laws of Kenya as well as Sections 32 and 4 of the Registration of Titles Act (repealed) and submitted that any unregistered lease for over one year is invalid and is but only a contract between the parties. He relied on the case of **W. J. Bakeman Ltd -v- Associated Hotel Management Service Ltd (1986) eKLR**. It is the Appellant's submission that Magistrates' Court lacked jurisdiction to hear and determine the case. That the right forum was the Business Premises Rent Tribunal. The Appellant also relied on the case of **Dr. Peter Kamau Njoroge -v- Caroline Waguthi Ndindi (2013) eKLR; Chimaual Meghji Naya Shah & Another -v- Oxford University Press (EA) Limited (2007)eKLR; James Michiki Mwangi & Another -v- Esther Wanjiru Kabugu & Another (2005)eKLR and Munaver N. Alibhai t/a Diani Boutique -v- South Coast Fitness & Sports Centre Limited(1995)KLR**.

7. Mr. Kibara learned Counsel for the Respondent submitted that the lease agreement which was for 10 years 3 months was deliberately and well above the 5 year period set by Cap 301. He cited Section 2 of the said Act and relied on the case of **Jubilee Company of Kenya Limited -v- Joseph Ndugu Karega t/a Leather Touch Foot Care Specialists (2014)eKLR**. It was further the Respondent's submission that the lease, though unregistered, was lawful and binding on the parties. The Respondent relied on the case of **Liquid International Ltd -v- Panari Center Limited (2009)eKLR and Kenya Tea Development Authority -v- Samuel Kanogo Ritho (2005)eKLR** and submitted that the instrument of lease, though not registered operated as a valid contract between the parties. It was further submitted that by the time the parties went to court, the Appellant as tenant had vacated from the suit premises and that alone removed the matter from the Business Premises Rent Tribunal which presupposes a relationship between a landlord and tenant. The Respondent relied on the case of **Republic -v- Business Premises Rent Tribunal & Another & Ex Parte Davies Motors Corporation Limited (2013)eKLR** and cited Section 12 of Cap 301. The Respondent urged the court to dismiss the appeal with costs.

DETERMINATION

8. I have perused and considered the Record of Appeal, the grounds of Appeal and the submissions by the parties as well as the authorities cited. The issues for determination in this appeal as I can deduce from the grounds of appeal are:

- i. Whether the lease Agreement dated 1st November, 2006 between the parties which was for a term of 10 years and 3 months created a controlled tenancy.**
- ii. What is the legal effect of an unregistered lease.**
- iii. Whether the Magistrate's Court had jurisdiction to determine the matter.**

9. It is not in dispute that the lease agreement dated 1st November 2006 was for a term of ten (10) years and three (3) months from 1st November, 2006. It is also not in dispute that the lease was not registered.

10. Section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301 Laws of Kenya, provides that: a "controlled tenancy means 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-

i) is for a period not exceeding five years; or

ii) contains provisions for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or

iii) relates to premises of a class specified under subsection (2) of this Section... ”

11. As already stated, it is not in dispute that the lease agreement between the parties herein was for a term of ten (10) years and three (3)

months which is a period exceeding five years. The lease was also reduced into writing. I have also perused the lease agreement. There is no provision for termination otherwise than for breach of covenant within five years. Clause 3.1 thereof allowed the lessor to re-enter into the premises inter alia, if the rent reserved or any part thereof falls in arrears or if there is any other breach or non-performance by the lessees of any covenants and conditions in the lease. In my considered view and going by the definition under Section 2 of Cap 301 hereinabove the term of the lease agreement in itself and the absence of a termination otherwise than for breach of covenant within five year, removes the tenancy relationship from the ambit of controlled tenancy under that Act. In my considered view, the Appellant was not a protected tenant.

12. The Appellant has submitted that since the lease agreement was not registered, it was reduced to a periodic tenancy and that it is invalid and is but only a contract between the parties. In the case of **Mega Garment Limited –v- Mistry Jadva Parbat & Co.(EPZ) Limited (2016)eKLR**, the Court of Appeal discussed the status of an unregistered lease and stated as follows:

“The time-honoured decision of this court in Bachelors Bakery Ltd –v- Westlands Securities Ltd (1982) KLR 366 which has been followed in a long line of subsequent decisions elucidates the status of an unregistered lease. It reiterates and confirms the firmly settled law, first that a lease for immovable property for a term exceeding one year can only be made by a registered instrument; that a document merely creating a right to obtain another document, like the one in this dispute, does not require to be registered to be enforceable; that such an agreement is valid inter partes even in the absence of registration, but gives no protection against the rights of third parties. That exposition of the law hold true in this case...”

13. In line with the above decision, and as rightly submitted by the Appellant, any unregistered lease is only a contract between the parties. The same gives no protection against the rights of third parties. In the present case, the unregistered lease was between the Respondent and the Appellant herein. In the case before the subordinate court the Respondent sought to enforce her rights as against the Appellant in terms of the lease. Going by the above decision of the Court of Appeal, the agreement was valid and enforceable as between the two parties.

14. I have already found that the lease created was not a controlled tenancy. In any case, the Appellant had already vacated the suit premises by the time the suit in the subordinate court was filed. It is not in dispute that the Appellant vacated the suit premises on 7th January 2014. The suit in the Magistrate’s Court was filed on 15th August 2015. It is therefore my finding that the Business Premises Tribunal had no jurisdiction to hear and determine the matter. It is my finding that the Magistrate’s Court was the forum that was suitably clothed with jurisdiction to hear and determine the Respondent’s claim against the Appellant. Therefore the learned trial Magistrate was justified in arriving at the decision he made. The finding and holding of the learned magistrate to have the Appellant’s Preliminary Objection dismissed was well founded and I find no basis to interfere with that finding.

15. In the result, I find no merit in the Appellant’s appeal and the same is dismissed with costs to the Respondent.

DATED, SIGNED and DELIVERED at MOMBASA this 19th day of February 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Ms. Nyaga holding brief for Kibara for Respondents

Ms. Mwainzi holding brief for Onyony for Appellant

Yumna Court Assistant

C.K. YANO

JUDGE