



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELCA NO. 95 OF 2014

(Formerly Nyeri HCCA NO. 42 OF 2011)

NYAMONTHE COMPANY LIMITED APPELLANT

-VERSUS-

JAMES GACHARA RESPONDENT

(Being an Appeal from the judgment of K. Cheruiyot R. M. in

Nyeri CMCCC NO.442 OF 2010 delivered on 5th April, 2011)

JUDGMENT

1. The appellant herein instituted a suit in the lower court, to wit Nyeri CMCCC No. 442 of 2010, seeking judgment against the respondent for, *inter alia*, an order of vacant possession of a business premise occupied by the respondent in Nyeri Municipality Block 1/40. The appellant contended that despite having been served with a notice to vacate the premises, he occupied under Cap 301, he had refused to vacate the premises.
2. In his statement of defence, the respondent denied having been served with a notice to vacate the premises and explained that the only notice he was served with is the one served on him on 27th May, 2010 in respect of which he contends that he filed a reference to the Business Premises Rent Tribunal (BPRT). Explaining that the said reference is still pending; the respondent contended that the lower court had no jurisdiction to hear and determine the suit preferred before it.
3. Upon hearing the cases presented before him, the trial Magistrate (hereinafter TM) stated:-

“I have considered the evidence. The main issue for my consideration is whether the Landlord and Tenant (Shops, Hotels and Catering) Establishments Act Cap 301 is applicable to the tenancy as between the plaintiff and the defendant. The question then is: Are the described premise is a shop, a hotel or a catering establishment.

From the evidence P.W.1 the defendant is in occupation of an office in block 1/40 belonging to the plaintiff. The defendant occupies an office where he told the court he operates from as a practicing auditor.

The suit premise is therefore not a hotel, shop or catering establishment. The BPRT has no jurisdiction even though parties seem to have consented or admitted to its jurisdiction. Parties

cannot confer jurisdiction on a court or tribunal by consent.

I hold that the provisions of Cap 301 are not applicable to the suit premises or tenancy and as such any notices to terminate or alter the tenancy issued by the plaintiff are ineffective and inconsequential.

It is not an issue that the defendant has been paying rent. I find that the tenancy was not terminated by the notices to terminate issued under Cap 301.

For these reasons I find that the plaintiff is not entitled to the reliefs sought. I therefore dismiss the plaintiff's suit with costs to the defendant."

4. Aggrieved by the decision of the TM, the appellant brought this appeal challenging the said decision on the following grounds that the learned TM misdirected himself on the law regarding the notice he had issued to the respondent, its legal validity and effect under Cap 301 Laws of Kenya and that the learned TM erred by giving a judgment completely against the weight of evidence.
5. For those reasons, the appellant prays that the judgment of the lower court be set aside and be substituted with an order allowing the Lower Court suit as prayed. The appellant also prays for costs of the appeal and the suit filed before the lower court.
6. The appeal was disposed of by way of written submissions.

On behalf of the appellant, reference is made to the definition of shop in **Section 2 of Cap 301** and submitted that the TM misapprehended the law by holding that the premises held by the respondent was not governed by the provisions of Cap 301.

7. With regard to ground two in the memorandum of appeal, it is submitted that the evidence adduced before the lower court sufficed to prove the appellant's case for vacant possession of the suit property.
8. On behalf of the respondent, this court is urged to consider and evaluate the evidence adduced before the lower court and come with its own determination of the dispute lodged before the lower court.
9. Concerning the evidence adduced before the lower court, it is submitted that the notice issued to the respondent was defective in that it required him to vacate the premise within one day of service. It is pointed out that after the respondent received the defective notice he filed a fresh notice prompting the appellant to withdraw the notice he had issued and purported to issue a fresh one. The respondent contended that he was not served with the second notice. It was the respondent's case that unless and until the reference he had filed had been withdrawn, no valid notice could be served upon him.
10. Maintaining that the second notice allegedly served on him was unlawful; the respondent submits that the appellant ought to have issued him with a fresh notice after the suit was dismissed.
11. This being a first appeal, it is the duty of this court to evaluate the evidence adduced before the lower court in order to come at its independent conclusion concerning the matter but bearing in mind that it neither saw nor heard the witnesses testify. See the case of **Selle & Another vs Associated Motor Co. Ltd & Others** (1968) E.A. 123.
12. As pointed out above, the appellant's case against the respondent was for recovery of a business premise leased to the respondent. It is not in dispute that the respondent was a tenant of the appellant. It is also not in dispute that the appellant had issued the respondent with a notice to vacate the suit property but the respondent refused to vacate alleging that he had not been served with a proper notice, under **Section 4** of Cap 301 laws of Kenya.
13. Upon considering the issues raised before him, the TM dismissed the appellant's suit on the ground that the suit premises were not subject to the Provisions of the Cap 301.

Did the TM error in holding that the suit premise is not a hotel, shop or a catering establishment?

14. In answering this question, I take note of the definition of a shop in **Section 2 of Cap 301**. The said Section defines a shop as:-

“Shop” 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.
(Emphasis supplied).

Was the premise held by the respondent a shop as contemplated by **Section 2** aforementioned?

15. My answer is in the affirmative. This so because it was/is a premise occupied wholly or mainly for business for purpose of rendering services for money or money's worth. To this extend the TM erred in holding that the suit premise was not a hotel, shop or catering establishment contemplated under Cap 301 Laws of Kenya.

16. Having found the suit premises to have been a shop as contemplated under Cap 301 laws of Kenya, the other question for determination should be whether the lower court had jurisdiction to determine the dispute brought before it. This determination is important because if the lower court had no jurisdiction to determine the dispute preferred before it, then the decision made without jurisdiction is a nullity in law and thus incapable of forming any basis in law.

17. Under Cap 301, it is the tribunals established there under which have power to, inter alia, determine whether or not a tenancy is controlled. In this regard see **Section 12** of the Act which provides as follows:-

“(1) A Tribunal shall, in relation to its area of jurisdiction have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in addition to and without prejudice to the generality of the foregoing shall have power— (a) to determine whether or not any tenancy is a controlled tenancy.....

(e) to make orders, upon such terms and conditions as it thinks 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.....”

18. Under **Section 15** of the Act, 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 submission or order, appeal to the High Court.

19. In the case that is the subject of this appeal, it is discernable from the pleadings that the respondent had challenged the jurisdiction of the lower court to hear and determine the dispute brought before it on account of the reference that he had preferred to the Tribunal. The fact of existence of a reference to the Tribunal is not in dispute. It in fact formed part of the decision of the lower court that the Tribunal had no jurisdiction to hear and determine the dispute because the suit premises were not a shop.

20. My view of the matter preferred to the lower court is that it was *sub judice* the proceedings initiated before the Tribunal by the respondent. As pointed out under **Section 12(1)(a)** of Cap 301, the Tribunal had power to determine whether or not the tenancy that existed between the appellant and the respondent was a controlled one and as such falling within its mandate. The tribunal had, subject to the determination of the question as to whether or not it had jurisdiction to determine the issue preferred before it, power to grant the orders sought in the case subsequently preferred before the lower case.

21. **Section 15** of the Act provides the mechanism of dealing with the decision of the Tribunal. The law does not allow a party dissatisfied with the reference or who holds the view that the Tribunal has no power to hear and determine the dispute preferred before it to commence fresh proceedings as the

appellant did. In my view, by preferring fresh proceedings during the pendency of the reference, the appellant violated the provisions of **Section 6** of the Civil Procedure Rules.

22. Having found that the Tribunal had jurisdiction to hear and determine the issues preferred to the lower Court and that the lawful way of challenging the Tribunal's decision on the dispute preferred before it was by way of appeal to the High Court and not preferring a fresh suit, I find the suit filed at the lower court to have been an abuse of the process of the court. The lower court erred in entertaining the suit preferred before it when there was evidence that there was pending before the Tribunal an unresolved dispute concerning the suit property.

23. In view of the foregoing, although the lower court was right in dismissing the appellant's suit, having found that its decision was a nullity in law for want of jurisdiction, I set aside and substitute in its place an order for referral of the dispute to the Tribunal for hearing and determination.

Orders accordingly.

Dated, signed and delivered at Nyeri on this 16th day of September, 2015.

L N WAITHAKA

JUDGE.

In the presence of:

Mr. Karweru for the appellant

Ms Kainga h/b for Mr. Wagita for the respondent

Court assistant - Lydia