IN THE HIGH COURT OF KENYA AT NYERI

ENVIRONMENT AND LAND COURT

CIVIL APPEAL NO. 17 OF 2014

BENSON KINYUA MWANGI.....APPELLANT

VERSUS

THE INTERIM CLERK NYERI COUNTY ….....1ST RESPONDENT

THE GOVERNOR NYERI COUNTY.....….2ND RESPONDENT

(Being an appeal against the Ruling by J. Wambilyanga SRM delivered on the 7/4/2014)

J U D G M E N T

This is an appeal against the ruling of the subordinate court in which the appellant was denied the orders of injunction against the respondents in respect of "**Unity Bar** located in **L.R Aguthi/ Gatitu /667** hereinafter referred to as the suit property. The appeal arises out of notice of termination of lease issued by the 1st respondent indicating the intention to terminate lease upon expiry of the term of the lease on the 30/9/2013. The lease was for a term of 6 years from 1/10/2007.

The appellant holds the lease as an assignee in an initial lease agreement entered into between Christopher M. Gitu and the County Council of Nyeri. Jane Wangechi Muchina is the administrator of the estate of Christopher, and the County Government of Nyeri ***(hereinafter referred to as the 2nd Respondent)*** is the successor of the County Council of Nyeri. Jane assigned her interest therein to the appellant on 8/6/2012 which assignment was ratified by the 2nd respondent on February 2013 for the remainder of the term.

The appellant sets out the following grounds of appeal in his memorandum of appeal:

1. ***The learned magistrate erred in law for considering the submissions by the 1st respondent despite having been filed after the application had been argued thus denying the appellant a chance to replying to the same occasioning a miscarriage of justice.***

2. ***The learned magistrate erred in law for failing to find that the 1st respondent has no power to hold property and therefore no power to issue notice on the suit property.***

3. ***The learned magistrate erred in law for failing to find that having accepted that the amount used for renovations would act as rent waivers, the tenancy was converted to month, to month tenancy and thus the appellant ought to occupy the suit property for the period covered by the amount used on the renovation.***

4. ***The learned magistrate ruling was against the weight of evidence tendered and thus a miscarriage of justice was occasioned.***

I have perused the documents attached to the respondent's replying affidavits as well as the proceedings before the subordinate court and the following are the issues for determination.

1. ***Effect of late filing of submissions by the respondent.***

2. ***Effect of the assignment and the term.***

3. ***Validity of the termination notice issued by the county assembly and not the county government of Nyeri.***

4. ***Effect of payments made upon expiry of term.***

5. ***Whether the orders sought can issue.***

The appellant argues that at the hearing of the application in the lower court had proceeded in absence of the respondents, but the 1st respondent filed his submissions after the said hearing. He also argues that the magistrate went ahead and considered the late filed submissions in the ruling which denied the appellant an opportunity to respond, denying the right to fair hearing. I have looked at the ruling and do find that the learned magistrate stated that she had considered the submissions of the 1st respondent and the affidavits filed in the suit and found that the term of the lease was about to expire. I have also looked at the submissions of the 1st Respondent and do find that the same were a repetition of what had been deposed in the affidavits with nothing new added which the appellant would have responded to. This ground cannot stand alone, so it awaits outcome of the other points raised.

The appellant states that he has carried immense renovations in the property totaling to 703,157.00, stating that if he lost the property he would suffer immense loss. He also states that he continues to pay rent monthly at kshs 30,000.00. The 2nd respondent in reply states it allowed the appellant to carry out renovations on the suit property valued at Kshs 131,625.00 as assessed by the ministry of works superintendent and informed the appellant through the letter dated 26/3/ 2013. The appellant laments that the repairs carried therein have cost him a lot above the set limit and he ought to be allowed to remain in possession of the suit property and the same be set off with rent. In response the respondent argues that some repairs are usually carried out by the tenant and if they were not authorized he has no recourse against them. He has also indicated willingness to refund the amount owing in case there were any unutilized rents as averred in para 14 of the 1st respondents replying affidavit. If the same were to stand this is an issue which can be ascertained in the main suit at the hearing.

The council has stated that it did not have ready funds, but it can offset the funds spent so far through rents waivers. The notice of termination of the lease dated the 8th July 2013 was addressed to the assignee, having recognized the assignment before. The same notice states that the property is currently under the 1st respondent despite having sent the confirmation notice.

The 1st Respondent had intended to terminate the lease upon the effluxion of time as per his many reminders, whilst the appellant was holding a lease of an assignment for the remainder of the term. Legally speaking, when a lease expires and the Landlord continues to accept rent payment by the tenant without indication of any contrary intention, the tenancy reverts from a tenancy of a term to a tenancy at will also called a year to year tenancy. There must be proof of intention of the parties to create this kind of tenancy. The appellant argues that the tenancy automatically reverted from a term tenancy to that of year to year when the respondent accepted rent after expiry of the term. On this he relied on the decided case of **Grossvenor –Vs- Rogan- Kamper EALR (1974) 446**.

In this case there appear no such intention as the 1st respondent has already issued a termination notice whose validity the appellant challenged in a court of law before the date of expiry in a matter pending

before the Chief Magistrates Court. When a suit is pending before the court such intention as aforesaid remains to be what was intended until the contrary is found by the said court. In this case, a 3 months notice was given however the suit was filed on the 9th October 2013 after notice had expired. This court holds that where a suit is filed challenging termination, parties continue to operate under the old lease terms as time stops running until determination of the suit from which date of determination actions taken takes effect. This is called interim period and rent paid during the pendency of proceedings may also be determined by the court if there is intention to vary the rent payable during that time by the parties.

Notice of termination of tenancy has been construed liberally enough according to the Halsbury's law of England (supra) a page 181, as long as it can ascertain the premises, the person and the date for termination. If the notice refers to the terms of the lease, it has been held to be a good notice even if the terms of the lease themselves were ambiguous. Notice can be given by the successors of the tenant or landlord or executers, and even assigns of the tenants. There are tenancies for residential premises and business premises. Notice of termination of business premises must be signed by the landlord or a duly authorized agent.

The final issue raised is whether the clerk of county assembly has authority to issue termination notice. The appellant has raised this issue to question the validity of the termination notice issued by the 1st Respondent. He argues that pursuant to County Government Act No. 17 of 2012, the County Assembly does not have the power to own property. Termination notice was issued by the Clerk of the County Assembly of Nyeri, wherein the termination notice showed that the suit property was under his management, and that he intended property to be used by the honourable members. The landlord's intention to occupy the premises by himself for his own use is a very important ground for opposing the renewal of a tenancy.

I have looked at Art 62 (2) of the Constitution which provides…

> "***Public land shall vest in and be held by a county government in trust for the people resident in the county and shall be administered on their behalf by the national land commission*** …"

The National Land Commission has not donated any power in dealing with the County Land to the County Executive Committee as per Land Act No. 6 of 2012. There is a creation of a County Assembly Service Board under Sec 12 of the County Government Act but the same has no power to manage public land. This board is stated to be a body corporate with perpetual succession and a common seal, chaired by the speaker, and its secretary is stated to be the county assembly clerk in Sec 12(4).

Among its responsibilities Sec 12(7**) *is to provide services and facilities to ensure the efficient and effective functioning of the County Assembly***… and finally (e) ***performing their functions for the well-being of the members and staff of the County Assembly.....*** The termination notice issued indicate intention of possession of the suit property by the County Assembly for use by its honourable members. This I deem is in line with their responsibilities above stated in the Act. Sec 13(4) states that the Clerk of the County Assembly is an authorized officer as per the Act to carry out functions of a County Government.

The appellant questions the County Assembly's power to own property. I have already pointed out it has the capacity to sue and be sued and to own property. Since the county assets have been vested to the County Executive Committee I don't foresee impossibility of this committee vesting some of the county property to the County Assembly service board to perform its functions, which has capacity to hold property. However neither the clerk to the County Assembly nor the board has the prerequisite power to manage public land.

The Halsburys Laws of England (supra) in page 185 para 194 guides us as to the person who can issue the notice thus …."***The person in whom the legal reversion is vested, or the person whom the tenant is bound to recognize as his landlord by estoppel***".... It's also provided that a termination notice may be given by the agent of either party as long as he is an authorized for that purpose para 195. I have already

stated that the Clerk of the County Assembly is an authorized officer of the county government hence authorized to bind the county government in whatever he does but this does not include management of public land. The Constitution of Kenya is clear on the management of public land and gives the mandate to National Land Commission. The appellant thus established a prima facie case by demonstrating to the court that the notice was issued by the clerk to the county assembly who did not capacity to do so, however this is an issue that will be canvassed in the main suit.

Section 18 of the National Land Commission Act provides that The Commission shall, in consultation and cooperation with the national and county governments, establish county land management boards for purposes of managing public land. Section 18(9) provides that the boards shall subject to the physical planning and survey requirements, process applications for allocation of land, change and extension of user, subdivision of public land and renewal of leases; and perform any other functions assigned by the Commission or by any other written law. This court ultimately finds that the argument that the termination of lease was not legally done as the clerk lacked the powers to do so is sound. The implication of the above is that the National Land Commission has the power to assign the County Land management Board functions envisaged under the Act hence the board could terminate the assignment only with express permission of the commission or in exercise of powers donated by written law.

I find that the learned magistrate erred in dismissing the application as the appellant had established a prima facie case with a probability of success to warrant issuance of stay orders as required by the law. There is no dispute that the appellant has invested in renovating the property with an intention to continue with the his business and therefore this court finds that if injunction is not issued the appellant will suffer irreparable harm.

The appeal is merited and is allowed with costs to the appellant. The ruling of the learned Magistrate in CMCC No.348 of 2013 is hereby set aside and substituted with an order for injunction pending the hearing and final determination of the suit in the subordinate court.

Dated, signed and delivered at Nyeri this 16th day of October 2014.

A. OMBWAYO

JUDGE