



**Nyali Intergrated Academy v Aden (Civil Appeal 36 of 2020)
[2022] KECA 784 (KLR) (10 June 2022) (Judgment)**

Neutral citation: [2022] KECA 784 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 36 OF 2020
SG KAIRU, A MBOGHOLI-MSAGHA & P NYAMWEYA, JJA
JUNE 10, 2022**

BETWEEN

NYALI INTERGRATED ACADEMY APPELLANT

AND

ABDARAHMAN ADEN RESPONDENT

*(An appeal from the Ruling of the Environment and Land Court at Mombasa
(Yano, J.) dated 6th November 2019 in Mombasa ELC Case No. 202 of 2018)*

JUDGMENT

1. The respondent filed suit against the appellant in Mombasa ELC Case No. 202 of 2018, averring that he was the appellant's landlord under a lease over titles registered as LR 9288 Sec 1 MN and LR 9289 Sec 1 MN (CR27062 and 27063) for a period of 10 years effective 1st June 2014 paying a monthly rental of Kshs 150,000/= with a 5% annual increment. The respondent contended that the appellant had altered the structural state of the premises without his consent or authority by putting up additional structures within the property without due approval and sublet the premises to a third party, and further breached the terms of the lease by persistent failure to adhere to the terms thereof as to payment of rent.
2. The lease contained a Clause 10 that conferred upon the lessor a liberal right to terminate the tenancy and by virtue of Section 2 of the *Landlord and Tenant (Shops, Hotels & Catering Establishments) Act* Cap 301 Laws of Kenya, the tenancy was a controlled one within the meaning of the Act. Clause 6 (1) of the lease provided that in the event of either party being desirous of terminating the tenancy, notice of such termination in writing would be sent by registered post to the address stipulated in the lease.
3. On 26th January 2018, the respondent sent to the appellant a notice dated 18th January 2018 issued in accordance with Section 4 of the Act terminating the appellant's tenancy as on 1st August 2018. Upon service of the notice, the appellant was required under Section 6 of the Act to notify the respondent



in writing as to whether it intended to comply with the notice and to thereafter file a reference with the Tribunal established under the Act. The appellant failed to file any reference or comply with other requirements of Section 6, the effect being that the tenancy stood terminated on 1st August 2018. In any event, the appellant was under the lease entitled to 6 months' notice which notice was duly served upon the appellant in accordance with the agreement.

4. The respondent therefore prayed for judgment against the appellant for a declaration that the appellant's tenancy determined on 1st August 2018; vacant possession; mesne profits amounting to Kshs 182,325.15 from 1st August 2018 till vacant possession is delivered; costs and interest.
5. The appellant filed a defence to the effect that it had spent a substantial amount of money building classrooms and all other related facilities on the suit property with the consent of the respondent, hence the tenancy could not be interfered with unnecessarily. The appellant denied that the tenancy was controlled under Cap 301 as alleged by the respondent. The appellant also denied receipt of the notice and averred that even if the said notice was sent, it was of no legal consequence since the tenancy was not controlled and not subject to Cap 301.
6. The respondent later filed a Notice of Motion application dated 26th November 2018 seeking orders to strike out the appellant's defence and to enter judgment in terms of the plaint; to strike out the defence as relates to the claim for vacant possession and that judgment in respect thereof be entered for the respondent accordingly; and costs of the application. The grounds for the application were that the appellant's defence was frivolous and was otherwise an abuse of the court process; that it was in the interest of justice that judgment for vacant possession be entered in the manner prayed, so as to obviate the prospect of the respondent being unduly kept from the seat of judgment; and that the claim for vacant possession being severable, entry of judgment in respect thereof would not in any way prejudice the fair trial and disposal of the rest of the action relative to accrued mesne profits, should the court find that there was a triable issue in relation thereto. According to the respondent, the substantive issues raised in the defence were all resolved in accordance with relevant sections of Cap 301; and that the upshot was that the tenancy stood terminated as on the effective date of the notice.
7. The appellant's response was that, the averments in the defence raised bona fide issues of the nature of the tenancy and the validity of the notice of termination. That the issues need to be determined on trial hence striking out the defence and granting summary judgment would be denying the appellant the opportunity to be heard.
8. The appellant contended that the nature and enterprise of the premises involved a school and by dint of Section 2 of Cap 301, the characteristic of the tenancy disqualified it from being a controlled one. The lease being a written tenancy exceeding 5 years was excluded from being a controlled tenancy. The tenancy still subsists as the notice of termination was irregular being that it was issued under Cap 301. The respondent's case was incurably defective for non-compliance with Order 3 of the Civil Procedure Rules as no witness statement had been filed in court and hence the suit should be dismissed with costs.
9. The learned judge held that lease stipulated that the tenancy was for a term of 10 years and Clause 6 thereof provided that the tenant may carry out alterations or additions subject to the prior written consent of the landlord. Clause 10 stipulated that either party may terminate the lease by giving the other 6 months' notice or payment of rent in lieu of notice. Clause 17 provided that the tenant will yield the premises to the landlord with the fixtures and fittings thereto at the expiration or sooner determination of the lease. The learned judge agreed with the respondent's argument that even if the tenancy is deemed to be outside the purview of Cap 301, the appropriate 6 months' notice was served as per the lease agreement and it would be of no avail to the appellant that the notice appears to take the form of one issued under Cap 301. No prejudice was suffered by the appellant merely because the



notice includes within it reasons for termination as are contemplated under Section 7 of Cap 301. Even if Cap 301 was applicable, there was no dispute that the appellant never filed a reference as required upon receipt of the notice.

10. As for the appellants averment that it had spent a substantial amount of money building classrooms and related facilities on the suit property, the learned judge did not see the issue as fit for trial, pointing out that the lease agreement was clear on the terms relating to alterations and additions as well as the tenant yielding the premises at the expiration or sooner determination of the lease. The learned judge held that the defence filed does not raise any triable issues worth a trial, citing *Dephis Bank v Caneland Limited* [2014] eKLR for the proposition that where there is no plausible defence and it is plain that the defence is a sham or cannot be sustained, it would be pointless to put the parties through a trial, unnecessarily inflating costs and delaying the delivery of justice. The learned judge struck out the appellant's defence and entered judgment in terms of the plaint.
11. Dissatisfied with the ruling, the appellant filed the present appeal on the grounds that the learned judge erred in:
 - a. Failing to hold that the appellant's defence raised triable issues which would only be determined at trial.
 - b. Failing to make a determination that the notice to terminate the tenancy was defective and there was no evidence of service of the same.
 - c. Holding that it was immaterial that the termination notice is made out as being issued under Cap 301 and that no prejudice is suffered by the appellant, and that the appellant never filed a reference as required upon receipt to the termination notice.
 - d. Failing to hold that the Business Premises Tribunal did not have jurisdiction to hear the matter and hence the notice issued was defective.
 - e. Misconstruing the decision in *Dephis Bank v Caneland Limited* which led to a misdirection and an erroneous conclusion on his part.
 - f. Elevating the notice under Cap 301 to the status of a proper notice of termination of tenancy which is not controlled without hearing any of the parties.
12. In written submissions, Counsel for the appellant referred to *Kivanga Estates Limited v National Bank of Kenya Limited* [2017] eKLR where this Court observed that in determining whether to exercise its power to strike out pleadings, the court must balance the right of a party to have his/her case fully heard and determined and the inconvenience of dragging an opposing party to the seat of justice when the case brought against him/her is clearly a non-starter. Counsel also cited *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* [1980] eKLR for the proposition that in such applications, the court ought to act very cautiously and carefully consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. That the court ought not to deal with the merits of the case itself as this is the preserve of the judge at the trial and at this stage, the court is not fully informed or possessed of sufficient material to deal with the merits.
13. Counsel contended that the statement of defence raised triable issues and the learned judge deprived the appellant the opportunity to be heard. The judge went beyond making a decision of whether the case fell within the jurisdiction of summary procedure and went on to erroneously decide that the tenancy was properly terminated.



14. Regarding the nature of the tenancy, Counsel submitted that from the period of the lease, to the use of the premises as a school, the lease was excluded from being a controlled tenancy by dint of Section 2 of Cap 301. The notice was void, bad in law and defective and the appellant was not under any legal obligation to reply and act on the defective and void notice, a fact that the learned judge disregarded. Counsel relied on *Munaver N Alibhai t/a Diani Boutique v South Coast Fitness & Sports Centre Limited* [1995] eKLR where this court found that a notice of termination was void and had no effect in law as it did not comply with the statutory requirements of Cap 301.
15. Counsel for the respondent submitted that the tenancy would fall under the definition of controlled tenancy under Cap 301 as it contained a termination clause within two years of commencement without there necessarily being any breach of contract. The business carried on in the premises, being a school, would still fall under the definition of a shop as set out in Section 2 of Cap 301, as the school would be rendering services for money or money's worth. Upon service of the notice, the tenant was obliged to file a reference with the Business Premises Rent Tribunal in accordance with Section 6, failure to which Section 10 of the Act would come into play and the notice became effectual. Counsel cited *Jitendra Kanabar v Fish & Meats Limited* [1997] eKLR for the proposition that the landlord would then be at liberty to move the regular courts for an order of vacant possession, the Tribunal having been deprived of jurisdiction as the controlled tenancy stood terminated under Section 10.
16. Even if the tenancy was not controlled, the requisite notice for termination stipulated in the agreement was 6 months' notice and it would be irrelevant that the said notice appeared to be one issued under the aegis of Cap 301. The manner of service of the notice was as agreed by both parties.
17. The appellant's grievances about the improvements it alleged to have made to the premises was a non-issue because the terms of the lease, specifically Clause 6, had already anticipated and addressed such a scenario.
18. We have considered the rival submissions placed before us by the parties. Order 2 Rule 15 of the *Civil Procedure Rules* establishes the principles that guide the court in making a determination of whether or not to exercise its power to strike out pleadings in the following terms:

“ 15. (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

- a. it discloses no reasonable cause of action or defence in law; or
- b. it is scandalous, frivolous or vexatious; or
- c. it may prejudice, embarrass or delay the fair trial of the action; or
- d. it is otherwise an abuse of the process of the court....and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

19. This Court in *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* (supra) observed that when considering applications for striking out pleadings:

“ The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that 'is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits



"without discovery, without oral evidence tested by cross-examination in the ordinary way".
(Sellers, L.J. (supra))"

20. In *Kivanga Estates Limited v National Bank of Kenya Limited* (supra), this Court cautioned that the discretionary power of the court to strike out pleadings is a drastic measure in litigation that must be resorted to sparingly as a last resort where a pleading cannot be salvaged by an amendment. This Court held that:

"The rules of natural justice require that the court must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case brought against him is clearly a non-starter. The exercise of the power to strike out pleadings must balance these two rival considerations."

21. In *Co-Operative Merchant Bank Ltd. v George Fredrick Wekesa* Civil Appeal No. 54 of 1999 the Court summarised the principles guiding this Court when determining whether or not to interfere with the exercise of this discretionary power on appeal as follows:

"The power of the Court to strike out a pleading..... is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong.....Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact....A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment."

22. In the present case, the appellant's defence in summary was that the tenancy was not a controlled tenancy under Cap 301; the appellant denied receipt of the notice of termination and averred that even if such notice was sent the same would be of no legal consequence as the tenancy was not controlled and therefore not subject to the provisions of Cap 301; and the appellant averred that it had spent a substantial amount of money building classrooms and other related facilities on the suit property hence the tenancy cannot be interfered with generally.

23. In his ruling, the learned judge sufficiently dealt with the defence that the appellant had made substantial additions to the suit premises by observing that Clause 6 of the agreement dealt with this situation by stipulating that the costs of such additions would solely be upon the Tenant and subject to obtaining prior written consent from the Landlord.

24. Giving allowance to the appellant's averment that the tenancy was not a controlled tenancy and therefore not subject to the provisions of Cap 301, the learned judge concentrated on the viability of the defence that the notice was defective, void and the appellant had no legal obligation to act on the same. The learned judge cannot be faulted for holding that the appellant could not take refuge in the fact that the format appeared to take the form of a notice issued under Cap 301. Clause 10 of the agreement which provided for termination by way of 6 months' notice did not stipulate any specific format for the notice of termination.

25. The notice clearly communicated the respondent's intention to terminate the tenancy with effect from 1st August 2018. The case of *Munaver N Alibhai t/a Diani Boutique v South Coast Fitness & Sports Centre Limited* (Supra) relied on by the appellant to highlight the effect of a defective and void notice is distinguishable from the present case. In that case, it was not disputed that the tenancy was controlled and the defect in the notice of termination was that it did not conform to the prescribed format and content of notices stipulated under Section 4 of Cap 301.



26. As the notice of termination was sent to the appellant by registered post to the address in the lease, this suffices as proper service as per *Shah v Padamsbi* [1982] eKLR. Proof of such service of the notice cannot be dispensed with and usually comes in the form of a certificate of posting or equivalent documentary evidence; see *Stephen Boro Gitiba v Nicholas Ruthiru Gatoto & 2 others* [2017] eKLR. The respondent attached to his supporting affidavit what suffices as documentary evidence indicating that his advocates had sent the notice to the appellant through registered post on 26th January 2018. The only conclusion that can be made is that the tenancy was duly terminated in accordance with the terms of the agreement and the defence raised no triable issues to subject the suit to a trial. Therefore, there is no reason to disturb the ruling of the learned judge.

27. The appeal is lacking in merit and therefore dismissed with costs.

DATED AND DELIVERED AT MOMBASA THIS 10TH DAY OF JUNE 2022.

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

I certify that this is a true copy of original.

Signed

DEPUTY REGISTRAR

