



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO 122 OF 1995

MOIZ KITABWALLA.....PLAINTIFF

VERSUS

MOHANLAL R MERAG.....DEFENDANT

R M SHAH T/A KHIMASIA STORES.....DEFENDANT

RULING

The plaintiff, Moiz E. Kitabwalla, has been the landlord of the Defendants, Mohanlal R. Merag and R.M. Shah trading as Khimasai Stores at his premises on Plot No. 569/Section XVII/Biashara Street Mombasa at a monthly rent of Kshs. 3,300/-. On or about the 1st of December, 1994, the Plaintiff served the Defendants with a notice terminating their tenancy on the 31st of January, 1995 and requiring them to quit, vacate and handover vacant possession of the said premises to the Plaintiff by the 31st of January, 1995. The reasons for such termination were stated on the said notice as follows: -

“You have not carried out any trade or business on the premises for the past 5 years or so and your tenancy is therefore not controlled tenancy under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap. 301, Laws of Kenya.

“You have now without our clients consent embarked on alterations and additions to the premises notwithstanding the fact you have all along promised to hand over vacant possession to our client as soon as your case in the High Court was finalized.”

The Defendants took the notice served on them as a tenancy notice under Section 4 (2) of the Landlord and Tenant Act (Cap. 301) and filed a reference before the Business Premises Rent Tribunal as Tribunal Case No. 18/95 (Mombasa) in which they were challenging the said notice. At the beginning of the hearing before the Tribunal, learned counsel for the landlord, Mr. K.A.A. Kasmani, raised a preliminary objection to the effect that the notice served was not a tenancy notice under the Act but simply a notice to the tenants that in the event of their refusing to quit and hand-over vacant possession of the suit premises as demanded, proceedings will be filed against them for their eviction and damages. The objection raised by Mr. Kasmani was upheld by the Tribunal and the Chairman rightly in my view pointed out that: -

“If a landlord does not want his notices to be misunderstood to be tenancy notices under Section 4 (2) of Cap. 301, the landlord should clearly state that it is not a tenancy notice to avoid tenants filing unnecessary References.”

The Plaintiff thereafter instituted this suit in which he is asking for vacant possession of the suit premises, an order for restoration of the premises in its original state and mesne profits from 1st of February, 1995

until possession is given together with costs.

Vacant possession of the premises is sought by the landlord mainly on the ground that the tenants have since December 1988 ceased to use the premises as a shop by carrying out any trade or business in the said premises.

The Defendants in their defence admit that they ceased running their previous business in the said premises but had continued to pay rent due regularly till the month of February 1995 which the landlord refused to accept after serving them with the aforesaid notice. It is however their contention that they are still tenants of the Plaintiff and that this court has no jurisdiction to entertain this suit.

The issue of jurisdiction was taken up by learned counsel for the Defendants, Mr. Gachiri who argued the matter on behalf of counsel on record Mr. A.N. Ngunjiri who filed a notice of Preliminary Objection dated 5th of April, 1995. I thought that it was necessary to dispose of this issue before hearing counsel for the Plaintiff on his application for summary judgment brought under Order 35 rules 1 & 2 and Order XII rule 6 of the Civil Procedure Rules that was filed on the 6th of March, 1995.

It is not disputed that until December 1988, the Defendants used to run shop business in the suit premises. They then closed down the shop and for 5 years now, they have ceased to run any business in the suit premises although they have continued to pay monthly rent till January 1995 when the Plaintiff's counsel refused to accept any further rents. In these circumstances, I entertain no doubt this court has jurisdiction to hear the landlord's claim for vacant possession of the suit premises. One is tempted to ask: for what purpose then, is the Defendant still keeping this premises if they are not doing any business therein?

There is at present no dispute pending before the Business Premises Rent Tribunal as Tribunal Case No. 18 of 1995 was disposed of when the Tribunal upheld the objection raised by counsel for the landlord. There is no any other matter still pending before the Tribunal.

I believe that this case is properly before this court, I would not like to say more as I still have the other application for summary judgment to deal with

I dismiss the preliminary point raised by counsel for the Defendants. Costs in the cause.

Dated and delivered at Mombasa this May 8, 1995

S.O OGUK

JUDGE