



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC APPEAL NO. 49 OF 2017

THE NEW CALABASH LIMITED.....APPELLANT

VERSUS

ENG. JOSEPH ODERO.....RESPONDENT

(Being an Appeal against the Judgment of Hon. Mbichi Mboroki, Chairman

Business Premises Rent Tribunal, delivered on 13th October 2017

in Nairobi BPRT Case No. 722 of 2016)

JUDGMENT

1. The respondent in this appeal is the registered proprietor of the premises known as LR. No. 2259/240 situated along Ngong Road, Karen (the **suit premises**). By a lease dated 27th May 2011, the respondent leased the suit premises to the appellant for a five year term commencing on 1st July 2011, at a monthly rent of Kshs.150,000. On 3rd June 2015, the respondent intimated to the appellant his willingness to renew the lease which was due to expire on 30th June 2016 for a further five year term. On 27th April 2016, the respondent wrote another letter intimating that he would not be renewing the lease because the appellant had sublet the premises in breach of the lease agreement.

2. On or about 1/7/2016, the respondent issued the appellant with a statutory notice of intention to terminate the tenancy under Section 4 of the Landlord and Tenant (Shop, Hotels and Catering Establishments) Act, (**Cap 301**). The appellant elected to challenge the notice through a reference in the Business Premises Rent Tribunal (hereinafter referred to as **the Tribunal**). On 13th October 2017, the Tribunal delivered its judgment dismissing the reference and allowing the respondent's notice of termination of tenancy. The Tribunal found that the appellant had breached the tenancy agreement by subletting the suit premises without the written consent of the respondent.

3. Dissatisfied with the judgment of the Tribunal, the appellant has preferred this appeal raising the following seven grounds:-

a. The Learned Chairperson of the Tribunal erred in law and in fact in failing to consider the relevant law relating to termination of the tenancies under Section 4(2) and Section 7 of Cap 301 Laws of Kenya and therefore arriving at a wrong determination of the matter.

b. The Learned chairperson of the Tribunal erred in law and in fact in failing to find that the Landlord's notice dated 1st July, 2016 to terminate the appellant's tenancy was motivated by extraneous reasons, namely for the Landlord to let/lease the premises to other third parties other than the Appellant

c. The Learned Chairperson of the Tribunal erred in law and in fact in allowing the Landlord's notice dated 1st July, 2016 and dismissing the tenant's reference despite the overwhelming evidence on record of the improvements/developments done on the premises by the Tenant/Appellant with the express consent of the Landlord.

d. The Learned Chairperson of the Tribunal erred in law and in failing to consider the massive capital expenditure and investment of the Tenant/appellant on the premises, and the need for the Tenant/Respondent to realize return on its investments.

e. The Learned Chairperson of the Tribunal erred in law and infact in finding that the Tenant/ Appellant had sub-let the premises without the consent of the Landlord when such sub-tenant's occupation of the premises had been sanctioned through an order of the Tribunal

f. The Learned Chairperson of the Tribunal erred in law and infact in failing to consider the submissions of the Appellant's Counsel.

g. The Learned Chairperson of the Tribunal erred in law and infact by arriving at the decision that was not weighed against the evidence adduced by the Tenant/Appellant and conceded by the Respondent/Landlord.

4. The appellant urged this court to allow the appeal and decree that the judgment of the Tribunal delivered on 13th October 2017 and the subsequent order/decree of the Tribunal be set aside and be substituted with an order dismissing the notice by the landlord (respondent) to the tenant (appellant) dated 1st July 2016 with costs to the appellant. The appellant also prayed for costs of this appeal.

5. The appeal was argued by way of written submissions. The appellant filed submissions dated 19th February 2018 in which it argued that the Tribunal failed to consider the real intention of the respondent in terminating the lease. It was submitted that although the notice to terminate the tenancy was based on grounds under Section 4(2) of the Act, the respondent's intention as contained in his letter dated 27th April 2016 was to let the premises to other tenants which was not a ground for termination under Section 7(1) of the Act.

6. Counsel submitted that the Tribunal found that the appellant had ostensible authority from the respondent to carry out alterations on the premises. It was further submitted that the respondent who had in his letter dated 3rd June 2015 conveyed his intention to renew the lease to allow the appellant sufficient time to realize ample return on its investment was estopped by proprietary and equitable estoppel from reneging on his promise. It was argued that allowing the respondent to terminate the lease would amount to unjust enrichment on the part of the respondent while at the same time occasioning irreparable losses to the appellant. The court was referred to the case of **Sifa International Ltd vs. National Social Security Fund Board of Trustees (2011)eKLR.**

7. Lastly, it was submitted that the Tribunal was wrong in finding that the appellant had illegally sublet the premises when the sub-tenant whose lease had expired was enjoying an injunctive order issued by the Tribunal on 15th July 2016.

8. The respondent in his submissions dated 27th February 2018 relied on the case of **Shah vs. Shah (1981)KLR 375** to argue that since the appellant was in breach of a covenant, its right of occupation was extinguished and the right to renewal of the lease upon expiry was also lost. The respondent contended that the lease between the parties herein expired by effluxion of time and that the appellant could therefore not insist on the continued occupation when the lease had not been renewed. The court was referred to the case of **Kasturi Ltd vs. Nyeri wholesalers Ltd Nyeri CA No. 248 of 2012** where the court stated that it was incumbent upon a tenant whose lease had expired to give vacant possession.

9. It was also submitted that the appellant who had undertaken to vacate and pull down the unapproved structures during the hearing at the Tribunal had been given ample time to vacate. Counsel argued that the appeal herein was not bonafide and was intended to buy time to allow the appellant's occupation beyond the time allowed thereby amounting to unjust enrichment to the disadvantage of the respondent. Reliance was placed on the case of **Nairobi Housing Development Ltd vs. Highridge Corner Bar Ltd Nairobi HCCA No. 110 of 1978.** Lastly, it was submitted that the appellant never brought any valuation report to prove that the illegal structures were valued at Kshs 35 million.

Issues and Determination

10. I have considered the tenor and import of the reference before the Tribunal, the evidence tendered before the Tribunal, the judgment of the Tribunal, the grounds of appeal in this appeal, and the parties' respective submissions in the appeal. I have also considered the relevant statutes and jurisprudence on the key issues in this appeal. This being a first appeal, this court is required to re-evaluate the evidence tendered before the Tribunal and make its own findings and conclusions.

11. The respondent raised three grounds upon which he sought to terminate the material tenancy. Two of the three grounds were rejected by the Tribunal. The ground which succeeded and which gave rise to this appeal was that the tenant (appellant) had unlawfully sublet the premises without the written consent of the lessor (respondent).

12. The appellant contends that the Tribunal failed to consider the relevant law relating to tenancies and that the Tribunal failed to consider the real reason for which the respondent intended to terminate the tenancy, contending that the real reason was that the respondent wanted to lease the suit premises to other tenants. On his part, the respondent contends that he was prepared to grant the appellant another term but changed his mind when he discovered that the appellant had sublet the premises without his consent and that the structures which he thought constituted the appellant's investments infact were put up and belonged to the illegal sub tenants. Owing to this discovery, he changed his mind and opted to terminate the appellant's tenancy within the framework of Cap 301.

13. The material tenancy was anchored on a tenancy agreement dated 27/5/2011. The tenancy agreement contained various covenants. Under Clause 1(i) of the tenancy agreement, the appellant covenanted not to transfer, sublet or part with possession of the suit premises or any part thereof without the previous written consent of the lessor.

14. Section 7 of Cap 301 contains grounds upon which a landlord may seek to terminate a controlled tenancy. Among the grounds itemized are commission of substantial breach by the tenant of his obligations under the tenancy or any other reason connected with the tenant's use or management of the premises comprised in the tenancy.

15. The respondent contended and still does contend that by subletting the premises without the consent of the respondent, the appellant committed a breach and that the action of subletting the premises to various subtenants without the consent of the respondent was a proper ground for termination of the tenancy.

16. The Honourable Tribunal's finding on the issue was captured at pages 8 and 9 of the judgment thus:

The lease agreement between the parties which is part of the record created a controlled tenancy agreement within the meaning of Section 2 of Cap 301. The lease agreement was for a period of five (5) years. The lease provided under Clause J Not to transfer, sublet or part with possession of the said the same premises or any part thereof without the previous written consent of the lessor such consent into be unreasoned by withheld (sic). The evidence on record clearly shows that the tenant had subtenants in the premises namely Disney Land Nature Tours & Travel whose proprietor is Jennifer Njoki Kairu. The tenancy agreement between the Tenant herein and the sub-tenant is on record and is dated 1st August 2015. There is bundle of receipts issued by the tenant to the sub tenant. At the time the Tribunal inspected the suit premises the sub-tenant had vacated the premises. There was another sub-tenant in the premises Deep Blue Limited whose director Johny Macmillan give evidence before the Tribunal. This sub-tenant was in the premises at the time the Tribunal inspected the same. The Tenant's Director Charles Wachira Ngundo gave evidence in the Tribunal admitted that he did not have written or oral consent from the Landlord, to sublet the premises. The evidence on the issue of sub tenancy is overwhelming. The Tribunal is satisfied that the land lord has proved this ground of tenancy.

17. I have on my own considered the law, the material tenancy agreement and the evidence before the Tribunal. I am satisfied that subletting of the demised premises without the written consent of the lessor was expressly prohibited and is a covenant the appellant agreed to abide by. The appellant in blatant breach of that covenant leased the suit premises to various sub-tenants some of whom erected their own structures on the suit premises. Through a tenancy agreement dated 1/8/2015 between the appellant herein and Jennifer Njoki Kairu t/a Disney Land Nature Tours & Travel, the appellant sublet part of the suit premises to the subtenant at Kshs 320,000 per month. Through another tenancy agreement dated 27/3/2014 between the appellant herein and Deep Blue Limited, the appellant sublet part of the suit property to the subtenant at Kshs 75,000. The subletting would have been faultless had the appellant obtained prior written consent from the respondent in tandem with the covenants in the tenancy agreement. In the present appeal, the tenant did not obtain the consent.

18. The appellant has argued that the Tribunal erred by failing to take into account the fact that one of the sub-tenants had vacated while the other sub-tenant was still in the premises courtesy of an order issued by the Tribunal in a different cause. In my view, these subsequent events do not cure the substantial breach which the appellant committed through sub-letting of the premises without the respondent's consent. Consequently, I find no fault in the Tribunal's finding that the tenant had breached the terms of the controlled tenancy and that the landlord had properly established a statutory ground of termination for tenancy under section 7 of Cap 301

19. The appellant contended that the Tribunal failed to take into account the appellant's investment in the suit premises. The respondent on his part contended that the structures which the appellant alluded to were erected by and belonged to the sub-tenants. I have evaluated the evidence by Johny Macmillan, a director of one of the sub-tenants. He testified that the sub-tenant constructed a kitchen, a bar and a restaurant. Similarly, Caroline Nyarai Kairu testified that Disney Land Nature Tours & Travel constructed the butchery. The totality of their evidence is that a number of the investments which the appellant passed as his were put up by the sub-tenants and belong to the sub-tenants. Indeed, the appellant did not present any evidence of his alleged investments in the suit premises.

20. In light of the foregoing, I have not found any substantial ground out of the seven grounds itemized by the appellant to warrant interference with the finding of the Tribunal. The net result is that the appeal herein is dismissed. The respondent shall have costs of the appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF JULY 2018.

B M EBOSO

JUDGE

In the presence of:-

Mr. Wanjohi Advocate for the Appellant

Mr Masinde Advocate for the Respondent

Ms Halima Abdi - Court Clerk