REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELCA NO. 24 OF 2015

REAL CONSULT AGENCIES LTD ..... APPELLANT

-VERSUS-

GERALD WACHIRA NGUTHI ..... RESPONDENT

JUDGMENT

Introduction

1. On or about 6th January, 2015 the appellant referred to the Tribunal a complaint relating to Plot No.5118/223 Naromoru (hereinafter referred to as the suit premises). The appellant complained that the respondent had unlawfully locked the suit premises thereby denying it access.

2. Upon hearing the appellant in the absence of the respondent, the court (read the Chairman BPRT) *inter alia*, ordered the respondent to open the suit premises, failing which the appellant would be entitled to break the padlock in order to gain access into the suit premises. The court also restrained the respondent from interfering with the appellant's quiet occupation of the suit premises pending the hearing and determination of the application (read the reference).

3. On 3rd March, 2015, the respondent filed a preliminary objection to the appellant's reference/complaint on the grounds that the court had no jurisdiction to hear, entertain and/or determine the dispute preferred before it and that the appellant's reference and/or complaint was incompetent, defective and an abuse of the process of the court as there existed no tenant/Landlord relationship between the appellant and the respondent.

4. Upon hearing the preliminary objection the court held:-

> **"The lease expired on 30/12/2014. The tenant, it is admitted by both parties is still in occupation of the premises. Continued occupation of the premises by a tenant does not create a periodic tenancy except where the conditions in Section 60(2) of the Land Act, 2012 are met. There is no evidence to show that after expiry of lease the landlord has accepted rent from the tenant for at least 2 months. The evidence on record shows that the landlord had not accepted any rent after expire of the lease and had not renewed the lease.**
>
> **The preliminary objection availed by the advocates of the landlord is on a pure point of law which does not require evidence to resolve."**

5. Aggrieved by the above cited decision, the appellant appealed to this court on the grounds that the

learned Hon. Chairman of the tribunal erred by:-

(i) Holding that the tenancy between it and the respondent was not a controlled one;

(ii) Finding that the tribunal had no jurisdiction to hear and determine the tenant's complaint;

(iii) Failing to find that there was no written tenancy between the appellant and the respondent from 1st January, 2015 thus making the tenancy between the parties a controlled one;

(iv) Striking out the appellant's notice of motion dated 6th January, 2015 when he had initially allowed the prayers therein sought;

(v) Condemning the appellant to pay the costs of the complaint and the notice of motion dated 6th January, 2015.

(vi) Hearing and determining a preliminary point of law on the basis of facts that could only be determined upon a full hearing of the dispute.

(vii) Failing to take due regard of the appellant's submissions and authorities.

6. For the foregoing reasons, the appellant prays that the impugned orders be set aside and substituted with an order reinstating the appellant's complaint and notice of motion dated 1st January, 2015. The appellant also prays that it be awarded the costs of the appeal.

7. This being a first appeal, this court has a duty to evaluate afresh the evidence adduced before the lower court in order to arrive at its own independent conclusion, bearing in mind that it neither saw nor heard the witnesses testify, and make allowance for that. In this regard see **Selle & Another** vs. **Associated Motor Co. Ltd & Others** (1968) E.A. 123.

8. The case presented before the Tribunal and which formed the basis of the impugned decision can be summarised as follows:-

The appellant moved the Tribunal through the notice of motion dated 6th January, 2015 seeking to compel the respondent to allow him access to the suit premises to wit shop on Plot No. 5118/223 Naromoru; unlimited access to the suit premises; an order to restrain the respondent from evicting, harassing, blocking, interferring with his right of ingress and egress or in any other manner interferring with his peaceful occupation or right of usage or running its business on the suit premises. The appellant also sought leave of the Tribunal to be depositing rent in favour of the respondent with the Tribunal, if the respondent declined to accept it. Compliance with the orders, if granted, was to be overseen by the OCS Naromoru Police Station.

9. The application was premised on the grounds that there existed a controlled tenancy between the appellant and the respondent; that the respondent had unlawfully locked thesuit premises thereby denying the appellant and its employees access. The appellant further complained that it was not served with any notice of the respondent's intended actions or intention to terminate the tenancy.

10. The respondent's actions are said to have affected the appellant who had invested heavily in the suit premises and required more time to recoup its investment.

11. The motion was supported by the affidavit of Nahashon Macharia, a Director of the appellant, wherein the appellant has, in addition to reiterating the grounds on the face of the application reiterated the contention that there existed a lease agreement between the appellant and the respondent over the suit premises (a copy of the lease is annexed to the affidavit and marked **NM-2**). It is contended that it was a term of the lease agreement that the tenancy was renewable by giving three (3) months' notice.

12. It is deposed that in accordance with the terms of the ease, the appellant issued the respondent with a three months renewal notice, which notice the respondent did not reject (a copy of the notice is annexed to the affidavit and marked **NM-4**).

13. Maintaining that the respondent had never indicated to theappellant that he was not going to renew the tenancy or issued a notice of termination to the appellant, the appellant urged the tribunal to grant it the orders sought because it had paid rent and was still desirous of doing business in the suit premises.

14. When the matter came up for hearing, in the absence of the respondent, the Tribunal certified it as urgent and ordered the respondent to give the appellant access to the suit property. It further restrained the respondent from evicting, harassing, blocking and/or in any manner whatsoever interfering with the appellant's use of the suit premises pending the hearing and determination of the application.

15. Upon being served with the application, the respondent filed the replying affidavit he swore on 15th January, 2015 wherein he admitted that there existed a lease between him and the appellant but contended that the appellant did not request for renewal of the lease within the time stipulated in the lease agreement and at all.

16. Concerning the letter annexed to the appellant's supporting affidavit showing that he was served with a notice for renewal of the lease, he contended that there was no evidence to show that the letter was posted to the address indicated therein.

17. The respondent further contended that the lease executed between him and the appellant was for a fixed period of time and that upon expiry of that time, he was entitled to repossess the suit premises.

18. In response to the issues raised in the respondent's replying affidavit, the appellant through its Director, Nahashon Macharia, filed a further affidavit in which he reiterates his contention that it issued a notice of renewal of the lease.

19. Concerning the respondent's contention that no notice of renewal of the lease was sent to him, he deposed that the notice was sent to the respondent by registered post and a copy hand delivered to him. In support of those allegations,he annexed to the affidavit a copy of the letter allegedly send to the respondent and a certificate of postage, marked **NM-2.**

20. Terming the allegations that the appellant did not serve a renewal notice false, he deposed that the letter was notreturned to him unclaimed.

21. Maintaining that the respondent did not respond to the renewal notice, he contended that at the expiry of the lease and there been no new lease executed between them, the tenancy which existed between them at the expiry of the lease was a controlled one.

22. According to the appellant in the circumstances of this case, a notice was required from the respondent before the tenancy that existed between them could be lawfully terminated.

23. When the matter came up for hearing on 3rd March, 2015, the respondent raised an objection to the application hereto on grounds that the Tribunal lacked jurisdiction to hear, entertain and/or determine the matter preferred before it. The respondent further contended that the application, reference and/or complaint was incompetent, defective and an abuse of the process of the court because no tenant/landlord relationship existed between him and the appellant.

24. The preliminary objection was disposed of by way of written submissions.

25. In the submissions filed in support of the respondent, a brief background of the dispute between the parties is given and submitted that the respondent had informed the appellant in advance that he would not renew the lease at the expiry of the tenancy because he wanted to use the premises for other purposes. He contended that when the time to hand vacant possession of the suit premises came, the

appellant refused to give him vacant possession and continued to occupy the premises illegally prompting the respondent to close the suit premises.

26. Arguing that the appellant obtained orders against it by misrepresentation of facts and non disclosure of material facts, the respondent contended that the Tribunal had nojurisdiction to hear and determine the dispute preferred before it because the tenancy that existed between him and the appellant was not a controlled one and that he did not receive the notice of renewal of lease relied on by the appellant.

27. Maintaining that the respondent had informed the appellant of his intention not to renew the lease, the respondent faults the appellant for having sent the notice for renewal of the tenancy by registered mail instead of by hand delivery.

28. Terming the notice allegedly sent to him an afterthought to justify the issuance of orders in favour of the appellant, the respondent alleges that the notice appear to have been made after the issuance of the certificate of postage. In this regard, it is contended that the letter is dated 22nd September, 2014 while the certificate of postage was issued on 23rd May, 2014.

29. Pointing out that no agreement was made pursuant to that notice and given the conduct of the respondent of locking the suit premises, it is submitted that the respondent is not agreeable to the request for renewal of the tenancy.

30. On whether the respondent has received rent, it was contended that the respondent never accepted the money sent to him by the appellant for the alleged new tenancy.

31. In view of the foregoing, it is contended that the orders issued in favour of the appellant were issued on account of misrepresentation and material non-disclosure of facts by the appellant. It is submitted that if the appellant had informed the Tribunal that the lease executed between it and the respondent had expired, the Tribunal would not have entertained the application for want of jurisdiction.

32. On behalf of the appellant, reference is made to the appellant's contention that it issued a notice of renewal of the lease and submitted that in the absence of any evidence to show that the respondent did not want to grant the appellant a new lease, the tenancy became a controlled one at the expiry of the former.

33. Terming the notice of preliminary objection misplaced, counsel for the appellant argued that the suit premises having been opened and there been no application challenging the issuance of the order pursuant to which the suit premises was opened, there was nothing on which the preliminary objection could hinge on.

34. It was further contended that the preliminary objection did not raise a pure point of law as by law required. In that regard, it was contended that ground one of the preliminary objection was premised on disputed facts. It was contended that the Tribunal could not address the question of jurisdiction without settling the issue as to whether there existed a lease between the parties to the dispute, which issues required review of facts to determine.

35. With regard to ground 2, it was submitted that the issue as to whether there existed a tenancy between the parties is a question of fact to be determined upon full hearing of theparties.

36. It is pointed out that the respondent has introduced disputed facts through its submissions, like the issue as to whether the appellant was notified of the respondent's intention not to renew the lease. It is pointed out that the issue is not covered in the respondent's replying affidavit.

37. With regard to the alleged variance between the dates in the notice and the certificate of postage of a registered mail and reference to M-pesa statement as proof of return of rent paid, it is submitted that those are issues of fact to be determined during the hearing of the application.

38. The respondent was blamed for originating the cause of action by unlawfully locking the suit

premises.

39. Upon considering the preliminary objection the honourable chairman of the Tribunal rendered himself thus:-

> "**The lease expired on 30/12/2014. The tenant, it is admitted by both parties is still in occupation of thepremises. Continued occupation of the premises by a tenant does not create a periodic tenancy except where the conditions in section 60(2) of the Land Act, 2012 are met. <u>There is no evidence to show that after expirely of lease the landlord has accepted rent from the tenant for at least 2 months. The evidence on record shows that the landlord had not accepted any rent after expirely of the lease and had not renewed the lease</u>.**
>
> **The preliminary objection availed by the advocates of the landlord is on a pure point of law which does not require evidence to resolve.**"

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

41. On behalf of the appellant, reference is made to **Section 2** of the Landlord and Tenants (Shops, Hotels and Catering establishments) Act, Cap 301 laws of Kenya which definesa controlled tenancy to include tenancy of a shop, hotel or catering establishment which has not been reduced into writing and submitted that from the special circumstances of this case there existed a controlled tenancy created by issuance of notice to renew the lease that existed between the parties, failure of the respondent to notify the appellant of his intention not to renew the lease and the respondent's receipt of rent upon expiry of the former lease.

42. Maintaining that the respondent received rent in respect of the suit property for the months of January, February and March 2015, it is submitted that there exists a controlled tenancy between the appellant and the respondent.

43. With regard to the contention that the respondent did not wish to renew the tenancy, it is submitted that no evidence capable of proving that fact was tendered by the respondent.

44. The Tribunal is faulted for having declined jurisdiction when in the first place it had entertained the dispute preferred before it.

45. Based on **Section 12** of Cap 301 Laws of Kenya, it is submitted that the Tribunal had jurisdiction to determine whether the tenancy that existed between the parties before it was a controlled one. The Tribunal is faulted for having failed to find that it had jurisdiction to determine whether the tenancy that allegedly existed between the appellant and the respondent was a controlled one.

46. Based on the cases of **<u>Mukisa Biscuit Manufacturing Co. Vs. West End Distributors Ltd (1969) E.A 696</u>** and **<u>James Ngata Kimondo vs. Major Rtd marsden Madoka & Elizabeth Mumbi Madoka (Nairobi ELC Civil Suit No. 1145 of 2014</u>**; the Tribunal is faulted for having relied on facts from one side which were disputed by the other side. For instance, it is pointed out that whereas the appellant asserted that it had paid three months rent which was acknowledged by the respondent, the respondent asserted that it had never acknowledged receipt of rent from the appellant. It is submitted that such an issue ought to have been made subject of determination at trial.

47. Striking the motion summarily is said to have been tantamount to sanctioning arbitrary deprivation of the interest that the appellant had in the suit property contrary to **Article 40 (2)** of the Constitution of Kenya, 2010.

48. Reference is made to **Section 15(2)** of Cap 301 which confers on this court the powers conferred on the Tribunal and urged the court to find that the Tribunal had jurisdictio to hear and determine the dispute preferred before it; the tenancy between the appellant and the respondent was a controlled one within the meaning of **Section 2** of Cap 301; set aside and substitute in their place an order reinstating the

reference to be heard by another member of the BPRT.

49. On behalf of the respondent, it is reiterated that the tenancy which existed between the respondent and the appellant was not a controlled one.

50. It is acknowledged that the expired lease had a renewal clause but submitted that there is no evidence that the appellant issued any renewal notice on the respondent. The notice allegedly sent to the appellant is also challenged on the ground that the notice was not proper because it was merely a request of renewal with an open to negotiation clause. It is contended that it was not an automatic renewal licence, respondent had a right to grant or reject. It is further contended that it was communicated to the appellant in time that the lease was not going to be renewed. That fact is said to be borne out by the appellant's minutes dated 5th January, 2015.

51. The notice on which the appellant claim hinges is said to be incapable of conferring a legally enforceable interest in favour of the appellant because it does not satisfy the conditions set out in **Section 3(3)** of the Law of Contract Act, Cap 23 Laws of Kenya. In this regard reference was made to the case of **Silverbird Kenya Limited vs. Junction Limited & 3 others (2013) eKLR**.

52. It is contended that the respondent did not at any time acknowledge receipt of any monies in term of rent from the appellant or acquiesced to the appellant's occupation of the suit premises after the lease expired.

53 On whether the Tribunal erred by declining jurisdiction when it had agreed to get seized of the matter and issued orders in favour of the appellant, it is submitted that the Tribunal was right in discharging the orders issued in favour of the appellant upon being informed of the true state of affairs.

54. The Tribunal is said to have properly exercised its discretion. Besides it is contended that this court lacks jurisdiction to entertain the appeal herein because what was preferred to the Tribunal was a complaint as opposed to a reference.

55. It is further submitted that the duty of the court is to give effect to the terms agreed by the parties pursuant to the agreement dated 11th March, 2012 and not to rewrite the contract for the parties. Arguing that the said relationship has come to an end the respondent contends that a new relationship cannot be imposed by one party unilaterally.

56. Terming the relationship between the parties to this dispute strained and incapable of being mended, the respondent urges the court to let the relationship come to an end.

57. In view of the foregoing, the court is urged to find that the decision of the Tribunal was justified/merited and uphold it together with the resultant orders.

58. **The issues for determination are:**

Whether this court has jurisdiction to hear and determine this appeal?

Whether the appellant has made up a case for being granted the orders sought?

59. With regard to the first issue, I begin by pointing out that this court under **Section 15** of Cap 301 has powers similar to those conferred on the Tribunal under **Section 12** of the Act, in addition to being an appellate court. The powers conferred on the Tribunal under **Section 12**, *inter alia*, include the power to determine whether or not any tenancy is a controlled one. In this regard see **Section 15** of the Act which provides as follows:-

> **"15.(1) Any party to a reference aggrieved by any determination or order of a Tribunal made therein May, within thirty days after the date of such determination or order, appeal to the High Court:**

Provided that the High Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.

(2) <u>In hearing appeals under subsection (1) of this section, the court shall have all the powers conferred on a Tribunal by or under this Act, in addition to any other powers conferred on it by or under any written law</u>."

60. As pointed out above, the respondent has challenged this court's jurisdiction to hear the appeal herein on the ground that what was preferred before the Tribunal was a complaint and not a reference.

61. With regard to that contention, I have carefully studied and analysed the law on that issue. My view of the matter is that the law does not distinguish between a reference and a complaint as contended by the respondent. In this regard see **Section 2** of the Act which defines a reference as follows:

"Reference" means a reference to a tribunal under Section 6 of this Act."

Section 6 aforementioned provides as follows:

"6. (1) A receiving party who wishes to oppose a tenancy notice, and who has notified the requesting party under section 4 (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.

(2) A Tribunal to which a reference is made shall, within seven days after the receipt thereof, give notice of such reference to the requesting party concerned."

62. In my view, the mere fact that the parties have described the dispute as a complaint or reference or have not moved the court prescribed in the Rules made under the Act, cannot prevent this court from discharging its primary duty which is to discharge justice to the parties without undue regard to procedural technicalities.

63. In view of the foregoing, I find and hold that the Tribunal had jurisdiction to determine whether the tenancy that allegedly existed between the parties to this dispute was a controlled one. In doing so, the Tribunal was duty bound to consider the evidence tendered by both sides concerningthat issue. By dint of the provisions of **Section 15** of Cap 301 aforementioned, this court similarly, has jurisdiction tohear and determine the appeal herein.

64. On whether the appellant has made up a case for being granted the orders sought, I begin by pointing out that the Hon. Chairman of the Tribunal determined the respondent's preliminary objection on the basis of want of evidence **<u>to show that after expiry of lease, the landlord had accepted rent from the tenant for at least 2 months!</u>**. Despite having determined the preliminary objection on the basis of want of evidence capable of showing receipt of rent by the respondent for at least two months, the Hon. Chairman of the Tribunal held that:-

"**The preliminary objection availed by the advocates of the landlord is on <u>a pure point of law which does not require evidence to resolve</u>."**

65. The question to ask is whether the finding of the Hon. Chairman of the Tribunal that the preliminary objection availed by the advocates for the landlord (read respondent) is reconciliable with his earlier observation that:-

"**There is no evidence to show that after expiry of lease the landlord has accepted rent from the tenant for at least 2 months. The evidence on record shows that the landlord had not accepted any rent after expirely of the lease and had not renewed the lease."**

66. My view is that the two findings cannot be reconciled. Having indicated that evidence was required to determine whether the landlord received rent after expiry of the previous lease, the Chairman ought to have determined that the preliminary objection was not proper. In this regard see **Mukisa Biscuit Manufacturing Co. Vs. West End Distributors Ltd (1969) E.A 696** where it was held:

"a preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is exercise of judicial discretion..."

67. Because in the circumstances of this case evidence was required to establish whether the respondent had received rent, which fact was disputed, it is not right to say that the preliminary objection by the respondent was on a purepoint of law which did not require evidence to resolve. In fact, the evidence on record shows that the Hon. Chairman determined that issue on the basis of disputed evidence.

68. It is also noteworthy that the appellant's claim did not hinge on the expired lease but on obligations imposed on parties pursuant to that expired lease and in particular clause 8 of the expired leased which provided:-

"8. THAT the term hereby created is renewable by giving 3 (Three) Month's notice before expirely of the term."

69. Whereas that clause did not entitle the appellant anautomatic renewal of the lease, in my view, if the appellant issued the notice for renewal of the lease which was not responded to by the respondent, that notice gave him a legitimate expectation that the respondent, would at the expiry of the lease renew it.

70. That legitimate expectation, in my view would, notwithstanding the fact that no new lease was entered into between the parties, entitle the appellant some notice time before he could reasonably be removed from the suit premises.

71. In view of the foregoing, I find and hold that the Hon. Chairman of the Tribunal erred by determining the issues preferred before him preliminarily yet evidence was required to conclusively determine them. By determining the matter preliminarily, the Hon. Chairman denied the appellant an opportunity to present evidence to prove its case against the respondent, hence denying the appellant a fair hearing as by law required.

The upshot of the foregoing is that the appellant has made up a case for being granted the orders sought in the Memorandum of appeal, which orders I hereby issue in it's favour.

Dated, signed and delivered at Nyeri this 5th day of October, 2016

L. N. WAITHAKA

JUDGE

In the presence of:

N/A for the appellant

N/A for the respondent

Court assistant - Lydia