REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELCA E176 OF 2024

HASSAN ABDILLE - APPELLANT/TENANT

VS

JOAN NJOKI NDUNGI - RESPONDENT/LANDLORD

(Being an Appeal against the Ruling of Hon. Mr. Andrew Muma delivered on 17/10/2024 in Nairobi BPRT No. E215 of 2024)

JUDGMENT

1. This appeal arises from the Judgement of the BPRT Tribunal delivered on 17/10/24 in which the reference and the Notice of Motion dated 14/2/2024 were simultaneously dismissed.
2. Aggrieved by the decision of the Tribunal, the Appellant lodged the instant on the grounds outlined below; that the Learned Member of the Tribunal erred in law and fact;
    a. in dismissing the appellant's application dated 14/2/24, despite no substantial opposition being offered by the Respondent and or failing to consider the totality of the facts raised therein.
    b. in failing to balance the rights and interests of the parties over the suit premises, hence tilting the scales of justice in favour of the Respondent.
    c. Failing to consider the appellant's capital investment of Kshs 30 Million in the premises, which averment was not controverted by the respondent, leading to an erroneous finding.
    d. Failing to consider that the Appellant is at risk of recouping his investment as the returns therefrom stand to be disrupted by the

entry of the estate agent who is being irregularly mandated to collect rent from the appellant's subtenants.

e. Concluding that the management and collection of rent does not fall within the scope of the controlled tenancy relationship between the Appellant and the respondent. The agent ought not to collect the rent from the subtenants.
f. Failing to consider the rights of the Appellant as a landlord to his subtenants, which included the collection of the rent.
g. Failing to grant the injunctive orders to the appellant, yet he had met the threshold for the grant of the orders sought.

3. Consequently, the Appellant sought that the appeal be allowed and the ruling of the Tribunal of 17/10/24 be set aside.
4. On the threshold for grant of injunctive reliefs and the orders in the reference as filed in the tribunal, it was submitted that a controlled tenancy existed between the parties in the premises. The Appellant has been in occupation of the premises since 2008, carried out extensive renovations/partitioning to the tune of Kshs 30 Million and sublet the exhibition stalls/spaces to other tenants.
5. Following the split of the premises between the current respondent's family and the estate of the late Komu in 2022, the Respondent took ownership and management of part B of the premises, while the estate of Komu took ownership of part A.
6. The Appellant was then required to split the rent of Kshs 320,000/- monthly between the two owners until January 2024, when the Respondent informed him that an agent had been appointed to collect rent from the appellant's subtenants occupying the stalls despite there being no tenancy relationship between them and the respondent.
7. That the act of collecting rent from the subtenants amounts to interference with the tenancy rights between the Appellant and his subtenants. This act indirectly alters the terms of the controlled tenancy existing between the Appellant and the respondent, without subjecting

the decision to the provisions of the Landlord and Tenant (Shops, Hotels & Catering Establishments) Act, [hereinafter referred to as Cap 301], thereby infringing his rights as a head tenant. It was further submitted that the question as to whether the terms of the controlled tenancy make it inoperative on the part of the Appellant could not have been determined at the preliminary stage as the Tribunal did.

8. The Respondent submitted that the Appellant had no primafacie case because; the Respondent was not involved in the renewal of the lease [which was allegedly done by the family of Komu in exclusion of the Respondent]; the Respondent acted in good faith and did not tamper with the terms of the occupation of the premises; the Appellant was not threatened with eviction whatsoever; no demonstration of violation or infringement of any right that was detrimental to him; did not demonstrate any harm he stood to suffer when the Respondent appointed an agent to take over the management of the premises [including the collection of rent];
9. Furthermore, the Respondent submitted that the appointment of the agent did not infringe on the rights of quiet enjoyment, use, and possession of the suit premises since there is no existing lease or tenancy between the Appellant and the respondent. In any event, the Tribunal found/held that the relationship between the parties was a controlled tenancy; therefore, there was nothing to waste, damage, or alienate the premises to warrant the application by the appellant.
10. It was further submitted that the Respondent did not harbour any intentions of altering the terms of the existing uncontrolled tenancy at all. That the Respondent failed to meet the threshold for the granting of the injunctive orders sought.
11. The Respondent submitted that the Appellant is no longer in occupation of the premises and this appeal is now overtaken by events and, in any event, is therefore moot.

Analysis and determination

12. Having considered the record of appeal in entirety, the rival submissions and the materials placed before the court the key issues for determination are;
    a. Whether the Tribunal erred in dismissing the appellant's application and reference dated the 14/2/24
    b. Who meets the cost of the appeal
13. My duty as the first appellate court was succinctly put up in the case of **Selle and Another –vs- Associated Motor Boat Co. Ltd & Others EA 123** as follows:

    “.....An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either it has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, of if the impression based on the demeanour of a witness is inconsistent with the evidence in the cases generally.’
14. Before I delve into the issues framed for determination, allow me to give the background leading to the appeal.
15. According to the record of appeal, the suit property L R No 209/2412 was owned by the estate of Gathumbi Komu, deceased, and the estate of James Samuel Gichuru. The Respondent is the legal representative of Gichuru's estate, while Samuel Gachara and Peter Gathumbi represented Gathumbi Komu's estate.
16. As far back as 2008, the Appellant claims to have been subleased the premises by the representatives of the estate of Komu. That after the expiry of the lease in 2018 he continued in occupation of the premises.

17. In addition, the Appellant avers that he has invested a sum of Kshs 30 Million in the premises, an amount that he hopes to recoup from the rents he collects from the subtenants.
18. A dispute arose between the representatives of the two estates, leading to a court case filed in **ELC No 322 of 2018- Nairobi**, where the parties later agreed to split the building into two parts [A and B]; the estate of Komu took the portion marked A, and the estate of Gichuru, represented by the respondent, took part B. The Appellant states that, as a result of the split, he paid rent promptly and directly to both estates.
19. That in January 2024, he received a letter from the Respondent stating that she had appointed an agent, namely Benson Mathu, to collect the rent from the tenants in the building. The Appellant has urged the court to find that this amounted to an alteration of the implied terms of the controlled tenancy he enjoyed, without the Respondent having followed the due process of law as outlined in CAP 301.
20. The respondent, on the other hand, refuted the claim of the Appellant and argued that the appointment of the agent was to be carried out on behalf of the respondent's management and rent collection obligations. That in any event, there was nothing to be altered since there was no lease agreement between the parties. The Respondent insisted that any arrangements that the Appellant had with the estate of Komu did not involve her.
21. It is not in doubt that the nature of the tenancy enjoyed by the parties was that of a controlled tenancy defined under Section 2 of the Landlord and Tenant (Shops, Hotels & Catering Establishments) Act Cap 301, Laws of Kenya which states as follows;

> “controlled tenancy" means a tenancy of a shop, hotel or catering establishment—
>
> (a) which has not been reduced into writing; or

(b) which has been reduced into writing and which—

(i) is for a period not exceeding five years; or

(ii) contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or

(iii) relates to premises of a class specified under subsection (2) of this section:

Provided that no tenancy to which the Government, the Community or a local authority is a party, whether as landlord or as tenant, shall be a controlled tenancy"

22. Section 4 of the Act provides for the termination of, and alteration of terms and conditions in, controlled tenancy as follows:

"(1)Notwithstanding the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be terminated, and no term or condition in, or right or service enjoyed by the tenant of, any such tenancy shall be altered, otherwise than in accordance with the following provisions of this Act.

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 right or service enjoyed by the tenant under, such a tenancy, shall give notice in that behalf to the tenant in the prescribed form.

3.A tenant who wishes to obtain a reassessment of the rent of a controlled tenancy or the alteration of any term or condition in, or of any right or service enjoyed by him under, such a tenancy, shall give notice in that behalf to the landlord in the prescribed form.

4.No tenancy notice shall take effect until such date, not being less than two months after the receipt thereof by the receiving party, as shall be specified therein:

Provided that-

i.where notice is given of the termination of a controlled tenancy, the date of termination shall not be earlier than the earliest date on which, but for the provisions of this Act, the tenancy would have, or could have been, terminated;

ii.where the terms and conditions of a controlled tenancy provide for a period of notice exceeding two months, that period shall be substituted for the said period of two months after the receipt of the tenancy notice;

iii.the parties to the tenancy may agree in writing to any lesser period of notice." [emphasis is mine].

23. It is well known that a landlord has the authority at any time to appoint an agent to manage a property, which management may include collecting rent. In this case, the agent will act on behalf of the Respondent according to the principles of the law of agency. There would be nothing wrong with the agent involving the head tenant in collecting rent when subtenants are present.
24. However, I have reviewed the record and the letter addressed by the Respondent to the occupants of part B of the building, informing them that Benson Mathu would henceforth collect the rent. It is not contested that the occupants of part B are the subtenants of the appellant. The appellant, being the head tenant, is bound by the tenancy terms between him and the Respondent on the one hand and between him and the subtenants on the other. By demanding rent from the subtenants, the Respondent is going beyond the implied terms of the tenancy between her and the appellant. The rights of the subtenants, though not independent of the head lease, flow from it and must be asserted within the framework created by the landlord and the head tenant.
25. In this case, the existing framework involves a controlled tenancy between the Appellant and the respondent, where the Respondent receives rent from the Appellant and not directly from the subtenants. Furthermore, the terms regarding rent payable and conditions of

occupancy between the Appellant and the subtenants do not extend to the respondent. This has been alluded to by the Respondent in her submissions. It was the appellant's case that he partitioned the premises and sublet them to some subtenants, and inevitably, implied rights and interests have accrued to both parties arising from the long sublease arrangements between them that cannot be wished away.

26. In the circumstances of this case, therefore, I find that the appointment of the agent with specific instructions to collect rent from the subtenants, in my considered view, amounted to an alteration of the terms of the controlled tenancy, for which the Respondent ought to have issued appropriate notices under the provisions of Section 4 (2) of Cap 301. To the extent that the Respondent failed, it is in breach of the said provisions of the said Act.

27. The most prudent course of action was for the agent to collect the rent from the appellant. The Respondent did not explain the difficulty she faced if the Appellant continued paying the rent to the agent as was the previous practice. By introducing an agent between him and his clients, the subtenants, the Appellant was left as a bystander, with accrued obligations and rights notwithstanding. This, in my view, was a disguised takeover of the premises by the Respondent without lawful compliance to the law.

28. Regarding the application for injunctive orders, and having established that the appellant's rights as a sublandlord/headtenant were infringed, the appropriate order would have been to maintain the status quo. Now that the court has determined the main appeal, I find the application is moot, and I see no need to examine it further.

29. **Final orders for disposal**

a. In the end I find that the appeal succeeds.

b. The Ruling and the decision of the Hon Andrew Muma, Member of BPRT, delivered on 17/10/24 in BPRT No E215 of 2024, and all the consequential orders issued thereto be and are hereby set aside.

c. Costs shall be in favour of the appellant.

30. It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 9TH DAY OF DECEMBER 2025 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

1. Ms Muthoni HB for Mr Ngaruiya for the Appellant
2. Ms Nasambu HB for Mr Mbaabu for the Respondent
3. C/A – Ms. Yvette Njoroge