



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELCA NO. 6 OF 2016

FAIRMONT, MOUNT KENYA SAFARI CLUB.....APPELLANT

-VERSUS-

JENNIFFER WAMBUI NYAKINYUA.....RESPONDENT

(Being an appeal from the ruling and order of the Business Premises Rent Tribunal, arising from reference number 99 of 2011 dated 11th October, 2011)

JUDGMENT

Introduction

1. On **5th August, 2011** the respondent herein filed a complaint before the Business Premises Rent Tribunal (BPRT) relating to her alleged tenancy with the appellant herein.
2. The respondent complained that the appellant was threatening to evict her without issuing a statutory notice and harrasing her to sign a contract for six months.
3. In the affidavit the respondent swore in support of the complaint, the respondent had *inter alia* deposed that she was a tenant of the appellant paying monthly rent of Kshs. 5000/-.
4. The respondent made reference to a letter sent to her by the appellant, dated 7th July, 2011, in which the appellant required her to sign a new lease agreement and buy new service items for her salon before the new lease could be executed.
5. The respondent further deposed that on 4th August, 2011, the general manager of the appellant, called her and told her to sign a contract or risk eviction on 5th August, 2011.
6. The respondent faulted the appellant for attempting to alter the terms of the lease that existed between her and itself without issuing her with a statutory notice as by law required. Consequently, the respondent urged the Tribunal to restrain the appellant from interfering with her business unless in compliance with the law.
7. Upon considering the respondent's claim, the Hon. Chairperson of the Tribunal temporarily restrained the appellant from harassing, evicting, levying distress, intimidating, closing or threatening to evict the respondent and/or in any other manner whatsoever interfering with the respondent's quiet possession and

lawful enjoyment of the suit premises pending the hearing of the complaint interparties.

8. In reply to the complaint, the appellant, through its general manager (Niall Cowan), contended that no lease agreement existed between the respondent and the appellant.

9. According to the appellant, the respondent was a mere licensee hence undeserving of the orders sought.

10. Explaining that the suit premises were in a state of utter disrepair, the deponent states that he engaged the respondent in a discussion with a view of addressing the deplorable state of the premises.

11. The deponent accuses the respondent of failing to honour her promise that she was going to undertake the required renovations. As a result, and given the fact that the respondent was not paying any rent to the appellant, he wrote to the respondent requiring her to start paying monthly rent of Kshs. 5000/-.

12. The appellant also sought to formalize its relationship with the respondent by requiring her to sign a lease agreement over the suit premises.

13. The respondent is faulted for having concealed material facts concerning the circumstances that led to issuance of the impugned letter.

14. Maintaining that there was no tenancy agreement between the respondent and the appellant, the deponent contended that the Tribunal lacked jurisdiction to hear and determine the complaint preferred before it.

15. In view of the foregoing, the appellant urged the Tribunal to dismiss the complaint with costs and to compel the respondent to hand over vacant possession of the suit premises to it.

16. Vide a further affidavit sworn on **27th September, 2011** the respondent deposed that she took over the tenancy relationship which existed between the appellant and her mother (deceased).

17. She clarifies that she was paying rent of kshs. 400/- per month and was opposed to the proposed rent of Kshs. 5000/=.

18. Concerning the contention that she was not paying rent, she denied that contention and argued that, even if that were the case, the appellant's right against her was to claim rent arrears, if any, but not to alter the terms of the tenancy without a statutory notice.

19. When the matter came up for hearing, counsel for the respondent, Mr. King'oo made reference to the respondent's averment that she was paying rent of Kshs.400/= having taken over the tenancy that existed between her mother and the appellant.

20. Maintaining that there existed a controlled tenancy between the appellant and the respondent, Mr. King'oo submitted that the attempt to compel the respondent to sign an agreement for 6 months was unlawful as it would alter the rent payable and reduce the term of the lease.

21. According to Mr. King'oo, if the appellant wanted to alter the terms of the tenancy, it had to issue the respondent with a statutory notice.

22. Counsel for the appellant M/S Muthoga, maintained that there never existed a tenancy relationship between the parties herein.

23. She reiterated the appellant's contention that the respondent was a mere licensee and contended that there is no evidence that the respondent ever paid rent since her mother passed on.

24. Concerning the receipts annexed to the respondent's further affidavit, she pointed out that they do not state the purpose of the amount indicated therein.

25. Without denying the respondent's contention that the appellant's agents broke her drier, she submitted that there is no evidence that it was agreed that the cost of the drier be converted to rent.

26. Arguing that the respondent failed to meet the terms of the license, counsel explained that the respondent was asked to convert her license to a tenancy which she refused to do.

27. In a rejoinder, the respondent's counsel submitted that the appellant did not deny that they had a manager called St. John Kelliher or denied that the receipts marked **J-1** were made by them. They also did not say what the receipts were for. After the death of the respondent's mother, they accepted rent. According to her it is not believable that the respondent could be in occupation of the suit premises as a mere licensee for 20 years.

28. Maintaining that there was a tenancy between the respondent and the appellant, he submitted that the appellant's remedy lies in **Section 7** of Cap 301.

29. In her ruling delivered on 11th October, 2011 the honourable Chairperson of the Tribunal held:-

“It is conceded by counsel for the respondent that the deceased, the mother of Jeniffer was a tenant and that hers was a controlled tenancy.

The question therefore is, did the death of Phyllis terminate the tenancy relationship?

The answer is to be found in section 4(1) which I hereby reproduce-

‘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.’

The emphasis is on the words ‘shall terminate’. It means a controlled tenancy cannot terminate on its own, not even the death of a party can terminate it. For it to be terminated, the landlord has to issue a notice under section 4(2). Therefore, the death of Phyllis did not terminate the tenancy relationship. The daughter Jennifer continued on the same terms as her deceased mother. She could not inherit a licensee relationship since her mother's relationship with the Landlord was a controlled tenancy.

Having found that there exists a tenancy relationship between the parties, the next question will be, how do you terminate or alter terms of a controlled tenancy? The answer is to be found in section 4(2). The landlord must issue a notice in the prescribed form. So how did landlord herein purport to alter terms of the tenancy?

Counsel for the respondent has conceded that they wrote a letter to the tenant asking the tenant to regularize her position. The letter is not in the prescribed form. That letter and any other letters written by the landlord contravene the provisions of section 4(2). I therefore find the complaint merited and proceed to allow the same with costs to the tenant assessed at Kshs. 25, 820/=.”

30. Aggrieved by the said decision of the Tribunal, the respondent preferred an appeal to this court on the grounds that; the learned Tribunal Chairperson erred by:-

1. Finding that there existed a controlled tenancy between the respondent and the appellant which finding was against the weight of the evidence presented before the tribunal.

2. Finding that there existed a controlled tenancy between the appellant and the respondent's mother which did not terminate following the demise of the respondent's mother yet the respondent had brought the complaint not as an administrator of the estate of her mother.

3. Failing to give due regard to the tenor of the evidence by the respondent and the judicial authorities relied on by the appellant.

4. Holding that the respondent continued on the same terms as her deceased mother whilst she did not have *locus standi* to lodge the reference before the tribunal without obtaining letters of administration of the estate of her deceased mother, Phyllis Nyakinyua.

5. Failing to properly consider the evidence on record hence arriving at erroneous finding that there was a controlled tenancy between the respondent's mother and the appellant.

6. Deciding in favour of the respondent against the weight of the evidence.

7. Failing to take full record of proceedings and disregarding and failing to give the appellant opportunity to file a supplementary affidavit thus occasioning injustice on the appellant by shutting out its evidence.

8. Exercising her discretion wrongly in computing the amount of costs awardable to the respondent thus arriving at an excessive award on the costs.

31. The appeal was disposed by way of written submissions.

32. On behalf of the appellant, it was submitted that the respondent had not paid any rent; that she obtained orders by misrepresentation and concealment of information; That she failed to consider the authorities cited by the appellant, which were binding on the Tribunal. It was further submitted that the proceedings were conducted in an unfair manner. For instance, the Tribunal is said to have erroneously indicated that the appellant had conceded that the tenancy that existed between itself and the respondent's mother was a controlled one. The Tribunal chairperson is also said to have failed to give the appellant an opportunity to respond to the issues raised in the respondent's further affidavit.

33. Contrary to the Tribunal's holding that the respondent inherited the relationship that existed between the appellant and her mother, it is submitted that since the respondent had not obtained letters of administration in respect of her mother's estate, she could only have brought the claim by her own right.

34. The Tribunal is faulted for having failed to find that it had no jurisdiction to hear and determine the dispute preferred before it.

35. The continued occupation of the suit premises of the respondent without paying rent is said to be in breach of the appellant right to own property and enjoy protection of the ownership rights under **Article 40** of the constitution.

36. The Tribunal is further faulted for having awarded excessive costs to the respondent.

37. The court is urged to allow the appeal with costs, both of the appeal and the case at the Tribunal.

38. On behalf of the respondent, it is submitted that the respondent's possession of the suit premises is not a license; that the respondent had exclusive control of the suit premises and distinction drawn between a tenancy and a license.

39. It is maintained that the respondent took over the tenancy that existed between the appellant and her mother; that because that tenancy was a controlled one, it could only be terminated in the manner provided under Cap 301, by issuing a statutory notice.

40. It is further submitted that as the person who inherited the tenancy that existed between her mother and the appellant, she had *locus standi* before the Tribunal. Further, it is submitted that the appellant did not demand that she obtains letters of administration.

41. From the conduct of the parties, it is submitted that the parties had entered into a new lease agreement on the terms that existed between the appellant and her mother.

42. Reference is made to **Section 12(1)** of Cap 301 and submitted that the Tribunal had jurisdiction to hear and determine the dispute preferred before it because it was a controlled one.

43. With regard to award of costs, it is submitted that **Section 12(1)(k)** of Cap 301 empowers the Tribunal to award costs. The costs awarded are said not to be excessive.

44. on whether the Tribunal had jurisdiction to hear and determine the dispute preferred before it, it is pointed out that the issue was not raised before the Tribunal.

45. On whether the respondent had proved existence of a tenancy agreement between herself and the respondent, it is submitted that the appellant did not dispute having received KShs. 400/- from the respondent whose purpose was not indicated.

Analysis and determination

46. From the memorandum of appeal and the submissions, the issues for determination are found to be:-

a. Whether the tribunal had jurisdiction to hear and determine the dispute preferred before it?

b. Whether the respondent had locus standi to institute a claim before the tribunal?

c. Whether the tribunal erred by finding in favour of the respondent?

d. What orders should the court make?

47. On whether the Tribunal had jurisdiction to hear and determine the dispute preferred before it, I begin by pointing out that the appellant had not challenged the tribunal's jurisdiction per se but only as it related to argument was in my view flawed because the Tribunal's jurisdiction being a creature of law, did not turn on the peculiar circumstances of the case before it.

48. In my view, irrespective of the dispute presented before it, under **Section 12(1)** of Cap 301, the Tribunal had power to, *inter alia*, determine whether or not any tenancy is a controlled one (**12(1)(a)**) and make orders, upon such terms and conditions as it thought fit, for the recovery of possession and for the payment of arrears of rent and mesne profits, which orders may be applicable to any person, whether or not he is a tenant, being at any material time in occupation of the premises comprised in a controlled tenancy.

49. Since the Tribunal by operation of law had power to hear the dispute presented before it for, among other purposes, determining whether there existed a tenancy agreement between the parties to the dispute and if found to exist, whether or not the tenancy was a controlled one; it is not right to say the Tribunal had no jurisdiction to entertain the dispute presented before it. What the appellant should be saying is that, based on the evidence adduced before it, the Tribunal should not have made the decision it made.

50. On whether the respondent had *locus standi* to bring or institute a claim before the Tribunal, there being evidence that the respondent was in use and occupation of the suit premises, I find and hold that she was entitled to bring the claim, not as a representative of the estate of her mother but as a person in use and occupation of the suit premises.

51. Did the Tribunal err in finding in favour of the respondent? My answer is, it did not. I say this based on the strength of the evidence presented before the Tribunal, namely that the respondent had been in use and occupation of the suit premises for a long period of time and the conduct of the parties over the period (respondent appears to have had exclusive use and possession of the suit premises). The only

evidence of interference of the respondent use and possession of the suit property is after there was change of management of the respondent. The conduct of the parties does not support the appellant's contention that the respondent was a mere licensee.

52. On the question of payment of rent, I note that the appellant did not controvert the explanation offered by the respondent that she continued paying rent at the rate her mother used to pay of Kshs.400/=. The respondent relied on receipts issued by the appellant which she claimed to be evidence of payment of rent. The appellant who did not deny that it issued such receipts and did not produce any evidence to show that the payment was for any other purpose or for a purpose other than the alleged payment of rent.

53. It is also noteworthy that the appellant did not deny or controvert the respondent's contention that there was an agreement between her and the appellant to convert the value of the drier which was allegedly broken by the appellant's agents into rent.

54. I find the appellant's contention that the Tribunal conducted the proceedings in an unfair and lopsided manner to be unsupported by the evidence on record. There is no evidence that what the chairman of the Tribunal recorded is different from what was urged before it. There is no evidence of any objection to the proceedings or a plea for leave to file a further affidavit which was denied.

55. With regard to the contention that by granting the orders sought by the respondent, the Tribunal denied the appellant its right to ownership and protection of the suit property, being of the view that the Tribunal did not prevent the appellant from removing the respondent from the suit property by using the right legal procedures, I find that argument to be without merit or any legal basis.

56. As to whether the Tribunal erred by accessing the costs payable to the respondent, being of the view that it was within the mandate of the Tribunal to award costs in respect of references made before it, and there being no evidence that the award was inordinately high to warrant the interference of this court, I find and hold that no case has been made for interfering with that order for costs.

57. The upshot of the foregoing is that the appeal herein has no merit. I dismiss it with costs to the respondent.

Dated, signed and delivered in Nyeri on this 25th day of January, 2017.

L N WAITHAKA

JUDGE

In the presence of:

Ms Maina h/b for Mr. Mugambi (Muthoga Gaturu) for the appellant

N/A for the respondents

Court clerk - Esther