REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC APPEAL NO. 26 OF 2016

(FORMERLY HCCA NO. 197 OF 2015)

FREDRICK MUTUA MULINGE

T/A KITUI UNIFORM……..…...…….……...……..APPELLANT

VERSUS

KITUI TEACHERS HOUSING

COOPERATIVE SOCIETY LIMITED…….RESPONDENT

(Appeal arising out of the ruling and order of the Chairman of the Business Premises Rent Tribunal Hon. Mbichi Mboroki delivered on the 10th April 2015 in Machakos BPRT Case No. 45 of 2014 between Fredrick Mutua Mulinge T/A Kitui Uniform vs. Kitui Teachers Housing Cooperative Society Ltd)

JUDGMENT

This appeal originates from a reference and an application which were filed by the appellant before the Business Premises Rent Tribunal ("the Tribunal") at Machakos relating to the appellant's tenancy on Plot No. 4096/70 ("the suit property") which was at all material times owned by the respondent. On or about 28th June 2014, the respondent served upon the appellant a notice purportedly issued under section 4(2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act ("the Act") purporting to terminate the appellant's tenancy in the suit property with effect from 1st July 2014. In response to that notice, the appellant filed a complaint against the respondent with the tribunal through a reference dated 31st July 2014 under section 12(4) of the Act. In the complaint, the appellant contended among others that the respondent had issued him with an unlawful and illegal notice of termination of tenancy of two days. The tribunal was asked to investigate the complaint and declare the termination notice dated 28th July 2014 illegal and unenforceable.

Through a ruling delivered on 23rd January 2015, the Tribunal found that upon receiving the termination notice aforesaid, the appellant did not write to the respondent under section 4(5) of the Act to notify it whether he intended to comply with the notice. Further, that the appellant did not file a reference to the tribunal under section 6 of the Act and that the notice of termination took effect under section 10 of the Act, and as such, there was no tenancy between the parties under section 10 of the Act. The appellant was dissatisfied with the said decision which was made by the tribunal on 23rd January 2015 and applied to the tribunal for a review of the same on 27th January 2015 under section 12(1)(i) of the Act. In the application of the same date, the appellant urged the tribunal to set a side its order of 23rd January 2015

and in the alternative to grant him leave to file reference out of time to the respondent's notice of termination of tenancy dated 28th June 2014. The appellant's application for review was brought on the grounds that the appellant was not given the statutory two months notice of termination of tenancy and that his failure to file a reference within time was not intentional. The application for review was heard and dismissed by the tribunal on 10th April 2015. In its ruling, the tribunal held that the issues which were raised by the appellant as grounds for review had been raised and determined by the tribunal in its ruling dated 23rd January 2015. The tribunal also made a finding that there was no error apparent on the face of its record that would have justified the review sought by the appellant.

It is against the said decision of the tribunal made on 10th April 2015 that this appeal was preferred by the appellant. In his Memorandum of Appeal dated 4th May 2015, the appellant challenged the decision of the tribunal on the following grounds:-

> 1. That the honourable Chairman of the Tribunal erred in law and in fact in failing to appreciate that the notice of termination issued by the landlord to the tenant on 28th June 2014 was defective and could not be made effective.
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> 2. That the learned Chairman of the Tribunal erred in law and in fact in giving undue weight to technicalities rather than making a determination based on the overriding interests of the parties.
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> 3. That the learned Chairman of the Tribunal erred in law and in fact in failing to consider the submissions by the appellant's Counsel.
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> 4. That the learned Chairman 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) of Cap 301 Laws of Kenya and therefore arriving at a wrong determination of the matter.
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> 5. That the learned Chairman of the Tribunal erred in law and in fact by considering irrelevant matters thereby arriving at a wrong determination on the matter.
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> 6. That the learned Chairman of the Tribunal erred in law and in fact in concluding that the reference by the appellant herein was meant to frustrate the landlord in its quest to develop the suit property.
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> 7. That the learned Chairman of the Tribunal erred in law and in fact in dismissing the reference and awarding costs of Kshs 15,000/- to the respondent herein.

The appellant is seeking the following orders:-

> a) The judgement of the Hon. Chairman of the Tribunal delivered on 10th April 2015 and the subsequent decree of the Tribunal be set aside and be substituted with an order dismissing the notice by the landlord to the tenant/appellant herein dated 28th June 2014 with costs to the appellant.
>
> b) That the costs hereof be to the appellant/tenant.

The appeal was argued by way of written submissions. The appellant in his submission dated 4th August 2016 contended that the respondent issued him with a two days notice dated 28th June 2014 to vacate the suit property which notice was to take effect on 1st July 2014. The appellant submitted that the said notice offended the provisions of section 4(2) of the Act and as such was defective. The appellant submitted that under the provisions of the Act, he was not required to file a reference to a defective notice and that owing to threats of eviction by the respondent, he filed a complaint and an application dated 31st July 2014 before the tribunal to restrain the respondent from evicting him from the suit property without

following the due process.

The appellant argued that the tribunal erred in not reaching a finding that the appellant was issued with a defective notice which he needed not to have answered to. In support of this submission, reliance was placed on the case of Munaver N. Alibhai T/A Diani Boutique and South Coast Fitness & Sports Center Ltd Mombasa CA No. 203 of 1994. The appellant argued that by stating that the appellant chose to file a complaint under section 12(4) of the Act instead of filing a reference under section 6 thereof, the Tribunal failed to appreciate the fact that the appellant had no obligation to file a reference to a defective notice by the respondent.

It was further submitted that the reasons which were advanced by the respondent for terminating the appellant's tenancy did not satisfy the requirements of the law. The appellant submitted that it was incumbent upon the respondent to satisfy the tribunal that the reasons given for termination were genuine and not malicious. The appellant urged the court to allow the appeal and set aside the tribunal's decision.

The respondent contended in its submissions dated 16th December 2016 that there was no valid and competent appeal filed against the judgement of the tribunal which was made on 23rd January 2015. The respondent submitted that the appellant failed to exercise his right of appeal against the said decision within 30 days as provided by law. The respondent submitted that the instant appeal which was filed on 4th May 2015 cannot be against the judgement of the tribunal delivered on 23rd January 2015 through which the appellant's reference was dismissed.

The respondent submitted that the termination notice dated 28th July 2014 which the appellant claimed to be defective was to take effect on 1st July 2014. However, on 1st July 2014, all tenants including the appellant were served with a letter clarifying that the effective date of termination was 1st September 2014 and not 1st July. The respondent submitted that none of the tenants faulted the contents of the said letter of 1st July 2014 and none of the tenants was called upon to vacate the premises before 1st September 2014. The respondent submitted that the appellant did not comply with the mandatory provisions of section 4(4) of the Act which required him to notify the respondent whether he intended to comply with the termination notice and as such, the said notice took effect in accordance with section 10 of the Act.

The respondent submitted further that if the appellant wished to challenge the said notice which was issued under section 4(2) of the Act he could only do so by filing a reference at the tribunal under section 6 of the Act. The respondent argued that the reference to the tribunal in this case was filed under section 12(4) of the Act. The appellant submitted that there was no competent reference before the tribunal. The respondent submitted further that the review application against the said judgement of the tribunal was properly dismissed and that the appeal before court is unmeritorious and an abuse of the court process.

With regard to the appellant's assertion that it issued a defective notice of termination, the respondent submitted that the appellant had admitted before the tribunal that on 1st July 2014, all tenants were issued with a letter amending the effective date of termination in the said notice from 1st July 2014 to 1st September 2014 and clarifying that the word "July" was a typing error. The respondent submitted that the appellant did not claim that he was required to vacate the suit property by 1st July 2014 and that he did not challenge the termination notice until late August 2014 when he filed the reference in contention. The respondent submitted that the appellant had based his reference on typographical errors which were mere procedural technicalities. The respondent submitted that the tribunal was enjoined by Article 159(2)(d) of the Constitution to ignore the said technicalities for the sake of substantive justice. In support of this submission, the court was referred to the case of Solomon Muathe Mitau & 787 others vs. Nguni Group Ranch, Nairobi Civil Application No. 250 of 2010.

The single issue which a rises for determination in this appeal is whether the tribunal was right in dismissing the appellant's application for review. The procedure for terminating of a controlled tenancy is provided for under section 4(2) of the Act as follows:-

"4. (2) A landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the tenant, any term or condition in, or right or service enjoyed by the tenant under such a tenancy, shall give notice in that behalf to the tenant in the prescribed form.

For a notice seeking termination or variation of a controlled tenancy to be effective, section 4(4) of the Act requires the same to be not less than two months unless parties agree in writing to a lesser notice period.

It is not in dispute that the notice dated 28th June 2014 issued by the respondent herein gave the appellant 2 days notice of termination of his tenancy as it was to take effect on 1st July 2014. I am in agreement with the submission by the appellant that by failing to comply with section 4(4) of the Act, the notice of termination dated 28th June 2014 was defective, null and void for all intents and purposes. This position of the law is now settled as can be seen in the cases which are cited below. In the case of Ann Mwaura & 9 others vs. David Wagatua Gitau & 2 others (2010)eKLR(Maraga J. as he then was), the court stated as follows:-

"As regards the period of notice, I concur with the Court of Appeal holding in the said case of Caledonia Supermarket Ltd vs Kenya National Examinations Council [2002] 2 EA 357 that "… failure to comply with these mandatory requirements rendered the purported notice(s) null and void and incapable of enforcement."

In the case of Manaver N. Alibhai t/a Diani Boutique vs. South Coast Fitness & Sports Centre Limited, Civil Appeal No. 203 of 1994, the court stated that:-

"The Act lays down clearly and in detail, the procedure for the termination of a controlled tenancy. Section 4(1) of the Act states in very clear language that a controlled tenancy shall not 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 specified provisions of the Act. These provisions include the giving of a notice in the prescribed form. The notice shall not take effect earlier than 2 months from the date of receipt thereof by the tenant. The notice must also specify the ground upon which termination is sought. The prescribed notice in Form A also requires the landlord to ask the tenant to notify him in writing whether or not the tenant agrees to comply with the notice."

In the case of Narshidas & Company Limited vs. Nyali Air Conditioning and Refrigeration Services Limited Civil Appeal No. 205 of 1995 the court stated as follows:-

"The Landlord and Tenant (Shops, Hotels & Catering Establishment) Act Cap 301 Laws of Kenya lays down clearly and in detail, the procedure for the termination of a controlled tenancy. Section 4(1) of the Act states in very clear language that a controlled tenancy shall not 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 specified provisions of the Act. These provisions include the giving of a notice in the prescribed form. The notice shall not take effect earlier than 2 months from the date of receipt thereof by the tenant and the notice must also specify the grounds upon which termination is sought. The prescribed notice in Form A also requires the landlord to ask the tenant to notify him in writing whether or not the tenant agrees to comply with the notice...The notice to quit purportedly relied on by the defendant in this appeal is by no means a notice which in any way complies with Form A as prescribed in the Act. Such notice can only have been given pursuant to the provisions of section 7(1)(g) of the Act. The notice to quit given or issued by the defendant was clearly void and had no effect in law on the plaintiff's tenancy and the plaintiff was under no duty, legal or otherwise to react to it."

In **Lall vs. Jeypee Investments Ltd Nairobi HCCA No. 120 of 1971 (1972) EA 512** the court stated as follows:-

"The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act is an especially

enacted piece of legislation which creates a privileged class of tenants for the purpose of affording them the protection specified by its provisions against ravages of predatory landlords. Such protection can only be fully enjoyed if the provisions of Act are observed to the letter otherwise the clearly indicated intention of the legislature would be defeated. In order to be effective in this fashion the Act must be construed strictly no matter how harsh the result... The Landlord and Tenant Act laid down a code which Parliament intended to be followed and if a landlord does not give notice of termination as prescribed, the notice will be ineffectual. This may seem a technical and unmeritorious defence, but there is no doubt that the court has no power to dispense with these time limits if the defendant chooses to object at the proper time. This is an Act which requires, insofar as the giving of the notice is concerned, absolute and complete not merely substantive compliance with its peremptory provisions."

It is clear from the foregoing authorities that the tenancy notice dated 28th June 2014 was null and void for failing to give the appellant two months' notice as required under the Act and as such was of no legal effect. Life could not be breathed into the defective notice by the letter dated 1st July 2014 through which the respondent purported to amend the effective date of the notice. The letter was not a notice in the prescribed form provided for under the Act. In view of the foregoing findings, the appellant's reference dated 31st July 2104 which was filed under section 12(4) of the Act and Notice of Motion of the same date were properly before the court and should have been allowed by the tribunal. The appellant was under no obligation to respond to a defective notice. The tribunal's finding that the said defective tenancy notice took effect under section 10 of the Act owing to the appellant's failure to respond to the same was in the circumstances erroneous. As I have stated above, a defective notice is a nullity and of no effect. See, the holding in the case of **Narshidas & Company Limited vs. Nyali Air Conditioning and Refrigeration Services Limited(supra)**.

The tribunal having dismissed the appellant's application and reference under section 12(4) of the Act aforesaid, the appellant had a right under the Act to seek a review of the tribunal's order or to appeal against the same. The appellant chose the former remedy. I am of the view that the appellant had put good grounds before the tribunal which should have justified the review of the tribunal's order of 23rd January 2015. The decision of the tribunal had an error on the face of it. The finding by the tribunal that the appellant could file a reference to a defective notice was an error on the face of the record. The finding by the tribunal that the defective notice could be amended by a letter which was not addressed to the appellant was another error on the face of the record. The same applies to the tribunal's finding that the defective notice had taken effect. I am also of the view that no good reason was given by the tribunal for refusing to grant the appellant's alternative prayer for leave to file a reference out of time having held albeit wrongfully that the notice by the respondent was valid.

In the final analysis and for the foregoing reasons, I find the appeal herein merited. I will allow the same on the following terms;

1. The ruling and orders made by the tribunal on 10th April 2015 are set aside and in substitution thereof, there shall be an order allowing the appellant's application dated 27th January 2015 in BPRT Case No. 45 of 2014 in terms of prayer 1 thereof.

2. The respondent's notice to terminate the appellant's tenancy in respect of the premises known as Plot No. 4096/70 dated 28th June 2014 is declared illegal, null and void.

3. The respondent is restrained from evicting the appellant from Plot No. 4096/70 without following the procedure laid down in the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301 Laws of Kenya ("the Act").

4. The respondent is at liberty to serve the appellant forthwith with a proper notice of termination of tenancy under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301 Laws of Kenya ("the Act").

5. Each party shall bear its own costs in BPRT Case No. 45 of 2014 and in this appeal.

Delivered and Signed at Nairobi this 26th day of July, 2017

S. OKONG'O

JUDGE

Judgment read in open court in presence of:

Mr. Murangasia h/b for Mrs. Owino for the Appellant

Mr. Musyoki h/b for Mr. Mwalimu for the Respondent

Catherine Court Assistant