



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO 1493 OF 2014 (OS)

DHIRAJLAL J. SHAH

RAJESH SHAH (Administrators of the Estate of

JUTHALAL VIRPAL SHAH).....PLAINTIFFS/APPLICANTS

VERSUS

BONNY FASHIONS LIMITED).....DEFENDANT/RESPONDENT

RULING

1. This is the Notice of Motion dated 29th January 2015. It is brought under Order 2 Rule 15 of the Civil Procedure Rules 2010, Section 3A of the Civil Procedure Act and all other enabling provisions of the law.

2. It seeks order:-

(1) That the defence filed by the respondent on 17th December 2014 be struck out and judgment be entered in favour of the applicants as pleaded in the originating summons dated 27th November 2014.

(2) That costs of the application be provided for.

3. The grounds are on the face of the application and are:-

(i) The defence filed is frivolous, vexatious and an abuse of the court process.

(ii) The respondent has fabricated a defence which is false and has no standing in law whatsoever.

(iii) That the respondent has not been paying rent and there are no agreements for payment of rent on terms purported and hence is attempting to mislead this honourable court.

(iv) The applicant is suffering loss of usage of the premises and hence losing income as the respondent continues to illegally occupy the premises as his tenancy lapsed on the expiry of the notice of termination that is effective from 1st June 2014.

4. The application is supported by the affidavit of the Applicants' sworn on the 7th December 2015 and on 13th June 2016.

5. The application is opposed. There is a replying affidavit sworn by Sanjay Kapoor a director of the Respondent on the 2nd November 2015 and a further affidavit sworn on 27th July 2014.

6. On the 26th May 2015, the court directed that the application be canvassed by way of written submissions.

The Applicants' Submissions

7. The Applicant served upon the respondent a notice of termination of tenancy dated 27th March 2014 which was to take effect on 1st June 2014. The said notice was not challenged. The Respondent did not file any reference before the Business Premises Rent Tribunal as required

by law. Section 6(1) of the Land Lord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301 confirms that it is only the filing of a reference which suspends time with regard to the tenancy notice and hence on 1st June 2014, the notice took effect. Based on the above, the Business Premises Rent Tribunal had and does not have any jurisdiction to entertain any application filed by the Respondent. The tenancy ceased to exist at the expiry of the notice.

They have relied on the case of **Nandlal Jivraj Shah & 2 Others t/a Jivaco Agencies vs Kingfisher Properties Limited HCCA No 35 of 2015 and Jetendra Mathurdas Kahabar & 2 Others vs Fish and Meat Limited (1997) eKLR.**

Respondent's Submissions

8. The Respondent never responded to the notice to terminate tenancy because they entered into several discussions with the applicants and reached a consent to continue occupying the premises. That by an order dated 6th August 2015, the Respondent was granted leave to oppose the notice to terminate tenancy. The Respondent has continued to deposit rent. The order of the Business Premises Rent Tribunal have never been set aside. The respondent should be given a chance to ventilate its case as striking out a defence is a draconian measure which is granted sparingly.

9. The orders of the Tribunal granting the respondent leave to file the reference out of time have never been set aside. They have relied on the case of **(1) M. N. Wahoro Advocate vs Uchumi Supermarkets Limited HC Misc App 112 of 2002; (2) DT Dobie vs Muchina [1982] KLR; (3) Kenya Anticorruption Commission vs Johnson githeka NRB HCCC 145 of 2007 and (4) Trust Bank Ltd vs Amalo Company Ltd [2002] 2 KLR page 629 and Prime Salt Works Ltd vs Kenya Industrial Plastics Ltd CA Civil Appeal No 186 of 2000.**

10. I have considered the notice of motion dated 29th January 2015, the affidavit in support and annexures. I have also considered the affidavit in response and the annexures. I have considered the written submissions of counsel and the authorities cited.

The issues for determination are:-

(i) Whether the defence herein ought to be struck out and judgment entered in favour of the applicant in the originating summons dated 27th January 2014.

(ii) Who should bear costs?

11. It is not in doubt that the applicant served upon the Respondent a notice of termination of tenancy dated 27th March 2014. The same was to take effect on 1st June 2014. It is also not in doubt that the Respondent never responded to the said notice nor did it file a reference before the tribunal. The reason given is that it was because they entered into several discussions with the Applicants and reached a consent to continue occupying the premises.

12. By a letter dated 11th June 2014 the Tribunal through one M/s Jane Kavoko on behalf of the Chairman wrote to the Applicants confirming that the Respondent had not opposed the notice to terminate tenancy. Section 6(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301 Laws of Kenya provides that:-

“A receiving party who wishes to oppose a tenancy notice, and who has notified the requesting party under section 4(5) of the Act, that he does not agree to comply with the tenancy notice, may before the date upon which such notice is to take effect, refer the matter to a Tribunal, where upon such a notice shall be of no effect until and subject to, the determination of the reference by the Tribunal:

Provided that a tribunal may for sufficient reason and on such condition as it may think fit, permit such a reference notwithstanding that the receiving party has not complied with any of the requirements of this section”.

Rule (2) provides that:

“A tribunal to which a reference is made shall within seven days after the receipt thereof give notice of such reference is the requesting party concerned”

13. The Respondent has exhibited an order dated 6th August 2015 obtained by Mr. Mokaya for the tenant. It shows that the tenant was allowed to file a reference within 14 days. There are other orders granted but they do not concern the instant application. I note that these orders were granted more than one year after the notice to terminate tenancy had taken effect. To date it is not clear whether the respondent ever filed the said reference and if it did, whether the provisions of Section 6 (2) of the Act were ever complied with.

The tribunal was required to serve the applicants with a notice of reference within seven days. It is my humble view that the order granting leave to the Respondent to file a reference out of time was irregular. It was more than one year since the notice to terminate tenancy had taken effect.

14. Section 10 of the Act, provides that;

“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 there under”.

It is my humble view that the tenancy ceased to exist on 1st June 2014 hence the continued payment of rent by the Respondent is of no consequence.

15. Having found that no tenancy relationship exists between the parties let me now turn to the statement of defence dated 17th December 2014 and filed in court in 18th December 2014. I have gone through each and every paragraph and I find that Respondent denies every allegation set out in the originating summons. Paragraph 3 of the statement of defence provides that:-

“The defendant further denies that if a notice to terminate tenancy was ever issued which is denied, the plaintiffs kept collecting the rent making them holding over tenants.”

16. I find this as a mere denial Sanjay Kapoor one of the directors of the respondent has sworn an affidavit stating that the Applicants have refused to receive the rent.

17. I have gone through the whole statement of defence and find that it amounts to a mere denial. The same does not issue triable issues. I rely on the case of **Nandlal Jivray Shah & 2 Others t/a Jivaco Agencies vs Kingfisher Properties Ltd HCCA No 35 of 2015** which quoted the case of **Jitendra Mathurda Kahabar & 2 Others vs Fish and Meat Limited [1997] eKLR** where the Court of Appeal held that:

“From what we have said above once a reference in accordance with Section 6(1) of the Act has not been made to the tribunal and a tenancy notice to terminate the tenancy has taken effect from the date specified therein in terms of Section 10 of the Act, the landlord/tenant relationship comes to an end. Thereafter, one can no longer talk of the existence of a controlled tenancy in terms of Section 2 of the Act without which the tribunal under the Act has no jurisdiction. In the instant appeal, the respondent’s failure to refer the appellant’s tenancy notice to the tribunal in accordance with section 6(1) of the Act, resulted in the cessation of its tenancy of the appellants godown/warehouse with effect from 1st June 1995 in terms of Section 10 of the Act. Henceforth, there was no controlled tenancy to talk about in regard to the said godown/warehouse and the appellants became entitled to possession of the same which the respondent did not give them. In those circumstances therefore, the appellant had to come to court to enforce the rights to their property.....”

I am guided by the above authority.

18. All in all I find merit in this application. The fact that the Respondent is still in occupation of the premises does not serve to resurrect a controlled tenancy which has already run its course and been terminated.

19. In the circumstances I grant the orders sought namely;

(a) That the defence herein filed by the respondent on 17th December 2014 be and is hereby struck out and judgment is entered in favour of the applicants as pleaded in the originating summons dated 27th November 2014.

(b) That costs of this application and of the originating summons be borne by the respondent.

It is so ordered.

Dated, signed and delivered in Nairobi on this 15TH day of NOVEMBER 2018

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiffs

.....Advocate for the Defendant

.....Court Assistant