



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC APPEAL NO. 97 OF 2015**

**KENYA COLLEGE OF COMMERCE & HOSPITALITY.....1ST APPELLANT**

**SIN WARUHIU.....2ND APPELLANT**

**CAFÉ D ELEGANCE.....3RD APPELLANT**

**VERSUS**

**ST. PAUL UNIVERSITY.....RESPONDENT**

***(Being an Appeal from the Judgment of the Business Premises Rent Tribunal delivered on 2/10/15 in Nairobi BPRT Case No 645 of 2013 – (consolidated))***

**JUDGMENT**

**Introduction**

1. Through a memorandum of appeal dated 16/11/15 and amended on 21/1/16, Kenya College of Commerce & Hospitality, S N Waruhiu, and Café D Elegance (the **appellants**) brought this appeal challenging the Judgment of the Business Premises Rent Tribunal delivered on 2/10/15 in Nairobi BPRT Case Number 645 of 2013 (consolidated). The references leading to the impugned judgment were triggered by statutory notices of termination of tenancy served upon the appellants by the respondent pursuant to the provisions of Section 4 of the Landlord and Tenant (Shops Hotels and Catering Establishments) Act, Cap 301. The appellants challenged the said notices under the provisions of Section 6 of the Act.

2. Among the grounds which the respondent itemized in the statutory notice was that the landlord required the entire premises for construction and/or reconstruction and exclusive occupation for more than one year in meeting its urgent and pressing needs for additional space to accommodate its growing student population and education needs, which could not be reasonably implemented without repossession of the premises.

3. Upon taking and evaluating the parties' evidence and submissions, the Tribunal made the following verbatim disposal orders:

***i. That the Tenants References herein are dismissed with costs.***

***ii. The Landlord's notices are allowed.***

***iii. The tenants shall vacate and deliver vacant possession of the suit premises on or before 31st December 2015 in default an eviction order shall issue without further reference to the Tribunal.***

***iv. The costs payable to the landlord shall be agreed by the parties or taxed by the Tribunal.***

4. Aggrieved by the findings and decision of the Tribunal, the appellants brought the present appeal on the following grounds:

***a) The learned chairman failed in facts and in law to consider that it is the duty of the tribunal to subject evidence before it, to exhaustive scrutiny to come up with its own findings and directions by determining that the respondent has proved the Notices on balance of probabilities.***

***b) The learned chairman erred in law when he failed to properly evaluate and weigh the applicants' evidence against the respondent thereby wrongly concluding and giving orders that the appellants should give vacant possession and allowing the respondents notices.***

c) *The learned chairman erred in law and fact when he failed to give a finding on the 2nd applicant witness statement where he stated that Café D Elegance was situated at ground floor and that did not make much sense.*

d) *The learned judge failed to consider that justice should not only be done but be seen to be done.*

e) *The learned chairman erred in both law and fact by failing to find that the Business Rent tribunal does not have jurisdiction over a learning institution.*

5. At the hearing of the appeal, parties agreed to dispose the appeal by way of written submissions.

#### **Appellants' Case**

6. The appellants contended that the Tribunal erred in finding that it had jurisdiction over tenancies relating to the 1st appellant which was a learning institution. It was argued that the 1st appellant fell outside the definition of "shop" as contemplated by Section 2 of the Act. Reliance was placed on the case of **The Owners of MV Lilian & 'S' v Caltex Oil Kenya Ltd (1989) KLR** and **Wamigwi v Simon Mbiriri Wanjiku & Another 2012 eKLR**.

7. It was further submitted that if a tenant had rent arrears, it would have made sense to levy distress within the framework of the Act. The appellants further submitted that the Tribunal failed to address itself to the issues raised by the 1st appellants. The appellants also argued that the respondent did not lead evidence to prove that it intended to undertake construction or reconstruction works on the premises. The appellants further argued that the Tribunal failed to pay regard to the interests of the appellants who had accumulated tremendous goodwill at the premises.

#### **Respondent's Case**

8. The respondent argued that the Tribunal considered all the relevant evidence and correctly applied the law. It was submitted that the appellants were in rent arrears at the time the references were heard. It was further submitted that since the tenant/landlord relationship no longer subsisted, there was no triable issue raised in the appeal. Lastly, it was submitted that the issue of jurisdiction does not arise because it was not raised in the memorandum of appeal. The respondent urged the court to dismiss the appeal.

#### **Determination**

9. I have considered the amended memorandum of appeal together with the parties' submissions. I have also considered the entire record of the Tribunal in Nairobi BPRT Case Number 645 of 2013. Similarly, I have considered the relevant legal framework and jurisprudence. This being a first appeal, I am required to re-evaluate the evidence and make my own findings.

10. The amended memorandum of appeal sets out five grounds of appeal. In my view, grounds 1 to 4 can be condensed into a single ground – whether or not the Tribunal erred in finding that the respondent (landlord) had proved a statutory ground of termination. The second issue is whether or not the Tribunal erred in entertaining the reference by the 1st appellant. The last issue relates to the award of costs in the Tribunal.

11. Section 7 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act sets out grounds upon which a landlord may seek to terminate a controlled tenancy. In the present appeal, the respondent issued a termination notice in which it stated, *inter alia*, that it required the suit premises for construction and/or reconstruction and for exclusive occupation for more than one year in meeting its urgent and pressing needs for additional space to accommodate its growing student population and education needs. At the hearing, James Wamathai Mururi testified on behalf of the respondent. He stated that the reason for termination was that the respondent needed the space for its own use as a university. He added that the respondent had been forced to lease premises in Information House. He further testified that there was a lot of pressure for space on the University. He was consistent during cross examination.

12. I have independently re-evaluated the evidence of the respondent during the hearing of the reference. I am satisfied that indeed the respondent led proper evidence to demonstrate that it required the premises for its own use as a University. Consequently, I do not find any error in the findings of the Tribunal on this particular issue.

13. The second issue relates to the jurisdiction of the Tribunal. The references leading to the present appeal were initiated by the appellants. The appellants submitted themselves to the jurisdiction of the Tribunal and initiated a trial on the basis that they were protected tenants. It is only at the stage of filing written submissions that they questioned the Tribunal's jurisdiction to adjudicate over their references. In my view, the appellants are abusing the process of the court by initiating references at the Tribunal conducting a hearing at the Tribunal, and thereafter faulting the Tribunal for accepting their references. If the 1st appellant felt that indeed the Tribunal did not have jurisdiction over its reference, all it needed to do was to withdraw the reference and proceed to an appropriate court to challenge the termination notice. The 1st appellant did not take that recourse. It is therefore the finding of this court that the issue of jurisdiction cannot be raised at this point. The court is in this regard guided by the decision in **Kingfisher Properties Limited v Nandlah Jivrag Shah & 2 others (2013) eKLR**.

14. Lastly, the references leading to the impugned judgment was prompted by termination notices issued by the respondent. Some of the appellants were in the premises prior to the acquisition of the suit premises by the respondent. Against that background, there was no proper justification, in my view, in condemning the appellants to pay costs of the references. A more equitable order in the circumstances would have been to let each party bear own costs of the references. I will therefore set aside the order awarding costs of the reference to the respondent and direct that each party bears own costs of the reference and the present appeal.

#### **Disposal Orders**

15. Consequently, save for the finding relating to costs, the appeal herein is dismissed for lack of merit. Each party shall bear own respective costs both in this Appeal and in the References leading to the present appeal.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF SEPTEMBER 2018.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Ms Ogutu holding brief for Mr Achoch Advocate for the Appellants

Ms Wambui Advocate for the respondent

June Nafula - Court Clerk