REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL NO 39 OF 1983

ANTHONY ANCENTO REMEDIOS ……...….....APPELLANT

VERSUS

MOHAMED SAID FARAR …….…….……..…. RESPONDENT

(From original Civil Case No 629 of 1983 of the Rent Restrictions Tribunal at Mombasa)

JUDGMENT

This is an appeal from a determination of the Rent Restrictions Tribunal, Mombasa, (under the Tribunal), made on 25th November, 1983, in its Civil Case No 629 of 1983. The appellant Anthony Ancento Remedios, the second defendant in the suit, was the unsuccessful party, with the respondent, Mohamed Said Farar, the plaintiff in the suit, as the successful party. In its determination the tribunal ordered the appellant to quit and deliver vacant possession of a two roomed flat which was comprised in a double storeyed block of four flats on plot No Mombasa/Block XI/520, situated in the Tudor area, Mombasa. The respondent was on the date of the suit and is still the owner of the premises.

The appellant was one of three tenants who resided in the premises. The others were Eric Stravens, who occupied the first one of the four flats, and one Owino who also occupied another. The respondent occupied the remaining one.

The flat respecting which this litigation concerns is the one, which was let to Eric Stravens (under Eric). It was on the ground floor. He became tenant of it sometime before the year 1976, the exact date is not apparent from the evidence before me. The evidence is indeterminate as to whether his tenancy was in writing or it was verbal. It is, however, clear that it was a monthly tenancy. Kshs 400/- monthly rent was payable for it.

This litigation was started before the Tribunal by the filing of a plaint which craved for three orders. Firstly, that the appellant and also Eric quit and deliver vacant possession of the suit flat. Secondly, that they pay mesne profits at rate of Kshs 400/- per month from September 1983, until vacant possession. Thirdly, that the costs of the litigation be met by the both defendants.

In the plaint the respondent as plaintiff avered, *inter alia*, that he was owner of the suit premises, had let it to Eric at a monthly rent of Kshs 400/-, but who without his consent, knowledge or approbation wholly sub-let and or assigned and or parted with it and handed its possession to this appellant who in turn used it in such a manner and for a purpose which caused the tort of nuisance to occupiers of adjoining premises. Two grounds were advanced for the remedies sought. Firstly, that the 1st defendant , Eric, had wholly sub-let the suit premises without the consent, knowledge, or approval of the respondent. Secondly, that

the tenant or occupier of the premises was guilty of the tort of nuisance, which tort caused annoyance to occupiers of adjoining premises.

There was no defence filed. As per the plaint Eric was not in possession of the suit premises, so that his joinder as a party was merely as a nominal defendant. He did not testify before the Tribunal nor was he represented. The trial proceeded on the basis that the dispute was between the respondent and the appellant.

Only the respondent and the appellant testified. Their respective testimonies were brief. The effect of the respondent's evidence was that he had not put nor had he authorized anybody to put the appellant in possession of the suit premises. He was a trespasser, had behaved in such a manner as caused annoyance to occupiers of adjoining premises, and that it was meet and just that he be ordered to vacate the suit premises. The appellant on the other hand testified to the effect that he was put in possession of the suit premises by an estate agent, Shimoni Enterprises, on the instructions of a firm of advocates, Sachdeva & Co, which firm had authority from the respondent, that he had paid his rent regularly since he took possession of the premises from Eric in March, 1976, and that previous to that Eric and him were joint tenants of the suit premises.

Further that since he took over possession of the premises he was using it jointly with Samuel Mwangi, Seko Maina and Raimond Sewe, for music practices and as a place to keep their musical instruments. The four of them were members of a musical band whose name he gave as Tyth- Sparter.

The suit was heard on 16th November, 1983, and judgment was delivered on 25th November, 1983, in favour of the respondent. The Tribunal did not deal with the twin issues which it was obliged to and determined the matter on a ground other than any of those which were pleaded in the plaint. The judgment is short and I consider it pertinent to reproduce it here:

"There is some confusion in the matter of the tenancy and the defendant. There are documents produced before this Tribunal to show that the tenancy is in the joint names of both tenants.

The evidence is clear that the defendant No 2 is occupying a flat on 1st floor as his residential premises, and the ground floor flat is used as a place to practice the musical composition for his music band business which said musical band is named Sparter. This from his own evidence the defendant admits that the suit premises in question which is a dwelling flat is used as a business premises. That is unlawful use of the said dwelling premises and that is more so when there is great need for dwelling premises in Mombasa Island. This Tribunal considers that a very serious breach of the law for changing the use of dwelling premises into business premises and hereby orders the defendant to vacate the suit premises on ground floor forthwith and to pay costs assessed at Shs 1,600/- plus disbursements to the plaintiff."

The appellant was aggrieved and hence this appeal. In his grounds of appeal the appellant laments, *inter alia*, that the ground relied upon for determining his tenancy was neither pleaded nor was evidence led on it, the Tribunal lacked jurisdiction to order him to quit and deliver vacant possession of the suit premises a statutory notice not having been served upon him, two separate grounds having been set out for seeking possession it was not open to the Tribunal to grant possession on grounds extraneous to those, and that possession was improperly ordered on a ground not provided for under section 14 of the Act.

This appeal was brought pursuant to the provisions of section 8(2) of the Act. The rent which was payable for the suit premises was in excess of Kshs 200/-, and, therefore, an appeal lay on points of both law, and on mixed law and fact. This being a first appeal I remind myself that I must weigh the evidence and draw my own conclusions from the evidence and, also, make my own findings without overlooking the Tribunal's judgment and bearing in mind that, unlike the Tribunal, I have the disadvantage of not having heard and not having seen the witnesses. (see *Okeno v R* 1972 EA 32; *Peters v Sunday Post* 1958 EA 424).

Two broad questions are raised by this appeal. Firstly whether the appellant was a tenant of the respondent respecting the suit premises. Secondly, whether the Tribunal possessed the jurisdiction to

order vacant possession on a ground or grounds other than those spelled out in the Act.

On the first of the above two issues the Tribunal found that the appellant was the respondent's tenant, that on the date of the suit he was inpossession, but that he had changed the user of the premises. There was evidence before the Tribunal to justify the finding that the appellant was the respondent's tenant. The appellant tendered in evidence two letters both written by Shimoni Enterprises, real estate agents and valuers; the first one was dated March, 1976, (Exht A) and the second one dated 25th July, 1977 (Exht B). In both letters the appellant is said to have rented the suit premises jointly with Eric.

In his evidence the respondent did not dispute the fact that Shimoni Enterprises were his agents. They had instructions from Sachdeva & Co, advocates, not only to get a tenant for the suit premises but also to recover rent from the tenant for and on behalf of the respondent. The appellant was not a trespasser in the suit premises as Mr Gautama who with Mr. Anil Suchak appeared for the respondent, seemed to suggest. He was lawfully in possession of the suit premises.

Mr Gautama argued in the alternative that on the date of the suit the appellant had parted with the possession of the suit premises with the result that he lost the protection of the Act. It was his submission that the appellant having conceded that he was using the premises jointly with three other people as a place to practice music, which people were in partnership with him in a music band the premises were in effect no longer in his possession, but in the possession of the partnership in question. Mr. Gautama was in effect saying that the appellant was not going to the premises in his personal capacity as a tenant but as a member of the partnership.

That was not, however, the respondent's complaint against the appellant. The respondent had considered the appellant as the sub-tenant. He could not possibly be the head and sub-tenant at one and the same time. The respondent testified that Eric, whom he recognized as his lawful tenant, vacated the suit premises in 1979. He did not state what he did with the suit premises after Eric's departure. There was no other tenant named who took over the premises after Eric vacated it. The respondent also testified that he had experienced the nuisance of noise generated by musical practices for a period of three years preceding the date of trial, namely16th November, 1983. That in effect meant that the appellant had been in occupation of the suit premises for upwards of three years before the date of the suit. The respondent who lived in the same block was aware of it.

He never took steps to evict the appellant. Even assuming that the appellant had moved into the suit premises without the respondent's consent, the latter had acquiesced to his continued stay. He continued to accept rent from the appellant notwithstanding that he knew Eric had parted possession of the suit premises to another person without his express or implied consent.

The other point worthy of note is that the respondent expressed ignorance as to who had been paying rent for the suit premises. He was using estate agents to collect rent for him and even to get tenants for the flats which were for letting. He did not call any of the estate agents to refute the appellant's allegation that he was a tenant of the suit premises. Considering the foregoing it is clear that the Tribunal came to the correct conclusion that the appellant was a tenant in the suit premises. There was however no evidence to support a joint tenancy. There was clear evidence that Eric was not in possession of the suit premises on the date of the suit and even for a long time preceding that date. He could not be regarded as a joint tenant with the appellant when in fact he was not in possession. I have used possession here in the actual and not in a legal sense. Possession under the Act, must be read to mean actual possession or occupation.

I now turn to the second issue. The Tribunal held that the appellant had changed the user of the suit premises. It considered the use of premises for music practices as being a use for business purposes. The Tribunal must have been influenced by the statement the appellant made in evidence that he was using the suit premises to keep musical instruments and as a place for holding music rehearsals "for our business run by us under the name Tyth-Sparter." "Us" here was used to refer to the appellant and the three men with whom he, practiced music, and whose names I stated earlier.

Assuming, as I am prepared to for a moment, that the premises were being used for business purposes,

could the Tribunal properly order vacant possession on that ground? The power of the Tribunal to order vacant possession is donated by section 5(1) (f) (i) of the Act. However the power must be exercised subject to the provisions of section 14 of the Act. Section 14(1) above, restricts the right to possessions of controlled premises.

Several grounds have been spelled out under that section which will entitle a landlord to recover possession. None of those is change of user. The jurisdiction of the Tribunal is specific. It does not possess inherent jurisdiction which then means it cannot competently order recovery of possession on any other ground except those set out under section 14(1) of the Act. The Tribunal was, to my mind, in error when it ordered recovery of possession of the suit premises on the ground that there was change of user. That is more so because the terms of the tenancy agreement were not stated in evidence to show the existence of restrictions as to user, if any, and upon which a request for possession would have been grounded. The foregoing apart the dispute between the parties did not extend to the user of the suit premises. It was confined to two aspects. Firstly, whether the appellant was a tenant or a trespasser in the suit premises. Secondly, whether he had committed an act of nuisance. Mr Gautama submitted before me that a tribunal, unlike regular courts, adopts an informal procedure, does not necessarily need to have pleadings like regular courts, and because of that there was no necessity for framing any issues. In his submissions the issues before the Tribunal were at large and the Tribunal was free to base its decision on any valid ground. Mr Satchu for the appellant did not think so. In his view the respondent having set out specific grounds for seeking possession it was not open to the Tribunal to travel outside those.

The function of a court or any judicial Tribunal is to resolve disputes between two or more parties. A court should not in my view, deal with or attempt to deal with a matter in which there is no dispute. The framing of issues has a very important bearing on the trial and decision of a case whether or not there are pleadings. Otherwise the parties might not know upon which issues they are required to call evidence. It is the issues fixed or settled not the pleadings that guide the parties in the matter of adducingevidence. That is why to my mind, on many occasions courts allow evidence to be called on unpleaded issues and base a decision thereon where it appears from the course the litigants have followed at the trial that those issues are central for the just decision of a case (*Mkahibo v Kibirige* [1973] EA 102).

The situation in this case was different. The question whether or not the appellant had changed the user of the suit premises was not in issue. The respondent did not raise it nor did he call evidence on it. His grievances were specific the appellant was a trespasser on the premises and had been guilty of conduct which amounted to a nuisances. I agree with Mr Satchu that the Tribunal slipped when it proceeded to decide a dispute which was not before it and on which no evidence was called.

Moreover, the Tribunal did not state the law, which the appellant had flouted. It was not the Act because there is nothing in it which prohibits the change of user to a purpose which is not unlawful or immoral. Use of premises may cause a nuisance without necessarily being unlawful.

The Tribunal, I presume, was influenced by the provisions of section 14(1) (b) of the Act which talks, *inter alia*, about a tenant allowing the premises to be used “for an immoral or illegal purpose”. However possession would only have been decreed on that ground had evidence been led to show the appellant or any person claiming under him had been convicted of using or allowing the suit premises to be used for an immoral or illegal purpose. No such evidence was adduced. Consequently possession was improperly ordered on the ground that there had been a change of user.

Was there evidence adduced which demonstrated that the respondent was entitled to possession? Mr Gautama submitted that there was evidence that the appellant had parted with possession of the suit premises to a firm to which he was a partner. That was not the respondent’s case. His case was that the tenant of the suit premises, Eric, had sub-let them to this appellant. The Tribunal having made a specific finding that the appellant was a tenant in the suit premises, and there was no cross-appeal against that finding the question of the appellant having parted with the suit premises did not arise. The issue I must now grapple with is whether nuisance was established. No evidence was adduced as to the intensity of the noise, which was being generated by the appellant during music practices. The Tribunal did not make any finding on it. Even if it had and came to the conclusion that it was such that it caused annoyance to

occupants of adjoining premises, it was duty bound to but did not consider whether the circumstances were such that vacant possession had of necessity to be ordered. The duty is called by the provisions of S 14(2) of the Act which reads:

“In any case arising under any of paragraphs (a) to (d), (f), to (h) and (k) to (m), inclusive, of sub-section (1), no order for the recovery of possession of premises shall be made unless the Tribunal considers it reasonable to make such an order.”

The reasonableness here has to be considered in light of the purpose of the Act which is clearly spelled out in the preamble to it, namely, restricting the increase of rent, the right to possession and the exaction of premiums, among others. Clearly the respondent did not prove his case.

The appeal must be and is hereby allowed. The order for vacant possession and costs is set aside. The costs of this appeal and the suit before the Tribunal are awarded to the appellant to be taxed if not agreed. Order accordingly.

Dated and Delivered at Mombasa this 30th Day of June, 1989

S.E.O. BOSIRE

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JUDGE