



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
MILIMANI LAW COURTS
ELC. CASE NO. 535 OF 2010

NATIONAL FUND FOR THE DISABLED
OF KENYA REGISTERED TRUSTEE.....PLAINTIFF
VERSUS
ESQUIRE LIMITED.....DEFENDANT

JUDGMENT

This suit was commenced by way of a Plaint dated 11th November 2010 and filed on 12th November 2010 in which the Plaintiff sought for judgment to be entered against the Defendant as follows:

- a) The Defendant be ordered to vacate from or give vacant possession of the suit premises.
- b) Alternatively (i) the Defendant be ordered to sign, execute and return to the Plaintiff the Formal Lease Agreement forwarded to the Defendant on 16th March 2007 in order to facilitate the registration of a valid Lease Agreement. (ii) In the event of refusal by the Defendant to sign and execute the said Lease Agreement, the Registrar of the High Court be permitted or authorized and ordered to sign and execute the said Lease Agreement for and on behalf of the Defendant.
- c) The Defendant do pay to the Plaintiff the sum of Kshs. 198,764/- being the legal fees for preparation of the said Lease Agreement.
- d) Costs of this suit
- e) Interest on (c) and (d) above.

The Pleadings

In the Plaint, the Plaintiff stated that it is the duly registered proprietor of the building known as “Rehema House” on Land Reference Number 209/4540 within the city centre of Nairobi (herein referred to as the “suit premises”). The Plaintiff further stated that the Defendant has under various previous written lease agreements been a tenant of the Plaintiff occupying 982 square feet on the ground floor and 1443 square

feet on the 1st floor. It was further stated that since the expiry of those leases, their relationship has been without the benefit of a written and registered lease which has exposed both parties to undesirable uncertainties and conflicts. The Plaintiff further stated that it has been desirous of formalizing the tenancy and to that end forwarded to the Defendant Letter of Offer on 2nd September 2009 and a written lease agreement on 25th May 2010 to execute but that the Defendant has failed, refused, neglected or ignored to execute it. It stated that as a result, it has filed this suit to compel the Defendant to execute the written lease agreement or be evicted out of the suit premises.

The Defendant filed its Defence dated 30th November 2010 and filed on 2nd December 2010 in which it stated that it is a monthly tenant on the suit premises and that its tenancy is governed by the Landlord & Tenants (Shops, Hotels and Catering Establishments) Act Cap. 301 of the Laws of Kenya (herein referred to as the "Act"). The Defendant further stated that the Plaintiff should therefore have lodged its grievances with the Business Premises Rent Tribunal established under the Act. The Defendant admitted that it has refused to execute the alleged written lease agreement but stated that it is not obliged and cannot be compelled to do so. The Defendant stated further that it is a protected tenant on the suit premises so the issue of execution of a lease cannot arise in any event. The Defendant further indicated that the Plaintiff had the written lease prepared without its authority and it is therefore not liable for any legal fees incurred in that regard. On those grounds, the Defendant stated that the Plaintiff is not entitled to the orders sought in the Plaintiff and this suit should be accordingly dismissed with costs.

In response thereto, the Plaintiff filed its Reply to Defence dated 20th December 2010 and filed on 11th January 2011 in which it stated that the Defendant did not object to the preparation of the written lease agreement, that it was involved and notified at every stage and is presumed to have acquiesced to the said process. The Plaintiff further indicated that this dispute does not fall within the purview of the Act or the Business Premises Rent Tribunal. It stated that this suit is properly before this court.

The Evidence

The hearing of this suit proceeded on 13th July 2015 when both the Plaintiff's case and the Defence cases were heard. The Plaintiff had one witness namely Joyce Kitavi Mutua, its Property Manager. She reiterated the contents of the Plaintiff set out above. She added that in the absence of a written lease agreement between the Plaintiff and the Defendant, the Plaintiff is unable to enforce its rights and obligations as a landlord. She confirmed that despite the Plaintiff's best efforts to try and get the Defendant to sign a written lease agreement, the Defendant has refused to execute it. She admitted that the Plaintiff was previously involved in a case before the Business Premises Rent Tribunal with the Defendant but at that time, the dispute was in respect of a rent increase. It was her testimony that the current issue in this suit is execution of the written lease agreement. She confirmed that the Defendant pays rent on a monthly basis. She also confirmed that it is the Plaintiff that instructed its lawyers to prepare the formal written lease agreement that they forwarded to the Defendant to sign.

The Defence also called only one witness being Mr. Firoz Ali Kassam, its director and majority shareholder. Mr. Kassam's evidence was that the Defendant is a controlled or protected tenant under the provisions of the Act. He testified that he pays rent to the Plaintiff on a monthly basis by way of a bank order. It was his evidence that the Defendant has no disputes with the Plaintiff as the landlord of the suit premises. It was his further evidence that the Plaintiff applied for an increase of rent at the Business Premises Rent Tribunal and a judgment was delivered in which the rent was increased. He confirmed having received a Letter of Offer and written lease agreement from the Plaintiff and confirmed that the Defendant refused to sign them. It was his evidence that the Defendant does not want to relinquish its status of a controlled tenant because it enjoys protection under the Act. He stated that if the Defendant signs the written lease agreement forwarded by the Plaintiff, it will lose its protection under the Act. He further testified that this dispute belongs to the Business Premises Rent Tribunal and was only filed in this court because the said Tribunal was not sitting for a year.

Issues for Determination

The following are the issues arising from this suit for determination by this court:

1. Whether or not the Defendant is a controlled tenant under the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act;
2. Whether or not the Defendant should be evicted out of the suit premises;
3. In the alternative, whether or not the Defendant can be compelled to sign the written lease agreement forwarded to it by the Plaintiff;
4. Whether or not the Defendant should pay the legal fees incurred in preparation of the written lease agreement amounting to Kshs. 198,764/-;
5. Who should bear the costs of this suit.

Determination

1. Whether or not the Defendant is a controlled tenant under the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act;

The Plaintiff denies that the Defendant is a controlled tenant in the suit premises but admits that while the tenancy relationship between it and the Defendant was in the past governed by written lease agreements, the current tenancy is not in writing which led them to file this suit so as to compel the Defendant to sign a written lease agreement. The Defendant asserts that it is a controlled tenant because its tenancy in the suit premises has not been reduced in writing. In **section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act**, a controlled tenancy is defined as follows:

“means a tenancy of a shop, hotel or catering establishment-

(a) Which has not been reduced into writing; or

(b) ...

Provided that no tenancy to which the Government, the Community or a local authority is a party, whether as a landlord or as a tenant shall be a controlled tenancy.”

The same section defines the word “shop” as follows:

“means premises occupied wholly or mainly for the purposes of a retail or wholesale trade or business or for the purpose of rendering services for money or money’s worth.”

Going by the definition of the term “shop” given above, it is quite clear that the business carried on by the Defendant at the suit premises qualifies to be termed a shop within the meaning of the Act. Further, since the tenancy of the Defendant at the suit premises has not been reduced into writing, then indeed the Defendant is a controlled tenant in the suit premises. This finding that the Defendant is a controlled tenant finds further support from the fact that the parties were previously involved in a dispute on the increase of rent and they proceeded to the Business Premises Rent **Tribunal in Case No. 257 of 2005**. In that case, the Plaintiff admitted to the jurisdiction of that Tribunal which deals with controlled tenancies. In fact, under **section 12(1) of the Act**, the said Tribunal has power to determine whether or not any tenancy is a controlled tenancy. Having adjudicated over that case and delivered its judgment, the Tribunal made a determination that the Defendant is a controlled tenant within the meaning of the Act. This court accordingly finds that the Defendant is a controlled tenant within the meaning of the Act.

2. Whether or not the Defendant should be evicted out of the suit premises;

Having found that the Defendant is a controlled tenant within the meaning of the Act, the legal procedure

for terminating such a tenancy is set out in the Act. Under Section 4(1) thereof, termination of controlled tenancies can only be undertaken under the purview of the Act as follows:

“4(1) 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.

(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. ”

The Act also dictates that the notice must indicate the reasons for the proposed termination of tenancy and must also give a period of one month within which the tenant may voice his objection (if any) to the proposed termination.

This requirement is contained in Section 4(5) which provides inter alia:

“A tenancy notice shall not be effective for any of the purposes of this Act unless it specifies the grounds upon which the requesting party seeks the termination, alteration or reassessment concerned and requires the receiving party to notify the requesting party in writing, within one month after the date of receipt of the notice, whether or not he agrees to comply with the notice.”

In the present case, the Plaintiff has refused to recognize the Defendant as a controlled tenant and has therefore not served the Defendant with a notice of termination of the tenancy. This is a legal requirement and must be followed strictly. Upon receipt of such a notice, the Defendant is entitled to lodge his objection to such a notice. In this regard, Section 6 (1) of the Act is most important, as it clearly provides that:

“A receiving party who wishes to oppose a tenancy notice, and who has notified the requesting party under section (5) of this 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, whereupon such 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 conditions 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.”

From the aforesaid provision, therefore, the recipient of a tenancy notice may elect to do one of four things. Either:

- a. Do nothing;
- b. Serve an objection upon the requesting party voicing his disagreement with the changes proposed in the tenancy notice then do nothing further or;
- c. Send an objection and lodge a reference before the tribunal for a formal determination of the dispute or;
- d. Fail to send an objection but proceed to lodge a reference in the tribunal.

Where a reference is lodged, as in (c) and (d) above, the tenancy notice is suspended from taking effect pending the hearing and determination of the reference by the Tribunal. Conversely, where an objection has been served but no reference is filed, time in respect of the notice continues to run and upon the lapse

of the stipulated notice period, the changes envisioned in the notice take effect by default.

From these provisions, it is abundantly clear that the termination of a controlled tenancy is an issue within the jurisdiction of the Business Premises Rent Tribunal. This court is not clothed with such jurisdiction cannot therefore issue an order to evict the Defendant out of the suit premises.

3. In the alternative, whether or not the Defendant can be compelled to sign the written lease agreement forwarded to it by the Plaintiff;

It is a time honoured and cardinal principle in the law of contract that a party cannot be compelled to enter into a contract of any nature. This applies in this case. The Defendant cannot be compelled to sign the written lease agreement, particularly considering that he enjoys protection of a controlled tenant under the Act.

4. Whether or not the Defendant should pay the legal fees incurred in preparation of the written lease agreement amounting to Kshs. 198,764/-;

Following the finding that the Defendant cannot be compelled to sign the written lease agreement, it follows that it cannot be compelled to pay the legal fees incurred in preparing the same.

Arising from the above findings, this suit is dismissed with costs to the Defendant.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2017.

MARY M. GITUMBI

JUDGE