IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 152 OF 2018

BETWEEN

KHALIF JELE MOHAMED.....1ST APPELLANT

SALAT W. HUSSEIN.....2ND APPELLANT

AND

THE REPUBLIC.....1ST RESPONDENT

THE CHAIRMAN BUSINESS

PREMISES RENT TRIBUNAL.....2ND RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Mombasa (Njoki Mwangi, J.) delivered on 23rd February, 2017

In

Judicial Review Application No. 23 o 2016)

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JUDGMENT OF THE COURT

1. The narrow issue in this appeal is whether a tenancy agreement in respect of a shop for a term of 6 years which contains a provision for termination of the tenancy by either party giving three months' notice, without limiting the application of such provision to within 5 years of the term of the tenancy, is a controlled tenancy within the meaning of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301 of the Laws of Kenya (the Act). The answer to that question depends on a proper interpretation of Section 2 (1)(b)(ii) of the Act.

2. That issue arises in this way: by separate Tenancy Agreements dated 22nd March 2010, Abdulkadir Hubess (*landlord*) leased commercial premises in his property known as Plot No. Msa/Block XLV/126 Bondeni Mombasa to the appellants (*the tenants*) for a term of six years from 1st April 2010 to 31 March 2016. The premises leased to the 1st appellant comprised of commercial or business premises on ground floor trading as a shop whilst the premises leased to the 2nd appellant also comprised of commercial or business premises on 1st , 2nd and 3rd floor trading as a guest house.

3. By letters dated 29th October 2015 addressed to the tenants by the landlord's advocates, the landlord informed the tenants that he did not intend to renew the leases and required them to hand over the vacant possession of the premises upon expiry of the terms of their respective leases on 31st March 2016.

4. The tenants were not amused. They filed a reference before the business premises rented tribunal in BRTC Case No.18 of 2016 complaining that the landlord had sought to unprocedurally terminate their tenancies. The tenants also filed an application before the tribunal seeking a restraining order against the landlord from interfering with their enjoyment of the premises.

5. The landlord took the view that the tribunal did not have jurisdiction over the matter because, they contended, the tenancies were not

controlled tenancies within the meaning of the Act. Accordingly, the landlord moved to the constitutional and judicial review division of the High Court at Mombasa seeking: an order of certiorari to issue to quash the proceedings before the tribunal; and an order of prohibition, prohibiting the tribunal from proceeding further with the reference.

6. The tenants, on the other hand, took the view that because the tenancy agreements contained provisions for termination by giving three months' notice in writing, in effect a break clause, the tenancy was controlled and the tribunal was therefore properly seized of the matter and had jurisdiction over the same.

7. In upholding the position advanced by the landlord, the learned Judge of the ELC had this to say in the impugned judgement:

> ***"Although counsel for the respondent and the interested parties argued that the tenancies in issue fell within the ambit of controlled tenancy, my view is to the contrary. Although clause (b) of the special conditions of the lease agreements in issue provided for termination of the tenancies by either party giving three calendar months' notice in writing, the clause did not expressly limit the duration within which notices could be issued to 5 years. The provisions of the said clause were open-ended and not in consonance with the definition of what comprises controls tenancy. It therefore follows that the ex-parte applicant could give notice to the interested parties to vacate the premises within a period of five years from the commencement of the lease agreements or after the commencement of the 6th year of the lease period. The interested parties were also at liberty to issue notices to the ex parte applicant."***

8. Having concluded that the tenancies were outside the ambit of controlled tenancies, the Judge held that the tribunal did not therefore have jurisdiction over the matter; quashed the proceedings of the tribunal and prohibited it from proceeding further with the matter.

9. The tenants were aggrieved and filed the present appeal. In their memorandum of appeal, the tenants complain that the Judge was wrong in her interpretation of what constitutes a controlled tenancy under Section 2(1) of the Act with the result that the Judge usurped the powers of the tribunal. The other complaint by the tenant is that the Judge should not have entertained the judicial review application on account of other existing statutory remedies.

10. Arguing the appeal before us, learned counsel for the tenants ***Mr. O. Siminyu*** relied on his written submissions which he highlighted; he submitted that the Judge erred in concluding that the tenancy was not controlled even though the tenancy agreements had "a drop clause" which made the tenancies controlled within the meaning of Section 2 (1)(b)(ii) of the Act; that the interpretation accorded by the Judge to Section 2 (1)(b)(ii) of the Act is clearly erroneous as there is nothing in the tenancy agreement that would have prevented a party invoking the termination clause within the first five years of the term.

11. Furthermore, counsel argued, the tribunal has jurisdiction to determine whether it has jurisdiction over a matter and the question whether the tenancies were controlled is a matter that should have been canvassed before the tribunal as it is vested with the power to do so under Section 12(1) of the Act; that as the Act provides a clear procedure that should be followed, that procedure should have been invoked. In that regard, counsel cited the decision of this Court in ***Syedna Mohamed Burhannudin Saheb vs. Mohamedally Hassanally, Civil Appeal No. 28 of 1980 (unreported)*** and the decision in ***Speaker of the National Assembly vs. James Njenga Karume [1992] eKLR***

12. Opposing the appeal, learned counsel for the landlord ***Mr. Khatib*** also relied on his written submissions which he highlighted. In counsel's view, the interpretation accorded to Section 2 (1)(b)(ii) of the Act by the learned Judge is correct as the termination clause in the tenancy agreements in the present case does not provide for termination within five years; that to construe the clauses in any other way would have been tantamount to rewriting the contract for the parties. According to counsel, the break clause was *"open ended"* and *"the parties to the contract agreed that the notices to be issued even on the sixth year."*

13. Citing the decision of the High Court in ***Republic vs. Business Premises Rent Tribunal & another Ex parte Albert Kigera Karume [2015] eKLR*** counsel submitted that being a creature of statute, the tribunal can only do those things which the statute has empowered it to do; and that it cannot exceed those powers; that the tribunal has no jurisdiction to issue injunction orders and the High Court was right in quashing the decision of the tribunal.

14. It was submitted that notwithstanding Section 12(1) of the Act, the High Court has jurisdiction to grant the remedy of judicial review in appropriate cases as it did in this case. In that regard reference was made to the decision of this Court in ***Shah Vershi Devshi vs. The Transport Licensing Board [1970] E A 631*** and a High Court decision in ***Republic vs. Chief Magistrate's Court Mombasa & another Ex Parte Bahajj & Co Ltd & another [2000] eKLR.***

15. Learned counsel for the 2nd respondent ***Mr. N. Wachira*** relied entirely on the written submissions dated 8th August 2016 that were filed in the High Court in which it was urged that the inclusion of a termination clause in the tenancy agreements which allowed termination before the lapse of 5 years for reasons other than breach rendered the tenancy to be a controlled tenancy and the tribunal has jurisdiction over the same; that based on Article 169(1)(d) of the Constitution and on the strength of the decision in ***John Mugo Ngunga vs. Margaret M. Murangi [2014] eKLR*** the tribunal has the power to grant orders of injunctions.

16. We have considered the appeal and the submissions by learned counsel. As we have already stated, the critical issue on which the appeal turns, and which we need to determine is whether the Judge correctly interpreted Section 2 (1)(b)(ii) of the Act by concluding that notwithstanding the provision for termination contained in the tenancy agreements, the tenancy was not controlled and the tribunal did not therefore have jurisdiction over the matter.

17. There is no dispute that the tenancy agreements in this matter contained a termination or break clause or what counsel referred to as a drop clause. Special condition (b) of the tenancy agreement provided thus:

"The tenancy can be terminated by either parties giving three calendar month notice in writing. AND the lessee hereby agrees to accept this lease subject to the terms and condition aforesaid." [Emphasis added]

18. According to the tenants, by virtue of Section 2 (1)(b)(ii) of the Act, the inclusion of that provision in the tenancy agreements, *ipso facto*, renders the tenancy to be a controlled tenancy and therefore subject to the jurisdiction of the tribunal. The landlord on the other hand is of the view, with which the Judge agreed, that that would have been so only if that provision expressly stipulated that the parties could terminate the tenancy within the first five years of the term.

19. Section 2 (1) of the Act provides:

"controlled tenancy" means a tenancy of a shop, hotel or catering establishment—

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

(b) which has been reduced into writing and which —

(i) is for a period not exceeding five years; or

(ii) contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or

(iii) relates to premises of a class specified under subsection (2) of this section:

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

20. For our purposes, the relevant part of that provision is Section 2 (1)(b)(ii). The Judge was of the view that, by dint of the words, "*within five years from the commencement thereof*" contained in Section 2 (1)(b)(ii), for the tenancy to be a controlled one, the break clause should have expressly provided for termination within 5 years, and since it did not, it took it outside of the purview of a controlled tenancy.

21. As reproduced above, Section 2 (1)(b)(ii) of the Act stipulates that if a tenancy agreement has provision for termination, otherwise than for breach of covenant, within 5 years from the commencement of the term, it is a controlled tenancy. In other words, if such a tenancy has provision for termination, which can be invoked at any time during the term, it is in our view a controlled tenancy.

22. In the present case, the termination clause was a blanket provision that gave liberty to the parties to terminate at any time and for any reason within the 6-year term of the tenancy. In effect, it could be invoked by either party, and either party could terminate the tenancy within the first 5 years of the term or even 5 years after commencement of the tenancy. In effect, as worded, the termination clause did not exclude termination of the tenancy within the first 5 years of the term. It was in fact permissive of termination within 5 years from the commencement of the tenancy. To that extent we are satisfied that the termination as worded brought the tenancy within the meaning of a controlled tenancy under Section 2 (1)(b)(ii) of the Act. Consequently, the tribunal was clothed with jurisdiction over the matter.

23. We are alive to the fact that the term of the lease under the tenancy agreements was 6 years from 1st April 2010 to 31st March 2016 and that by the time the landlord gave notice to the tenants on 29th October 2015 intimating that it did not intend to renew the lease, 5 years of the term had already lapsed. We do not, however, think that that is material to the interpretation of Section 2 (1)(b)(ii) of the Act with which were are concerned.

24. The Judge appears to have "read into" the termination clause a provision that either party could only terminate the tenancy after expiration of the first five years after commencement, and not earlier, when the provision does not say so. We accept that had a provision to that effect been included in the termination clause, then the tenancies would have been outside the purview of a controlled tenancy. That would be in line with the Mombasa High Court decision in ***Melas vs. New Carlton Hotel Limited [1976-80]1KLR 458***, where ***Sheridan, J.*** held that a right to serve notice to determine the term of a tenancy on the expiration of five years does not bring the tenancy within the terms of Section 2 (1)(b)(ii)of the Act.

25. In the result, we are in agreement with counsel for the appellant that there is nothing in the tenancy agreements which can be interpreted to mean that a termination notice could not be issued within the first five years by either party to the agreement. It does not matter, in our view that no such notice was in fact given by either party.

26. We note in passing, that even though the notices of 29th October 2015 issued to the tenants by the advocates for the landlord to the effect that the landlord did not wish to renew the tenancy upon expiry of the 6-year term is the basis upon which the tenants moved to the tribunal, those notices merely informed the tenants that they would be required to hand over possession of the premises on expiry of the 6 year terms. The landlord was not thereby seeking to terminate the tenancies.

27. The conclusion we have reached is sufficient to dispose of this appeal. In our judgment, the learned Judge erred in her interpretation of Section 2 (1)(b)(ii) of the Act and by concluding that the subject tenancies are not controlled tenancies. We accordingly allow the appeal and set aside the judgment of the High Court given on 23rd February 2017 in Judicial Review Case No. 23 of 2016 and substitute therefore an order dismissing the 1st respondent's application dated 9th May 2016. As regards costs, the order that commends itself is that each party shall bear its own costs of this appeal and of the proceedings in the High Court.

Dated and delivered at Mombasa this 25th day of July, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR