REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 841 OF 1988

BIRDS PARADISE TOURS & TRAVEL LTD ……..……APPLICANT

VERSUS

HOTEL SECRETARIES……..RESPONDENT

RULING

It is necessary at the beginning of this ruling to set down in some detail the twist and turns that have characterised the course of this dispute which was finally come to this court. This it is my hope, will assist in identifying the issues at stake.

The applicant in this matter, Birds Paradise Tours and Travel Ltd, became a tenant of Hotel Secretaries, the respondent herein, on or about 4th April, 1986. The premises first occupied by the applicant was office No 9 in Westminister House on Kenyatta Avenue at a rental of Shs 6,000/- a month inclusive of various services. Subsequently, the applicant was on 7th July, 1986, offered a bigger office, No 7 in the same building, inclusive of services, at a monthly rent of shs 8,000/-. The applicant on accepting this offer moved into office No 7. It would seem from the letter written by the advocates of the respondent to the applicant dated 2nd April, 1987 and attached to the applicant's supplementary affidavit filed on 16th March, 1988, as JKN3, that the applicant had been seeking a reduction of thisrent on the ground that the applicant no longer required the services provided by the respondent that went with the renting of office No 7. It also appears from "JKN3" the applicant was then given notice to quit by 30th April, 1987, but after receiving "JKN3" the applicant, according to its supplementary affidavit, then commissioned estate valuers to estimate what was the reasonable rent for office No 7 excluding the services provided. The estate valuers then prepared their report dated 26th May, 1987 in which they assesed Shs 1,860/40 as the reasonable and fair rent for office No 7 exclusive of services attached to the applicant's supplementary affidavit as "JKN4". Prior to this, however, the applicant served upon the respondent a notice for the assessment of rent dated 27th April, 1987, under section 4(3) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act which I shall call "the Act". The respondent upon receiving this notice which is attached to the applicant's supplementary affidavit as "JKN5", caused its advocates to write to the applicant in compliance with section 4(5) of the Act, a letter conveying the respondent's decision not to agree to comply with "JKN5" which contained the proposal that the rent for office No 7 should be Shs 2,000/ - a month with effect from 1st July, 1981. This letter is attached to the supplementary of Mr Gross, advocate for the respondent, which was filed on 12th April, 1983, as "AFG2". But section 6(1) of the Act provides that a person who wishes to oppose a tenancy notice such as "JKN5", and has notified the requesting party that he does not agree to comply with the notice, may, before such notice is to take effect, refer the matter to the Tribunal. The respondent did not take advantage of these provisions. The applicant, however, took it upon itself to make before 1st July, 1987, a complaint under section 12(4) of the Act, to the Tribunal. The complaint was to the effect that (i) the applicant was being harassed by the

respondent with threats to distress for rent; (ii) the respondent had threatened to illegally evict the applicant; and (iii) the respondent was increasing the applicant's rent illegally. This complaint which is attached to the supplementary affidavit of Mr Gross as "AFG3", gave rise to Tribunal

Case No 233 of 1987, which was determined by the Tribunal in its judgment dated 1st July, 1987, and also attached to the supplementary affidavit of Mr Gross as ("AFG4"). It is clear to me from reading "AFG3",

"AFG4" and the proceedings in Tribunal Case No 233 which was admitted in evidence by consent as exhibit "AFG10", that the assessment of the rent of office No 7, even though the Tribunal found that the rent being paid by the applicant for office No 7 was Shs 8,000/- a month, was not directly and substantially in issue. The following negative orders made by the Tribunal in "AFG4" and which accord with the complaint contained in "AFG3", support this view:

"(1) The landlord should stop harassing the tenant and threatening him with distress unless application is made to the Tribunal in accordance with the provision of the Act.

(2) The landlord is further warned not to evict the tenant illegally save on properly issued notice of termination in accordance with section 7 of the Act.

(3) The landlord is refrained from increasing his rent arbitrarily except in accordance with section 4(2) of the Act."

After the delivering of the judgment of the Tribunal, "AFG4" the respondent obtained on 29th July, 1987, the permission of the Tribunal (see "AFG5" attached to the supplementary affidavit of Mr Gross) to levy distress for three month's rent in arrears to the tune of Shs 24,000/-.

The applicant did not seek the setting aside of this permission by the Tribunal but chose to prevent the levying of distress by applying to this court by way of notice of motion and supporting affidavit, filed on 6th August, 1987, and which is attached to the supplementary affidavit of Mr Gross as "AFG8a", for what I can only describe as a declaratory order to the effect that the respondent, having been served with the applicant's notice to obtain assessment or rent, "JKN5", the rent for office No 7 was as from 1st July 1987, Shs 2,000/- a month. This notice of motion which was High Court, Misc Application No 408 of 1987 was on 21st September, 1987, dismissed for non attendance on the part of the applicant. Whilst this was going on, the respondent served the applicant with two notices to terminate the tenancy, which are dated 15th July, 1987, and 1st August, 1987, and attached to the supplementary affidavit of Mr Gross as "AFG7c" and "AFG7b" respectively. The applicant on his part, referred the matter to the tribunal under section 6 of the Act. This reference which is dated 29th September, 1987, is attached to the supplementary affidavit of Mr Gross as "AFG7a". Subsequently the respondent on December, 1987, applied to the Tribunal Case No 286 of 1987 for orders to distrain against the applicant for four months arrears of rent to the tune of Shs 32,000/- (see AFG8a," - "AFG8d" attached to the supplementary affidavit of Mr Gross), attaching to the application as "AFG8c, a copy of the certificate permitting levy of distress for rent, "AFG5", previously issued by the

Tribunal on 29th July, 1987. During the same month of December, 1987, the respondent applied on 21st December, to the Tribunal for the termination of the tenancy. The applicant's advocates wrote to the respondent signifying the applicant's unwillingness to comply with the termination notice and on 25th February, 1987, referred the matter to the Tribunal under section 6 of the Act as Tribunal Case No 72 of 1988. The respondent's application to terminate the tenancy, the applicant's letter of opposition and reference to the Tribunal are attached to the supplementary affidavit of Mr Gross as "AFG9a", "AFG9b" and "AFG9d". Both the application for permission to levy distress and to terminate the tenancy namely Tribunal Case No 286 of 1987, and Tribunal Case No 72 of 1987, have not yet been disposed of and a notice dated 6th April, 1988, exhibit "AFG8f", in respect of Tribunal Case No 286 of 1987 and another notice undated, and attached to the supplementary affidavit of Mr Gross as "AFGc", in respect of Tribunal Case No 72 of 1987, have been issued by the Tribunal to the applicant and the respondent requesting them to call at the office of the Tribunal on 29th April, 1988, and on 23rd May, 1986,

respectively to fix the hearing dates for the two Tribunal cases. But the applicant again decided to bypass the proceedings in the Tribunal and on 4th March, 1988, filed a plaint to HCCC 841 of 1988, in the court for a declaration and confirmation that the rent payable in respect of office No 7 is Shs 2,000/- per month as from 1st July, 1987, and for an order that rents paid over and above Shs 2,000/ per month be returned to the applicant.

The basis for these orders according to the plaint, is that;

"On the 27th day of April, 1987 the plaintiff issued the defendant a notice for obtaining reassessment of rent in the sum of Kshs 2000/- per month for premises hereinabove mentioned which notice took effect on 1st of July, 1987. The defendant failed to comply with the said notice and continue to demand rent from the plaintiff in the sum of Kshs 8,000/- per month.

The applicant also filed on the same 4th March, 1988, an *ex parte* application to restrain the respondent from levying distress for rent against the applicant in respect of office No 7. This *ex parte* application was granted and it is its inter parties hearing that is now before this court. The burden of the applicant's affidavit and supplementary affidavit in support of his application, is that the respondent, having failed to refer the applicant's notice for assessment of rent, "JKN5", to the Tribunal, that notice took effect as from 1st July, 1987 from which time, the respondent was only entitled to receive from the applicant a monthly rent of Shs 2,000/-, and that the levying of distress for rent at Shs 8,000/- a month would ruin the business of the applicant. The application has been vigourously resisted on three main grounds:

(i) That the Tribunal had in Tribunal Case No 233 of 1987 stipulated that the applicant pay the rent of Shs 8,000/- a month and the matter was therefore *res judicata*;

(ii) That the applicant had in High Court Misc Application No 408 of 1987 applied for the assessment of rent which application having been dismissed, the applicant' suit and application were *res judicata*;

(iii) That the applicant's application was without merit and bad in law.

I think that the first ground can be quickly dealt with. As I have already indicated, the assessment of rent or the confirmation of the rent of Shs 8,000/- per month, was not the matter that was directly and substantially in issue during the hearing of Tribunal Case No 233 and the decision in that case in my view, does not operate as *res judicata* in respect of the present application.

With respect of HC Misc Application No 408 of 1987, the inter parties hearing was fixed for 14th August, 1987, but on that day it could not be heard and was stood over to 21st September, 1987. It was on this adjourned date that the application was dismissed. Although the learned judge's notes of the proceedings in the case does not state the order under which the court dismissed the applicant's earlier suit, it could not have been made under order 9 rule 4 as canvassed by Mr Gross since the provision of order 9 rule 4 can only be invoked not only when a plaintiff fails to appear either in person or by counsel but also when this occurs on the date fixed in the hearing notice for a defendant to appear and answer. (See *Salem A H Zaidi v Faud B Humedian* [1960] EA 92). In my view, order 16 rule 3 would be more applicable. But if am wrong in this and order 9 rule 4 is what should apply, then although the dismissal under order 9 rule 4 may not operate as *res judicata*, order 9 rule 7 would prohibit a fresh suit in respect of the same cause of action. It would therefore be necessary for me to determine whether the present suit is in respect of the same cause of action as the earlier suit, HC Misc Application No 408 of 1987. In the earlier suit, the applicant sought by notice of motion, declaratory orders that the respondent having been served with notice of reassessment of rent, under section 4(3) of the Act, namely, "JKN5", the rent for office No 7 was Shs 2,000/- as contained in "JKN5".

The present application and the suit upon which it is based depend on the question whether the rent for office No 7 can be deemed to be Shs 2,000/ - a month, by virtue of the applicant having served on the respondent "JKN5". To my mind there is no doubt that the matter directly and substantially in issue in the earlier suit is also directly and substantially in issue in the present application and the plaint upon which it is based. Holding as I do, that the matter directly and substantially in issue in the earlier suit is also

directly and substantially in issue in the present application, I shall now consider whether order 16 rule 3 could have authorised the dismissal of the earlier suit. Order 16 rule 3 is as follows:-

"Where, on any day to which the hearing of this suit is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes directed in that behalf by order IXB, or make soon other order as it thinks fit".

Having regard to what I have already stated to the effect that the earlier suit was dismissed on the adjourned date, I would prefer to base the dismissal of the earlier suit on the provisions of order 16 rule 3. And when these are read together with order 9B rules 4 and 7 the appropriate rules of order 9B, the result would be the same as I have set at as if the earlier suit had been dismissed by virtue of order 9B rule 4. In other words, the applicant would be prohibited from bringing a fresh suit in respect of the same cause of action, which I find the present application, for the reasons I have already stated, to be. Thus, though the earlier suit does not operate as *res judicata*, its dismissal either directly under order 9B rule 4 or by virtue of order 16 rule 3, and it involving the same cause of action as the present application and the plaint upon which it rests, the applicant, not having applied as required under order 9B rule 8 to set aside or vary the order dismissing the earlier suit, is prohibited from bringing the present application which for this reason must be dismissed.

I must now consider the third ground of opposition to the present application. It has been contended by Mr Ndegwa on behalf of the applicant that the respondent having failed to refer the matter under section 6 (1) of the Act to the Tribunal, the reduced rent of Shs 2,000/- a month must be accepted as the rent that the applicant should pay for office No 7 from 1st July, 1987. This brings the basis for the applicant's application, it becomes therefore necessary to consider the relevant provisions of the Act. Section 4(1) of the Act makes it quite clear that no terms or conditions of a controlled tenancy, which the relationship between the applicant and the respondent is, shall be altered except in accordance with the Act. Under section 4 (3) of the Act, where a tenant wishes to have his rent reassessed, he shall give notice in the prescribed form to his landlord. This the applicant did by serving "JKN5" on the respondent. This notice informed the respondent that Shs 2,000/- a month was the rent which the applicant regarded as appropriate for office No 7 and that this reduced rent should take effect from 1st July, 1987. As required by section 4(5) of the Act, the respondent caused his advocate to write "AFG2" informing the applicant of his unwillingness to agree w/o the proposed reduced rent. Section 6(1) of the Act, however, provides that a party, in this case the respondent, who having received a tenancy notice disagrees with its terms, may refer the matter to the Tribunal and if this is done in this case before 1st July, 1987, "JKN5" shall have no effect until and subject to the determination of the reference by the Tribunal. But the respondent did not refer the matter to the Tribunal under section 6(1) of the Act prior to 1st July, 1987 or at all. It is under these circumstances that Mr Ndegwa for the applicant has urged me to hold that the respondent by this default accepted Shs 2,000/- a month as the rent for office No 7 as from 1st July, 1987. I am, however, unable to accede to this, for failure to refer a matter to the Tribunal under section 6(1) of the Act not operated by virtue of that section, to alter the actual terms and conditions of a controlled tenancy.

All that section 6(1) of the Act provides for is, that when a matter is referred to the Tribunal prior to the date when the related notice is to take effect, the notice shall be of no effect until and subject to the determination of the reference by the Tribunal; section 6(1) of the Act does not provide for a notice filed under section 4(3) of the Act, to alter the terms of a controlled tenancy where there has been no reference to the Tribunal under section 6(1) of the Act. But this has, however, been specially and specifically provided for in another provision of the Act, namely section 10 of the Act, so that this court cannot infer from section 6(1) of the Act the effect of non reference to the Tribunal with respect to the alteration of the actual terms and conditions of a controlled tenancy. Section 10 of the Act in making provision as to the effect of notice where there has been no reference to the Tribunal, limits itself to the notice of a landlord thereby excluding from its application the case where no reference has been made to the Tribunal by a landlord in respect of a tenant's notice. Whilst section 6(1) of the Act gives to either the landlord or tenant the right to refer a matter to the Tribunal, and prescribes what shall happen upon such referenced, the Act in section 10, provides only for a landlord's notice to have effect so as to alter the terms and conditions of a controlled tenancy where the tenant fails to signify his disagreement with the notice or to refer the matter to the Tribunal under section 6 of the Act. No similar provisions exist in respect of the effect of a

tenant's notice. The terms of section 10 of the Act are as follows:-

"Where a landlord has served a notice under section 4 of this Act and the tenant fails to notify the landlord within the appropriate time of his unwillingness to comply with such notice or to refer the matter to a Tribunal, then subject to section 6 of this Act, such notice shall have effect from the date therein specified to terminate the tenancy, or terminate or alter the terms and conditions thereof or the rights or services enjoyed thereunder".

If the Legislature had intended to attribute to a notice given under section 4(3) of the Act by the tenant to the landlord the same force and effect given by the landlord to the tenant, where the landlord has failed to refer the matter to the Tribunal, the Act would have so prescribed it as has been done in s 10 of the Act in respect of a notice from the landlord to the tenant. This is the answer to the applicant's contention that by the respondent's failure to refer the matter to the Tribunal, he must be deemed to have accepted Shs 2,000/- a month as the new rent for office No 7 as from 1st July, 1987. Section 10 of the Act makes provision for the only special set of circumstances throughout the Act in which rights or terms and conditions in respect of a controlled tenancy may be altered without a determination by the Tribunal and I do not think that that principle of law enunciated in section 10 of the Act, can be extended to apply to any other case where not specifically included. Some support for any interpretation of section 6(1) of the Act, I think can also be found in the Landlord and Tenant (Shops, Hotels and Catering Establishments) (Tribunal) (Forms and Procedure) Regulations made under s 16 of the Act, which I shall call "the Regulations". According to regulation 5 of the Regulations, reference to the Tribunal under section 6(1) or section 12(4) of the Act shall be respectively in forms B and C to the schedule to the Regulations. The terms of form B, that is the form that shall be used in respect of a reference under section 6(1) of the Act, show that Form B is to be used only by tenants, although in view of the provisions of section 6(1) of the Act, a landlord should be able to refer matters to the Tribunal without using Form B. This Form is headed "Reference by Tenant to Tribunal (Section 6 of the Act)" and is clearly intended for use by the tenant only. In its substative part, the Form states that:

"I ..... the tenant do wish to oppose a notice of termination of terms / alteration of conditions / of tenancy served on me by .....the landlord in respect of the premises described below –

.....

Dated this ..... day of ..... 19..."

In contradistinction, Form C which is to be used by either tenant or landlord in respect of complaints that may be referred to the Tribunal, is headed

"Reference by Landlord or Tenant to Tribunal (Section 12(4) of the Act)" and in its substantive part states that

"I ..... the tenant/landlord of ..... in accordance with the provisions of section 12(4) of the ..... Act, do hereby refer to the Tribunal a complaint relating to ..... tenancy.

The complaint concerns the landlord / tenant in that he .....

Dated this ..... day of ..... 19 .....

Landlord / Tenant"

Is the tenant therefore bereft of any remedy where the landlord fails to refer a matter under section 6(1) of the Act? I would say not, because the Tribunal has power under section 12 (1) (b) of the Act to:

"determine or vary the rent payable in respect of any controlled tenancy, having regard to all the circumstances thereof".

I will still be open for the applicant to apply to the Tribunal in pursuance of these provisions to determine or vary the rent payable in respect of office No 7. The applicant, however, chose not to make such a reference and the position therefore is that the monthly rent of Shs 8,000/- for office No 7 and related services has not been reassessed by virtue of the applicant's notice "JKN5" to the respondent or the latter's failure to refer the matter to the Tribunal. In my view, no reassessment has been made as required by, in conformity with, under, or by virtue of, the Act and the monthly rent of Shs 8,000/- for office No 7 stands undisturbed. There can therefore be no basis for the applicant's application that the respondent should be restrained from levying distress for rent which had by the respondent's act been reduced from Shs 8,000/- to Shs 2,000/- a month. No irreparable harm would be done to the applicant if distress is levied, for to prevent this all he has to do is to pay the arrears of rent demanded. Also, as far as I can judge, I do not think that *prima facie*, the applicant is likely to succeed in his substantive suit and on this ground also would dismiss the present application.

The applicant chose to come to this court to ask for an interlocutory injunction restraining the respondent from levying distress instead of resisting the respondent's related application now pending before the Tribunal as Tribunal Case No 286 in the Tribunal. I do not think that this is right. The applicant's contention that the rent of Shs 2,000/- per month had by the respondent's failure to refer the matter to the Tribunal became the new rent for office No 7, can be canvassed before the Tribunal in Tribunal Case No 286 which is not only seized with the matter but has jurisdiction to hear it. Were I not to dismiss the present application, I would have stayed then in pursuance of section 6 of the Civil Procedure Act

As must be clear from the foregoing and for the reasons given hereinbefore, the present application must be dismissed and is hereby dismissed with costs.

Dated and Delivered at Nairobi this 20th Day of May, 1988

A.M.AKIWUMI

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JUDGE