



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 403 OF 2017**

**NURU ALI ISLAM JEIZAN T/A**

**AL-KHALEEJ TRADING....PLAINTIFF/APPLICANT**

**- VERSUS -**

**DILEEP PATEL.....DEFENDANT/RESPONDENT**

**RULING**

1. The plaintiff/applicant filed the present suit and together with it an interlocutory application seeking interim reliefs. The application is dated 2<sup>nd</sup> August 2017 and it sought for orders:

**1) Spent**

**2) Spent**

**3) That the defendant, its agents, servants and/or employees be restrained from evicting or in any other way interfering with the plaintiff's quite possession and enjoyment of the suit premises namely plot No. 5169, Section I.M.N. pending the inter partes hearing of this suit.**

**4) That the orders issued be served upon Nyali Police Station to ensure compliance.**

2. The application is opposed by the defendant vide grounds of opposition dated 21<sup>st</sup> August 2017, preliminary objection dated 18<sup>th</sup> August 2017 and a replying affidavit which is undated but filed on 30<sup>th</sup> August 2017. In the replying affidavit, the defendant referred to annexures **AM-01 to AM-08**. These documents were later introduced by the supplementary affidavit dated 22<sup>nd</sup> September in the Court file.

3. Both parties have filed written submissions to argue the application. The applicant pleaded that their relationship with the defendant was a controlled tenancy under the provisions of the Landlord & Tenant (Hotels, Shop & Catering Establishment) Act Cap 301 because there was no tenancy agreement that was signed and or registered. That the defendant served him with a notice to vacate dated 21.6.2017 indicating the expiry of the tenancy to be 31<sup>st</sup> July 2017. The applicant submits that the defendant cannot increase rent or serve eviction notice without an order from the Business Premises Rent Tribunal. It is her case that if the orders are not granted and notice is allowed to take effect, she will suffer both financial loss and market (described as good will) created over the past one year. She urged the Court to allow the application.

4. The defendant on his part submitted that his preliminary objection should be upheld because section 15 of Cap 301 provides that appeals from the Tribunal lie to the Environment & Land Court and section 6 requires any aggrieved tenant to file a reference with the Tribunal. The defendant in support of this line of submission put reliance on the cases of **The Speaker of the National Assembly vs James Njenga Karume C. A No 92 of 1992** and **the Owners of M. V. Lilian S vs Caltex Oil E. A (1989) KLR 1**. The defendant submits further that his preliminary objection meets the legal threshold and the same should be allowed. The defendant also submitted on the following headings which I consider cannot be determined at this interlocutory stage:-

**i) Was there a valid tenancy agreement between the parties**

**ii) Is the applicant guilty of material breach of the tenancy agreement**

5. Once a party raises an issue of jurisdiction, the Court is obliged to determine the same before going into the merits of the case. It is the defendant's contention that the plaintiff/applicant having pleaded that there was a controlled tenancy between them then the proper Court to

deal with the matter is the Business Premises Rent Tribunal under section 6 and this Court then becomes clothed with jurisdiction only on appeal under section 15 of Cap 301. The preliminary objection was served on the applicant. I also note that the Respondent filed his submissions on 25<sup>th</sup> September 2017 while the applicant filed her submissions on 16<sup>th</sup> October 2017. However the applicant did not address herself to the preliminary objection or the Respondent's submissions on the issue of jurisdiction.

6. The applicant pleaded in paragraph 2 of the plaint that the tenancy commenced on 20.7.2016 and fell for renewal on 1.8.2017 meaning the first agreement was to end on 31.7.17. In paragraph 7, the applicant pleaded that she is a protected tenant under Cap 301 accordingly the threatened eviction of the plaintiff does not comply with the statute and therefore should be declared null & void and of no consequence. The plaintiff proceeded to pray for declaratory order that the tenancy on plot No 5169 Section I.M.N is controlled and its terms cannot be altered unless with approval of the Business Premises Rent Tribunal.

7. Section 2 of Cap 301 defines a controlled tenancy thus;

***“A tenancy of a shop, hotel or catering establishment –***

***(a) Which has not been reduced into writing.***

***(b) Which is reduced into writing and which:-***

***(i) Is for a period not exceeding five years***

***(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 sub-section (2) of this section.”***

8. In clause K of the lease agreement between the parties, it is stated that the leased premises is to be used for **Residential only**. However in the photographs annexed in support of the application and the facts deposed to by the applicant, the premise was being used as a hotel/restaurant. Consequently given that both parties agree the lease was for a period of one (1) year and that the premises was being used as a hotel and or restaurant, then it became a controlled tenancy under the definition given in section 2 above. The effect is that it invites the application of section 6 (1) of the same Act which provides that:

***“A receiving party who wishes to oppose a tenancy notice and who has notified the requesting party under section 4 (5) of this Act that he does not agree to comply with the tenancy notice may before the date the notice takes effect refer the matter to the Tribunal and such notice shall be of no effect until the determination of the reference by the Tribunal.”***

Section 15 provides that any party to a reference aggrieved by any determination or order of the Tribunal may appeal to the Environment & Land Court.

9. Going by the above provisions of the law, the Court clothed with jurisdiction at the 1<sup>st</sup> instance to determine the issue of the notice which forms the subject matter of this dispute is the Business Premises Rent Tribunal. Section 13 of the Environment & Land Court Act gives this Court original and appellate jurisdiction and in section 13 (4) over decisions of subordinate Courts and Tribunals in respect of matters falling within the jurisdiction of the Court.

10. In the case before me, even if it is assumed that the premises was let for residence only and therefore not covered under Cap 301, then it became a periodic tenancy i.e. month to month going by how the rent was being paid. The rent payable per month whether Kshs 140,000 or Kshs 250,000 is a sum which amendments falls under the pecuniary jurisdiction of the Magistrate's Court following the amendments to the Magistrate's Court Act which were operational at the time the suit was filed. For this reason the matter should have been filed in the subordinate Courts.

11. In conclusion, I come to the finding that this Court does not lack jurisdiction within the meaning of the case of **owners of Motor vessel Lilian S**. However it is an agreed principle by precedence that parties should ventilate their claims in appropriate tribunal/Court that allows room for this Court to exercise its appellate jurisdiction. I will thus not order struck out the suit for want of jurisdiction. Instead I make an order that this matter be transferred to the Business Premises Rental Tribunal for hearing and determination as it is the one clothed with jurisdiction to determine issues of validity of a notice of termination and or increment of rent. In the meantime, the orders of injunction given on 15.8.2017 and extended on terms on 7<sup>th</sup> September 2017 shall remain in force pending further orders and directions of the Court as shall be made by the learned chairman of the Business Premises Rent Tribunal. The parties herein to move the tribunal at the earliest available dates.

**Dated, signed & delivered at Mombasa this 7<sup>th</sup> February 2018.**

**A. OMOLLO**

**JUDGE**