



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 32 OF 2013

*[Being an Appeal in Business Premises Rent Tribunal Case No. 222 of 2013: Hon. Mr. Mochache D.
Chairperson Business Premises Rent Tribunal, Mombasa]*

RAMADHAN MOHAMMED ALI.....APPELLANT

VERSUS

HASHIM SALIM GHANIM.....RESPONDENT

JUDGMENT

1. The Appeal herein arises from the Judgment of the Business Premises Rent Tribunal (“the Tribunal”) dated and delivered on 15th February, 2013, allowing the notice to terminate the tenancy, served by the Respondent herein to the Appellant, terminating the tenancy between the Respondent and the Appellant.

2. In a Memorandum of Appeal dated 13th February, 2013 but filed on 15th March, 2013, the Appellant has set out six grounds of Appeal:-

(1) that the learned Chairperson erred in law and in fact in failing to appreciate that the Respondent/Landlord did not have the capacity to apply for the termination of the tenancy of the Appellant relating to Plot No. 4740/VI/MN the suit property as the Respondent has never been the registered owner of the property,

(2) that the learned Chairperson erred in law and in fact in making an order in favour of the Respondent which amounted to perpetuating an illegality as the Respondent has never been appointed as an Administrator of the estate of the late Salim Said who is the registered proprietor of the suit property,

(3) that the learned Chairperson erred in law and in fact in making a decision that was wholly against the weight of the evidence that had been adduced,

(4) that the Chairperson erred in failing to take cognizance of the Appellant’s huge contribution in developing the subject property for which he should have been duly compensated as otherwise the Respondent will have unduly enriched himself at the expense of the Appellant,

(5) that the learned Chairperson erred in failing to determine the issue of compensation for the goodwill that the Appellant had created especially in light of the fact that the Appellant has been a tenant on the suit property for over thirty years,

(6) that the learned Chairperson erred in making an order for the Appellant to vacate the property by First April, 2013 as the period given was unreasonably short.

3. For those reasons, the Appellant proposed that the court should make the orders following:-

(a) that the appeal be allowed and the Tribunal's Judgment be set aside;

(b) in the alternative a determination be made of all the cost of development carried out by the Appellant in the suit property and also a determination of the goodwill earned by the Appellant and the Respondent be ordered to pay the Appellant for the same and also the Appellant be given a reasonable period to vacate the premises after being paid;

(c) the costs of the appeal and the reference be awarded to the Appellant in any event.

4. Counsel for the Appellant and the Respondent both filed written submissions for, and against the Appeal herein. The Appellant's counsel's submissions dated 11th March, 2015 were filed on 12th March, 2015. Those of counsel for the Respondent are dated and were filed on 26th March, 2015. In addition, counsel made oral submissions at the hearing of the Appeal on 7th May, 2015, and adopted their respective written submissions.

5. The primary issue raised by this appeal is **whether** the Respondent had capacity to issue a Notice for the Termination of the Appellant's Tenancy. The subsidiary issues are whether the Appellant is entitled to –

(a) Compensation for improvements made upon the suit property, and

(b) Whether he is entitled to goodwill for vacating the premises.

6. We will consider each of these issues in turn taking into account respective submissions of counsel.

Primary Issue – Whether the Respondent had capacity to issue Notice of Termination of Tenancy against the Appellant

7. The Appellant's case is that the Respondent, not being the registered owner or legal Administrator of the suit property, had no capacity to issue notice to the Appellant to vacate the suit property. Counsel for the Appellant relied upon the provisions of section 45 of the Law of Succession Act, (Cap 160, Laws of Kenya). That section provides –

“45(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession, or dispose of, or otherwise intermeddle with any property of a deceased.”

8. It is common ground that the suit property is registered in the name of, and was owned by the Respondent's father, one **SALIM SAID GHANIM**, now deceased. It is also common ground that even during the lifetime of the said Salim Said Ghanim (the deceased), the Respondent was the person to whom the Appellant paid the rent, and in whose name the Respondent also issued receipts in acknowledgment of the rents received. The question which then arises is whether the Respondent was, and is, the Appellant's landlord, and had the capacity to serve the Appellant with the Tenancy Notice to vacate the suit premises, notwithstanding the acknowledged facts that he was neither the registered owner of the suit premises nor the Administrator of the registered owner's estate.

9. The answer to this question is found by reference to two statutes; section 45 (supra) of the Law of

Succession Act which permits a person to deal with the estate of a deceased if it is permitted by another within law. The question which then arises is which law allows, the dealing of a deceased's estate without a grant of representation under the Law of Succession Act?

10. The answer is to be found in section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301, Laws of Kenya), which defines a "landlord" in relation to a tenancy to mean –

"... the person for the time being entitled as between himself and the tenant, to the rents and profits of the premises payable under the terms of the tenancy."

10. And section 4(2) of the said Act provides –

"(2) A landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the tenant, any term or condition in, or of any right or service enjoyed by the tenant under, such tenancy, shall give notice in that behalf to the tenant in the prescribed."

11. There is no dispute that the Respondent was in relation to the payment of rent, the Appellant's landlord, and from the evidence before the Tribunal he is the person who is entitled to rents and profits from the suit property as part of the deceased's estate. As such, it was not compulsory for him to apply for and take out a Grant of Letters of Administration under section 45 of the Law of Succession Act before giving the notice of termination of tenancy. The Tribunal's finding at page 3 of its Judgment is correct that"-

"Ownership is not an issue that is relevant under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301, Laws of Kenya)."

12. Indeed there is legal merit in the argument of counsel for the Respondent, that under the said Act, even a **"tenant"** can be a **"landlord"**. This has been common practice in commercial lettings where there is an **"anchor"** tenant and many **"such tenants"** under the anchor tenant. That is the practice in malls not just in Kenya but across the world. The **"anchor"** tenant merely has a Head lease with the owner of the premises, or its lawful agent who also is not the owner of the demised premises. The argument by counsel for the Appellant to the contrary, has neither basis in law nor custom and practice. The prime ground of appeal must therefore fail, and we so find hold.

13. For the reasons following the two subsidiary grounds of appeal – regarding compensation for improvements made, and the goodwill for the business must fail also.

14. These grounds must fail because they constitute new causes of action. This is an appeal, an appellant can only raise issues which arose from the decision or cause appealed from or against. The Appellant never raised those issues during the hearing before the Tribunal. What the Appellant raised as his concern was – *"he had nowhere to go, he has a large family"*. *"I recognize him (the Respondent) as landlord that is why I sued him in Mombasa RM CCC No. 302 of 2011. My problem is where to go if the tenancy is terminated"*. He never raised any issue about compensation or goodwill. Any such issue raised on appeal becomes a new cause of action and can only be struck out on appeal.

15. If, for argument's sake we were wrong in this conclusion, were the Appellant to file a suit against the Respondent for improvements during the tenancy, and goodwill for the business, we set out below why we think such an action would still fail.

16. **Firstly**, the title to the suit property is issued under the Registration of Titles Act, (Cap 281, Laws of Kenya). The substantive law, the Law of Property Act, 1882 as amended in 1959 (of India). So far matters of improvements during the tenancy are concerned, the said Act provides in section 108 thereof that all the improvements made on the property become part of the suit property, and anything else which the tenant fixed is removable, like tools of trade will belong to the tenant. In any event if the tenant made any improvements, those would be for his benefit, and which, as in this case, he enjoyed over a period of

thirty years. He is not entitled to any compensation.

17. **Secondly**, “*goodwill*” is a concept which is difficult to define. In the context of this appeal, “*goodwill*” means

“the business advantage, whatever it may be, which a person gets by continuing to carry on and being entitled to represent to the outside world that he is carrying on a business which has been carried for sometime previous ...”

18. On the other hand “*goodwill*” may be regarded as “*property*”. It occurs in cases where the goodwill operated as an increase of the value of real property, in the sale of a well-customed shop. The revenue would easily be defrauded by dividing the price of the real estate and the goodwill into two portions and paying the duty only on the former part”

19. Whether considered as part of the real property on a sale of that property and accounted as such for purposes of stamp duty, or merely as a transfer of a business is not the concern of a landlord upon termination of a tenancy. The lessee is entitled to remove at any time during the continuance of the lease, all things which he has attached to the earth provided he leaves the property in the state on which he received it/ sections 108(B) and (L).

20. In the circumstances therefore we find and hold that the Appellant would not be entitled to either any compensation whether called “*goodwill*” or “*improvements*”. The subsidiary issues of appeal equally fail.

21. The Appeal having failed on all limbs is hereby dismissed with costs to the Respondent.

22. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 10th day of July, 2015

M. J. ANYARA EMUKULE

JUDGE

MARY KASANGO

JUDGE

In the presence of:

Mrs. Ali holding brief for Mr. Gikandi for the Appellant

No appearance for Respondent