



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KISII

E.L.C APPEAL NO. 12 OF 2019

LENA SARANGE..APPELLANT/APPLICANT

VERSUS

ROBERT OYIEKO ANGOI.....RESPONDENT

JUDGMENT

INTRODUCTION

1.This appeal arises from the ruling of Mr. Mbichi Mboroki, Chairman Business Premises Rent Tribunal of Kenya delivered at Kisii on 12th April 2019 in respect of **Tribunal Case No. 8 of 2019 Robert Oyieko Angoi v Lena Sarange**. In the said decision the Chairman ordered that the business premises be reopened to enable the Respondent continue with his business.

2. Being dissatisfied with the said ruling, the Appellant filed this appeal. The Appeal is based on the following grounds:

- i. The Chairman erred in law and fact by finding that the Respondent was a landlord whereas the said respondent is a tenant.
- ii. The Chairman erred in law and fact in issuing eviction orders against the Appellant to the Respondent (sic).
- iii. The Chairman erred in law and fact by handling/dealing with a matter where he had no jurisdiction.
- iv. The Chairman erred in law and fact by issuing an order to re-open the premises so as to enable the Respondent resume business.
- v. The Chairman failed to consider the facts that the Respondent had failed to prove that he is the Landlord as required in the particular circumstances of this case.
- vi. The Chairman erred in fact by forcing (sic) to take account and consider the evidence adduced on behalf of the Appellant.
- vii. The Chairman failed to appreciate the submissions of the learned counsel for the Appellant by finding in favour of the Respondent herein.
- viii. The Chairman erred in law and fact by failing to award the Appellant herein costs of defending the suit against the Respondent.
- ix. In circumstances of the case, the findings of the Chairman are unsupportable in law or on the basis of the evidence.

BACKGROUND

3. Before delving into the merits of the appeal, it is necessary to give a brief background of the case at the Tribunal.

The suit at the Business Premises Rent Tribunal was instituted by a Notice of termination of tenancy issued by the Respondent to the Appellant on 26.10.2018 pursuant to section 4(2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301. On 31.1.2019, the Tribunal wrote to the Appellant indicating that the notice had expired on 1.12.2018 without any opposition by the tenant. On 22.2.2019 the Respondent appeared before the Tribunal and informed the Tribunal that the tenant had not filed any reference to the Notice as required by section 6(1) of the Act.

4. The Tribunal then issued an order allowing the Respondent to evict the Appellant with the assistance of the O.C.S Kisii Police Station.
5. Before the eviction could be effected, the Appellant filed an application dated 25.2.2019 seeking a stay of execution and setting aside of the orders of the Tribunal. Among the grounds raised by the Appellant was that the matter had proceeded ex-parte and that there was no tenancy relationship between the Appellant and the Respondent. When the application came up for hearing on 26.2.2019, the court granted a stay of execution and fixed the application for hearing on 1.3.2019. The matter did not proceed on 1.3.2019 and was put off to 11.3.2019 when the Tribunal extended the orders of stay and ordered the suit premises closed and Respondent and Appellant to each put their padlocks on the door. Witness summons were issued to Johnson Nyakundi Kingoina and Joseph Gateri Kingoina to attend the Tribunal on 22.3.19. The matter did not proceed on 22.3.2019 and it was put off to 12.4.19.
6. On 12.4.2019, counsel for the Respondent informed the Tribunal that the Landlord Robert Angoi (Respondent) was in possession of the suit premises and without inquiring into the issue of the relationship between the Appellant and the Respondent or the presence of Johnson Nyakundi Kingoina and Joseph Gateri Kingoina who had earlier been summoned to appear before the Tribunal, the Tribunal proceeded to make the following orders:
1. "The orders issued on 11th March 2019 are hereby set aside
 2. Robert Oyieko Angoi shall have the premises reopened and continue with his business
 3. The OCS Kisii Police Station shall enforce compliance
 4. The matter shall be mentioned on 31.5.2019 on the issue of costs of Lena Sarange and compensation for loss of tenancy".
7. It is the above orders that gave rise to this appeal. The appeal was disposed of by way of written submissions which were later highlighted orally.
8. Counsel for the Appellant submitted that the appellant was aggrieved by the eviction orders issued by the Tribunal on 22.2.2019. She submitted that the Appellant had been a tenant in the premises known as KISII TOWN BLOCK 111/85 when she was evicted through an ex-parte order. She submitted that the Appellant had not been served with a Notice of termination of tenancy. It was her contention that the Appellant's late husband had leased the suit premises from Johnson Nyakundi Kingoina and Joseph Gateri Kingoina who were brothers and at no time had she entered into a lease agreement with the Respondent. It was her further submission that the Appellant's lease which was for a period of 7 years from 1.5.2015 to 1.5.2022 was still in force and she had paid rent upto the month of June 2019.
9. She cited the case of **Price v Easton (1833) 4B & A** for the proposition that person who is not a party to a contract has no right whatsoever to enforce it or terminate it. She submitted that the Respondent is mere tenant who had no right to evict the Appellant in accordance with section 4(2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. It was her submission that the Chairman erred in granting eviction orders without proof of the Respondent's status as section 2 of the Act defines a landlord as a person entitled as between himself and the tenant to the rents and profits of the premises.
10. Counsel submitted that the Appellant who is a widow had wrongfully been evicted by a person who was not her landlord and she had not only been denied her source of livelihood but she had also not been compensated for the rent she had paid up to June 2019. She prayed that the order of eviction be set aside.
11. In his submissions counsel for the Respondent stated that the appeal was in respect of the orders issued on 12.4.2019 and not the eviction order of 22.2.2019. He stated that the order which was set aside was the one that had ordered the Respondent to close the suit premises. He submitted that the Tribunal had not made any finding that the Respondent was a Landlord of the suit premises and had instead issued witness summons to Johnson Nyakundi Kingoina and Joseph Gateri Kingoina with a view to establishing the true landlord. The said summons were to be served by counsel for the Respondent and counsel for the Appellant respectively. He was therefore of the view that the Appellant's complaint that the Chairman of the Tribunal made a finding that the Respondent was a landlord was not valid.
12. It was counsel's contention that the Tribunal ordered that the premises be re-opened after considering the affidavit evidence on record and after an inspection was done by a rent inspector when it was established that the Appellant was not in occupation of the suit premises. It was his submission that the appeal was premature as the Tribunal was still seized of the matter and the issue of compensation should be handled by the tribunal.
13. On the issue of the Tribunal's jurisdiction, he referred to section 12 (1) (c) (sic) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act which empowers the Tribunal to make such orders upon such terms and conditions as it thinks fit for the recovery of possession and payment of arrears of rent and mesne profits, which orders may be applicable to any person, whether or not he is a tenant being at any material time in occupation of the premises comprised in the controlled tenancy. The correct provision is actually section 12(1) (e) of the Act.
14. Counsel contended that by approaching the Tribunal for an order of stay of execution and an order that the reference be heard on merit the Appellant had submitted to the jurisdiction of the Tribunal. He argued further that the lease agreement on which the Appellant is relying which is found at page 45 to 46 of the Supplementary Record of Appeal is entitled "Sub-lease Agreement" meaning that the Appellant was a sub-tenant of another tenant. It was his contention that the main tenant was the Respondent who could be described as the landlord of the Appellant and therefore the Chairman of the Tribunal exercised his powers under section 12 of the Act to order for recovery of possession of the demised premises to the Respondent.

ISSUES FOR DETERMINATION

15. Having considered the grounds of appeal and the submissions of counsel there are two key issues for determination:

- i. Whether the Tribunal acted within its jurisdiction in evicting the Appellant
- ii. Whether the order issued on 12.4.2019 to reopen the demised premises ought to be set aside

ANALYSIS AND DETERMINATION

16. The jurisdiction of the Tribunal is provided under section 12 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.

S. 12. "A Tribunal shall, in relation to its area of jurisdiction have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in addition to and without prejudice to the generality of the foregoing shall have power—

- (a) to determine whether or not any tenancy is a controlled tenancy;
- (b) to determine or vary the rent to be payable in respect of any controlled tenancy, having regard to all the circumstances thereof;
- (c) to apportion the payment of rent payable under a controlled tenancy among tenants sharing the occupation of the premises comprised in the controlled tenancy;
- (d) where the rent chargeable in respect of any controlled tenancy includes a payment by way of service charge, to fix the amount of such service charge;
- (e) to make orders, upon such terms and conditions as it thinks fit, for the recovery of possession and for the payment of arrears of rent and mesne profits, which orders may be applicable to any person, whether or not he is a tenant, being at any material time in occupation of the premises comprised in a controlled tenancy;
- (f) for the purpose of enabling additional buildings to be erected, to make orders permitting landlords to excise vacant land out of premises of which, but for the provisions of this Act, the landlord could have recovered possession;
- (g) where the landlord fails to carry out any repairs for which he is liable—
 - (i) to have the required repairs carried out at the cost of the landlord and, if the landlord fails to pay the cost of such repairs, to recover the cost thereof by requiring the tenant to pay rent to the Tribunal for such period as may be required to defray the cost of such repairs, and so that the receipt of the Tribunal shall be a good discharge for any rent so paid;
 - (ii) to authorize the tenant to carry out the required repairs, and to deduct the cost of such repairs from the rent payable to the landlord;
- (h) to permit the levy of distress for rent;
- (i) to vary or rescind any order made by the Tribunal under the provisions *of this Act*.

17. Counsel for the Appellant argued that the Tribunal had no jurisdiction to order the re-opening of the demised premises thereby evicting her and handing the premises over to the Respondent as there was no tenancy relationship between her and the Respondent. Indeed, the Lease agreement attached to her affidavit at page 30 of the supplementary Record of Appeal shows that her late husband entered into a sub-lease agreement from 1.5.2015 to 30.4.2022 in respect of a room situated on the 1st Floor on L.R No. Kisii Municipality Block 11/85 with Techno Tech International Trading Co. Ltd represented by Joseph Geteri Kingoina. She has also attached a lease agreement dated 26.9.2017 between the Respondent and Joseph Geteri Kingoina in respect of 16 rooms on the second floor and a bar on the first floor of the same building. It would appear that the bar described in the Respondent's lease agreement is the same one that was leased to the Appellant's late husband.

18. The Notice to Terminate the tenancy issued to the Appellant gives the following reasons:

1. "That on termination of tenancy you have occupied my business premises without lease agreement.
2. That on termination of tenancy, I intend to do business therein".

19. What emerges from the foregoing is that the owner of the building leased the same room to the Appellant and the Respondent without their knowledge, thus creating a scenario where the Appellant was a sub-tenant of the Respondent even though there was no lease agreement between them. This would explain why the Respondent issued a termination notice to the Appellant. Although the Appellant pointed out to the Tribunal that the Respondent was not her landlord, the Tribunal did not bother to establish the true position and instead simply acted on

the reference by invoking its powers under section 12 (e) of the Act. The said section gives the Tribunal the power to make an order for the recovery of possession from a tenant or indeed from any person in occupation of a controlled tenancy.

20. Chesoni J and Simpson J in **Hebtulla properties Ltd (1979) KLR 96** dealing with the powers of the Tribunal under Section 12 of the Said Act stated as follows:

“Under Section 12 of the L & T (SH & CE) Act, the Tribunal’s powers are restricted to the area of its jurisdiction, that is the determination of reference made to it under Section 6. These can be made only by a receiving party that is a tenant who wishes to oppose a notice of termination or alteration of the terms or conditions of this tenancy or a landlord who wishes to oppose a notice by a tenant seeking reassessment of rent or alteration of any terms and conditions of the tenancy. It has power to do all things which it is required to do under the Act. This may be tautological, but it must refer to Section 5(3) and (6) the provisions of which are procedural only, and to the provisions of Section 9, which set out what the tribunal, can do on a reference. In addition to these powers the tribunal has the specific powers contained in paragraph (a) to (n) of Section 12(1). The expression “all things” being qualified by the words “which it is required or empowered to do by or under the provisions of this Act,” no room is left for the application of the ejusdem generis rule.....The specific powers include the powers to make an order for the recovery of possession from a tenants or indeed from any person in occupation. Such an order would be an order made on an application of the land lord.

No corresponding powers is given to have an order on the application of a tenant who has been forcefully dispossessed by a landlord. The powers specifically conferred can be exercised on a reference, which is defined in Section 2 as a “reference to a tribunal under Section 6 of this Act.”

But the maker of a mere complaint has no such right. The word “complaint” is referable only to minor matters....

.....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.

.....It would be erroneous to think that the tribunal has 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 of the courts and the tribunal cannot by way of a complaint to it by a landlord or tenant purports to deal with such matters.....”

21. Applying the principles in the above matter to the instant suit, it is my finding that the Tribunal acted within its jurisdiction.

22. The second issue for determination is whether the Tribunal ought to have ordered the re-opening of the demised premises thereby reaffirming the order of eviction against the Appellant. The Appellant’s application for stay of execution was premised on two main grounds; the first ground is that she was not served with a termination notice and secondly that there was no landlord/ tenant relationship between her and the Respondent.

23. With regard to service, I have gone through the record of appeal and there is no indication that the Tribunal satisfied itself that the Appellant had been served with the Notice of termination of tenancy.

24. I now turn to the issue as to whether there was a landlord/tenant relationship between the Appellant and the Respondent. In her supporting affidavit the Appellant stated that her landlords were two others known as Johnson Nyakundi Kingoina and Joseph Gateri Kingoina with whom her late husband had entered into a lease agreement. She annexed a receipt for rent in the sum of Kshs. 48,000 issued by Joseph Geteri Kingoina. Based on this assertion, the Chairman issued witness summons to the two gentlemen to appear before the Tribunal on 22.3.2019. He ordered that the witness summons be served by the Appellant and the Respondent respectively.

25. However, on the 22.3.19 the matter did not proceed as it was put off to 12.4.2019 and the witness summons were not extended. In the meantime, the Tribunal sent a rent inspector to confirm who was in occupation of the demised premises. When the matter came up for hearing on 12.4.2019 the Chairman having received a report that Respondent was in occupation of the premises did not revisit the issue of the tenancy relationship between the Appellant and the Respondent and instead ordered that the premises be re-opened so that the Respondent could continue with his business.

26. Even though the Tribunal’s proceedings are supposed to be informal, the absence of a ruling giving reasons why the Tribunal arrived at the decision to reopen the premises gives the impression that the Tribunal’s decision was not supported by the evidence on record. At the very least the Tribunal ought to have resolved the issue of the relationship between the appellant and the respondent on the basis of the available evidence.

27. Having said that, it would not be practical to set aside the order issued on 12.4.2019 and reinstate the Appellant in the premises as the owners of the premises have already leased the premises to the Respondent. The Appellant’s only recourse is in damages for loss of tenancy. The Appellant is also at liberty to sue the owners of the demised premises for a refund of the unutilized rent and general damages for breach of the lease agreement.

28. In view of the foregoing, I find merit in the appeal and I allow it. The matter is referred back to the Tribunal for assessment of the Appellant’s damages for loss of Tenancy. The Respondent shall bear the costs of this appeal.

Dated, signed and delivered via zoom this 20th day of May 2020.

J.M ONYANGO

JUDGE