



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & MURGOR, J.J.A.)

CIVIL APPEAL NO. 161 OF 2002

BETWEEN

LUCY NJERI NJOROGE.....APPLICANT

AND

KAIYAHE NJOROGE.....RESPONDENT

(Appeal from the Judgment of High Court of Kenya at Nairobi (Waki J.) dated 19th April 2002)

in

H.C.C.C. No. 14 of 1998)

JUDGEMENT OF THE COURT

This appeal concerns a sale agreement between the appellant and the respondent for the sale of a half portion in Land Reference No. 4480/190 Ngong township, hereinafter referred to as ***“the Suit Property”***, which, the respondent sought to terminate under the Landlord and Tenant (Shops, Hotels, and Catering Establishments) Act (***“the Landlord and Tenant Act”***) Cap 301 Laws of Kenya.

The facts of the case as can be discerned from the record were that by an agreement dated the 7th September 1990 made between the respondent and the appellant, (who are brother and sister), the respondent agreed to sell, a half share of the suit property to the appellant for an amount of Kshs 350,000. In terms of the agreement, the appellant paid to the respondent an amount of Kshs. 210,000 which the respondent acknowledged. It was also an agreed term that the appellant would pay the balance of Kshs. 140,000 in two equal installments of Kshs. 70,000 each. No time frame was stipulated within which the balance would be paid to the respondent. Instead, the agreement specified, that in the event it failed to take effect as envisaged, all monies paid would be summarily recovered as a civil debt.

Though it was not specified in the agreement, it was the parties evidence that, the respondent had agreed to sell the half portion of the suit property to the appellant so as to repay an outstanding bank loan. The respondent contended that the appellant failed to pay the balance of the purchase price as stipulated, forcing him to repay the outstanding loan amount from the sale proceeds of another property he owned in Rongai. As a result, it was contended, the sale of the suit property to the appellant was overtaken by events.

When the balance was not forthcoming, from the appellant, sometime in 1992, the respondent filed a reference to the Business Premises Rent Tribunal,

(“the Business Premises Tribunal”) in **Reference No. 251 of 937** under the Landlord and Tenant Act to terminate a tenancy with the appellant, and to convert the deposit paid to cover rent arrears. The proceedings and decision of the Business Premises Tribunal were not made a part of this record.

With the ensuing orders, the respondent filed proceedings in the Senior Resident Magistrate’s Court at Nairobi **Civil Suit No. 7947 of 1994** where in his Complaint he stated that at all material times he was the registered proprietor of the suit property, and that the appellant was a “controlled tenant” within the meaning of the Landlord and Tenant Act. He sought orders for vacant possession by the appellant of the suit property, and for payment of all outstanding rent arrears and mesne profits from 1st June 1994 until delivery of possession of the suit property.

In her defence, the appellant stated that she was in occupation of the suit property, not as a tenant, but as a purchaser for value of one half share in terms of the sale agreement of 7th September 1990, that no tenancy relationship existed with the respondent, who as a consequence, was not entitled to claim rent from her. She also filed a counterclaim where she contended that after payment of the initial amount of Kshs.210,000, she attempted to pay to the respondent Kshs. 80,000, which the respondent refused to accept and had also since refused to transfer to her the half portion of the suit property. The appellant requested for an order of specific performance of the agreement or in the alternative a refund of the sum already paid to the respondent together with interest.

In a judgment dated 22nd December 1997, the learned trial magistrate, concluded that the Business Premises Tribunal ruling had put to rest the appellant’s contention that there was no tenancy agreement, and stated that since the appellant had failed to pay the balance soon thereafter, the agreement had been frustrated. The learned trial Magistrate ordered the vacant possession of the suit property by the appellant, and further ordered that the rent arrears owed to the respondent be offset by the deposit of Kshs. 210,000.

The appellant sought a stay of execution of the trial Magistrate’s orders in the High Court, which was granted by Githinji J (as he then was), on condition that the undisputed amount of Kshs. 80,000 be paid into an interest bearing account to be held by the parties respective advocates.

Aggrieved by the decision of the trial Magistrate, the appellant appealed to the High Court, where in a judgment dated 19th April 2002, Waki J, (as he then was) found that by failing to pay the balance of the purchase price, the respondent was forced to resort to the sale of another property to salvage the bank loan, and that it was this action which destroyed the very basis of the contract, so that the venture to which the parties committed themselves was radically different from that originally contemplated, hence frustrating the contract. As a result, the respondent was no longer bound to the contractual obligations. The learned judge also found that, though the discharge of the contract did not convert the appellant into a tenant, a tenancy nevertheless must have existed by virtue of the failure of the appellant to refute the allegation of its existence on three occasions in respect of the notice of termination of tenancy.

Being again aggrieved by the decision of the High Court, the appellant filed this appeal which is before us, as set out in the five grounds of the Amended Memorandum of Appeal in the following terms;

- i. *That the learned judge erred in law in finding that a tenancy between the appellant and the respondent was created as the contract of sale of the suit property in dispute was frustrated or rescinded;*
- ii. *That the learned judge erred in law in finding that the contract of sale of the suit property was frustrated by the failure of the appellant to pay the purchase price fully;*
- iii. *That the learned Judge erred in law in that a tenancy was created by the failure of the appellant to challenge a termination Notice or by her inability to comply with conditional orders of stay*

granted by Pall, J, as he then was;

- iv. That the learned Judge erred in law in that the existence of the tenancy was settled when there was pending in the High Court a Civil Appeal No. 113 of 1994 against the orders of the Tribunal regarding the existence of the tenancy; and
- v. That the learned judge erred in law in failing to find that the parties were bound by the contract of sale.

When the parties came before us on 6th November 2014, **Mr. Kibe Mungai** learned counsel for the appellant, contended that with respect to ground one and two, the Supplementary record of Appeal, showed that the appellant and the respondent had entered into a sale agreement for the appellant to purchase one half portion of the suit property. After payment of the initial sum of Kshs.210,000, the appellant paid the balance to the respondent's advocates which the respondent declined to accept. Counsel further contended that subsequently, the respondent issued a Notice of termination of a tenancy against the appellant in the Business Premises Tribunal and alleged that he had served the notice on the appellant. When the appellant failed to file a reference, she was adjudged an unsuccessful tenant. The respondent went on to file a suit in the High Court to obtain rent arrears and vacant possession of the suit property. No reference was made to the sale agreement in the Plaintiff. In her defence, the appellant stated that she was not a tenant but a purchaser, and pursuant to this, she filed for specific performance in her counterclaim.

In allowing the respondent's claim, the High Court without any basis found that the sale agreement had been frustrated. Which had not been pleaded, nor any evidence tendered with regard thereto. Furthermore the reason for the sale was not incorporated as a term of the agreement, and that this extrinsic argument should not have been made the basis of the finding of frustration of the agreement. Counsel submitted that the frustration of an agreement does not transform a purchaser into a tenant, particularly under the Landlord and Tenant Act. There was also no rescission of the sale agreement by the respondent.

On ground three counsel contended that, where one is not a tenant, there is no requirement to file a reference to the Business Premises Tribunal. The proceedings before the Business Premises Tribunal were null and void, and the High Court should have taken into account the existence of the sale agreement, but instead, it declared that the agreement had been frustrated. Counsel cited **Mapis (K) Ltd vs Kenya Railways Corporation Court of Appeal No. 14 of 2005 (unreported)** for the proposition that something illegal *ab initio* cannot be the basis of relief sought from the court, and the lower courts should have found that the Business Premises Tribunal did not have jurisdiction to deal with the dispute.

With respect to ground four, counsel contended that the learned judge should have found that the tribunal had no jurisdiction to determine the matter on the basis of a non-existent tenancy. That the learned judge was wrong to find that the tenancy resolved the issue since there was a sale agreement in existence; and yet a tenancy agreement and a sale agreement are mutually exclusive one from the other, and it was not possible for the appellant to have been a purchaser and a tenant all at the same time.

Under ground five, counsel contended that, in view of the existence of a valid sale agreement, both courts were duly bound to find that there was an uncontested and enforceable sale agreement in existence and ordered that all the terms be enforced, more particularly the provision concerning payment of the balance. Counsel submitted that since the sale agreement was valid, the judgment of the High Court should be set aside and instead, issue an order for specific performance. Counsel concluded by stating that the appellant resides in the suit property and does not possess any other property.

In response counsel for the respondent, learned counsel **Ms. Muigai** argued that the grounds as enumerated were erroneous given that the finding of the existence of a tenancy by the courts below was based on the determination of the Business Premises Tribunal in Reference No. 251 of 1993 against the appellant. Counsel submitted that the appellant was a controlled tenant within the meaning of the Landlord and Tenant Act, and that the reference was heard *inter partes*, where the appellant was represented by a counsel Mwangi Mbuthia. The appellant was adjudged a tenant whereupon she filed a

suit in the High Court challenging the decision which was not pursued. As a consequence, the Business Premises Tribunal orders remain valid and enforceable. Thereafter the landlord issued a notice to terminate her tenancy, and having received the notice, the appellant should have filed a reference to oppose the notice. She did not. In terms of Section 10 of the Landlord and Tenant Act, the notice took effect, and that the appellant cannot now seek the relief of the Court having ignored the notice. Counsel further submitted that the finding of a tenancy was based on three facts and not on the rescission of the sale agreement. The appellant had done nothing to extinguish the contention of the existence of a tenancy which remains the position today.

With respect to ground 2 and 5, counsel argued that once again these were erroneous as advanced. Counsel submitted that the High Court rightly made a finding that the contract was frustrated due to the bank threat to sell the property for the failure to repay the loan which was a basis of the agreement. Hence the doctrine of venture gone bad, when the respondent was forced to sell another property in order to repay the loan. In 1992, the respondent demanded rent, which showed his intention to rescind the agreement, and the appellant was made aware that the respondent was no longer interested in the sale of the property. Counsel also argued that, with regard to the payment of the balance of the purchase price this was considered by the trial court. There had been no proof of the payment as the record did not show that it had been paid. ***Kenya Airways vs Satwant Singh Flora Civil Appeal No 54 of 2005*** on the nature of the doctrine of frustration and

Gatere Njamunyu vs Joseck Njue Nyaga [1983] eKLR, where the court held that the vendor was entitled to rescind the contract following the failure by the purchaser to pay the balance of the purchase price 14 months later.

On the relief sought, counsel stated that specific performance was an equitable remedy, and the appellant must come to court with clean hands. Since there was no proof that the balance of the purchase price had been paid, she was not entitled to the benefit of this remedy. The only remedy available to the appellant was a recovery of the sums due as a civil debt. Counsel urged the Court to dismiss the appeal.

In reply Mr. Mungai, reiterated that the submissions before the lower court contradicted its findings. The notice to terminate a tenancy and the case in the Business Premises Tribunal did not seek a declaration of the existence of a tenancy, but was to seek orders for the deposit to be converted into a payment of rent. On the issue of relief, Mr. Mungai contended that the appellant was a victim who had been adjudged a tenant, yet at no stage in the proceedings was the court required to determine her relationship with the respondent. The balance of payment was paid into court and was released to the advocates of the respondent. This is evidenced by the current stay of execution order of Githinji, J (as he then was) that was conditional upon payment Kshs. 80,000, and which would not have subsisted, had the orders not been complied with. The Court should order that the appellant's name be included on the title, and the property be divided into two.

In this appeal, we must remind ourselves that this Court is not minded to interfere with the findings of fact by the first appellate court unless they are not based on evidence or are a misapprehension of the evidence or that the trial judge is shown to have acted on a wrong principle in arriving at the findings. See

Ephantus Mwangi & Another vs Duncan Mwangi Wambugu (1982-88) 1 KAR 278.

We will begin with the issue of whether the failure by the appellant to pay the full purchase price frustrated the agreement.

In this regard the learned judge found that the agreement had been frustrated when he stated,

“As stated earlier both parties knew the purpose for which Kaiyahe was selling part of his interest in the property. It was to forestall an impending assault on his property by his Bankers. But that event was not averted, thanks to non payment of the balance by Lucy. Kaiyahe had to resort to his other property to save the situation. Consequently the event destroyed the very basis of the contract so that the venture to which the parties now find themselves committed is

radically different from that originally contemplated. It was an extraneous event forced in by the Bank and so to my mind there was an element of frustration. The ends of justice demands that Kaiyahe should not be bound to the contract when the very basis for entering into it in the first place was destroyed.

From the evidence it is not in dispute that a sale agreement existed between the appellant and the respondent. It is also not in dispute that an amount of Kshs. 210,000 was paid by the appellant for the purchase of the suit property. What was in dispute was whether there had been payment of the balance of the purchase price, and if not, whether as a result of non-payment, the sale agreement was frustrated, thereby discharging the respondent from the obligations under the agreement.

With regard to whether the balance was paid, the respondent was categorical that following the initial payment, no further amounts were paid. According to the appellant, she paid a further amount of Kshs. 60,000 to the respondent's lawyers, and sought to make the final payment of Kshs. 80,000, but that the respondent had refused to receive the final payment. The learned judge found no evidence to show that any further payments were made, and concluded that the contract had been frustrated.

This leads us into the issue of whether the contract was indeed frustrated. The case of ***Davis Contractors Ltd vs Farehum U.D.C. (1956) AC 696*** sought to provide guidance on when a contract can be held to have been frustrated. In that case Lord Radcliff stated thus:-

“...frustration occurs whenever the law recognizes that, without the default of either party, a contractual obligation has become incapable of being performed because the circumstance in which the performance is called for would render it as a thing radically different from which was undertaken by the contract. “Non haec in foederi veni” It was not what I promised to do...There... must be such a change in the significance of the obligation that the thing undertaken would, if performed be a different thing from that contracted for.”

For frustration to be held to exist, there are certain factors that require to be taken into consideration. One factor is whether the frustration was caused by the default of the parties. It is trite that the frustrating event cannot arise from default of the parties. In ***Maritime National Fish vs Ocean Trawlers [1935] AC 524.***, self-induced frustration was held to have occurred where a party elected to allocate a fishing licence to three of their other trawlers leaving no licence to operate the contracted trawler.

In ***Davis Contractors Ltd vs Farehum U.D.C. (supra)***, it was stated thus,

“The doctrine of frustration is in all cases subject to the important limitation that the frustrating circumstances must arise without fault of either party, that is, the event which a party relies upon as frustrating his contract must not be self induced .” (Emphasis ours).

In ***Howard & Company (Africa) Ltd vs Burton [1964] EA 157*** this Court concurred with Lord Sumner in ***Bank Line Ltd vs Arthur Capel & Company (26) [1919] AC p. 425*** who stated,

“It is now well established that the doctrine of frustration cannot apply where the event is alleged to have frustrated the contract arises from the “act or self-election of the party” who seeks to invoke it. Reliance cannot be based on a self-induced frustration”.

In the circumstances, it is evident that, in the appellant's case, the alleged failure to complete the purchase was not capable of frustrating the contract.

On his part, the respondent sought to unilaterally repay the bank loan himself. This was found by the High Court to be the event that frustrated the contract. We consider that his actions led to frustration by self-inducement. In being responsible for the so called frustrating event, that is, self-induce frustration, the respondent was estopped from pleading frustration of the contract. It would have been different if the suit property had been destroyed, and was therefore unavailable for sale to the appellant. See ***Taylor vs Caldwell (1863) 3 B & S 826.***

The next consideration, was whether an unforeseeable event occurred leading to the frustration of the agreement. According to the judgment, it was the sale of another property by the respondent to liquidate the bank loan that was identified as the intervening event that frustrated the agreement.

In setting out what constitutes a foreseeable event in *Ewan Mckendrick's, Contract Law, Eight Edition, para 14.15 page 251*, it is stated that,

“An event is foreseeable and will prevent frustration of the contract only where it is one which ‘any person of ordinary intelligence would regard as likely to occur’ (see Treitel, 2007, para. 19-078, and contrast Hall 1984). In other words, the question would appear to be one of fact and degree and much will depend on the extent to which the event in question was foreseeable by the parties. As Rix LJ stated in

The Sea Angel [2007] EWCA Civ 547, [2007] 2 Lloyd’s Rep 517, [127], ‘the less that an event, in its type and its impact, is foreseeable, the more likely it is to be a factor which, depending on other factors in the case may lead on to frustration.’”

The respondent was the registered owner of the suit property, and his intention at all times was to rescue the suit property from repossession by the bank. It was not inconceivable that the respondent would seek alternative ways to repay the outstanding bank loan, in the event the appellant failed to pay the balance. His actions were foreseeable, and not capable of being considered an event that would have frustrated the contract.

Another consideration is whether, the intervening event resulted in something so radically different from that originally contemplated by the parties.

In *Howard & Company (Africa) Ltd vs Burton (supra)* this Court stated thus,

“We are thus left with the simple test that a situation must arise which renders performance of the contract ‘a thing radically different from that which was undertaken by the contract’: see Davis ; per Lord Radcliffe. To see if the doctrine applies, you have first to construe the contract and see whether the parties have themselves provided for the situation that has arisen. If they have provided for it then the contract must govern. There is no frustration. If they have not provided for it, then you have to compare the new situation with the old situation which they did provide. Then you must see how different it is. The fact that it has become more onerous or more expensive for one party than he thought, is not sufficient to bring about frustration. It must be positively unjust to hold the party bound.”

In the instant case, what was contemplated was the repayment of the bank loan by the respondent with the sale proceeds from the appellant. Instead, the respondent sold another property to repay the bank loan. There is no question that ultimately, the bank loan was repaid. We find that there was nothing radically different from what was originally contemplated by the parties, even if in the end, it is the respondent who repaid the loan from other sources.

From the above, given the circumstances of the case, it is evident that the prerequisites for a finding of frustration were not in existence, and accordingly, we find that, the courts below wrongly concluded that the sale contract had been frustrated by the repayment of the loan by the respondent.

A further finding of the High Court was that the respondent had rescinded the agreement. As to whether the contract had indeed been rescinded, is a matter of fact. *Black’s Law Dictionary, Ninth Edition* defines “*rescission*” as,

“A party’s unilateral unmaking of a contract, for a legally sufficient reason such as the other party’s material breach or a judgment rescinding the contract.....Rescission is generally available as a remedy or defence for a non-defaulting party and is accompanied by restitution of any partial performance, thus restoring the parties to their precontractual positions.”

In the instant case, when the appellant defaulted in the payment of the balance of the purchase price, there is no doubt that the respondent was at liberty at any time to rescind the agreement, by notifying or communicating such rescission to the appellant. In so doing, the respondent would in turn have had to return any amounts paid to him in part performance of the contract, so as to return the parties to the position they would have been prior to entering into the agreement. Needless to say, that instead of rescinding the agreement, the respondent sought to file the impugned notice of termination of a non-existent tenancy, so as to obtain vacant possession of the suit property and convert the appellant's deposit into rent, which in our view was, merely to avoid refunding the amount paid by the appellant.

As the appellant was not notified of the cancellation of the agreement and accordingly, no effort was made to refund any part of the initial payment, we consider that the agreement could not have been held to have been rescinded. See also *Kenya Airways vs Satwant Singh Flora (supra)* where the sale agreement was found to have been rescinded following the notification of the purchaser of such rescission, and the refund by the vendor of the deposit paid. As such, the learned trial magistrate, and the judge fell into error when they so found that the agreement had been rescinded by the respondent.

Having found that the agreement was neither frustrated nor rescinded, the question arises as to whether it was terminated at any time by the parties. A consideration of the sale agreement shows that it did not provide a completion date for payment of the balance. The agreement did not also specify that time for payment was to have been of essence. Though it is envisaged that contractual terms should be performed within a reasonable time, particularly having regard to the pressing need for the loan repayment without any timeframe having been specified by implication, the agreement and the obligations thereunder would remain in existence until mutually terminated.

There is nothing to show that the agreement was terminated by either the respondent or the appellant. The respondent contends that the notice of termination of a tenancy, was a notification of termination of the sale agreement. We disagree. As we will see later, the notice of termination was specific to a tenancy agreement and not the sale agreement. This being the case, we again find that, the sale agreement remained in existence, until terminated. Our reading of the record indicated that this remains the position.

The next issue for our consideration was whether a tenancy arose out of a failure of the appellant to challenge the termination notice. In determining this issue, what required to be established was the nature of the parties relationship prevailing at the time of issuance of the notice, and whether the provisions of the Landlord and Tenant Act could intervene in such relationship.

In this regard, the learned judge stated:-

“A tenancy may be created by express agreement, arise by implication or created by statute. What bothers me as it did the learned Magistrate below is the evidence that Lucy was given an opportunity to challenge the allegation that there was a tenancy between her and Kaiyahe on three occasions.” Firstly, an application was made by Kaiyahe to the Tribunal to authorize distress for rent, Secondly before this Court when Pall J gave her stay pending the hearing of her application to challenge the Tribunal orders, which conditions were not complied with. Thirdly when Kaiyahe served her with the Landlord's notice to terminate the tenancy on account of non payment of rent.”

The Landlord and Tenant Act seeks to protect tenants of specified premises from eviction or exploitation. **Section 3** of the Landlord and Tenant Act stipulates that the Business Premises Tribunal is mandated to consider matters relating to controlled tenancies within the meaning of the Act.

The Act defines a “**controlled tenancy**” as,

“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 provisions for termination, otherwise than for breach of the covenant, within five years from the commencement thereof; or*

iii. *Relates to a premises for a class specified under subsection (2) of this section...*”

In this case, no written lease agreement less than five years was produced in evidence, and there was nothing to show that the appellant agreed to enter into a tenancy arrangement with the respondent or that, she regularly paid rent to the respondent, therefore implying that a tenancy had come into existence.

It is incontrovertible that the genesis of the claim that a tenancy existed can be traced back to the notice filed by the respondent to terminate a tenancy, whereupon, the Business Premises Tribunal issued an order of termination of the tenancy, and ordered the appellant to pay Kshs.180,000 as rent arrears. Subsequently, the trial Magistrate concluded that the Business Premises Tribunal, had determined that a tenancy was created, and in entering judgment in favour of the respondent ordered the appellant to pay Kshs. 210,000 to offset the rent arrears. On its part, the High Court concluded that the discharge of the contract did of necessity convert the appellant into a tenant, but that a tenancy was created when the appellant failed on three occasions to challenge the termination notice and the contention that a tenancy existed between herself and the respondent.

What existed between the respondent and the appellant was a sale agreement of a half portion of the suit property. We have already said that this agreement was not at any time terminated by either the appellant or the respondent, so that when the respondent issued the notice of termination of a tenancy to the appellant, such notice could not have been applicable to the appellant. There was no tenancy to be terminated, and, it was improper for the respondent to have sought to obtain unlawful orders from the Business Premises Tribunal. Conversely, without a tenancy arrangement, on what basis was the appellant to respond to the impugned notice of termination, particularly as the requirements for termination are specific to the confines of the Landlord and Tenant Act? Furthermore, the dispute in the Business Premises Tribunal was not to determine the existence of a tenancy, but to terminate a non-existent tenancy. Given these circumstances, it is apparent that no purpose would have been served by requiring the appellant to respond to a notice to terminate a tenancy to which she was not a party.

Having said that, we turn to the next issue which is, whether the Business Premises Tribunal had jurisdiction to issue a notice of termination in respect of the vendor/purchaser relationship that existed between the appellant and the respondent.

In dealing with the question of jurisdiction, the oft cited case of *The Owners of Motor Vessel “Lillian S’ vs Caltex Oil Kenya Ltd [1989] KLR 1* stated thus:-

“Jurisdiction is everything. Without it a court has no power to make one step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction.”

The proceedings and ruling of the Tribunal were not made a part of this record, it is therefore not possible for us to know whether the respondent misled the Business Premises Tribunal into believing that a tenancy arrangement existed between himself and the appellant. Nevertheless, the resultant orders were for payment of rent arrears and vacant possession of the suit property by the appellant.

The Landlord and Tenant Act is unequivocal on the mandate of the Business Premises Tribunal, which is limited to controlled tenancies within the meaning of the Landlord and Tenant Act, and does not extend towards other contractual arrangements between parties. The respondent was aware that the basis of the appellant’s occupation of the suit property was a sale agreement and not a tenancy arrangement. This

being the case, she could not have been considered a controlled tenant within the meaning of the Landlord and Tenant Act, and therefore this was not the forum within which to prosecute any grievance that he may have had against the appellant. With this in mind, the only conclusion that can be drawn is that, the Business Premises Tribunal had no jurisdiction to intervene in the vendor/purchaser relationship between the parties.

From the record, the appellant, at all times sought to clarify her relationship with the respondent in the courts below, but despite this, the courts below nevertheless, erroneously reached a finding of the existence of a tenancy arrangement, based on the ruling of the Business Premises Tribunal.

It is our view that, if the trial Magistrate and the High Court had not firstly, wrongly misconceived that, the Business Premises Tribunal had already determined that a tenancy existed, secondly, made a finding that the sale agreement was frustrated, and thirdly, concluded that the appellants' failure to refute the notice of termination, brought into existence tenancy, they would have found that no tenancy existed, and that the Business Premises Tribunal had no jurisdiction to determine the matter on the basis of a non-existent tenancy. In so doing, they would have declared that the decision of the Business Premises was null and void *ab initio*, and accordingly, would have set it aside *in toto*.

Counsel for the respondent has argued that because the appellant did not challenge the orders of the Business Premises Tribunal, which were upheld by the courts below, they remained valid and are capable of enforcement.

In this regard, we are guided by the case of *Barnard vs National Dock Labour Board [1953] 1 All ER 1113* where Denning LJ stated,

“It is axiomatic that when a statutory tribunal sits to administer justice, it must act in accordance with the law. Parliament clearly so intended. If the Tribunal does not observe the law, what is to be done? The remedy of certiorari is hedged around and may not be available. Why then should the court not intervene by declaration and injunction? If it cannot so intervene it would mean that the tribunal could disregard the law.” See also *Anisminic vs Foreign Compensation Commission [1969] 1 All ER 208*.

In the case of *Choitram & Others vs Mystery Model Hair Saloon (1972)*

EA 525 Madan J, (as he then was) upheld Lord Denning in *Barnard vs National Dock Labour Board (supra)* and stated thus,

“This is a case in which in my opinion it is right and proper in the exercise of the Court’s discretion to intervene. There will be judgment for the plaintiffs for a declaration that the orders (a) and (e) made by the tribunal on 15 January 1971 without jurisdiction and are accordingly a nullity and an injunction restraining the defendants from enforcing them. On the basis of this principle, we wish to reiterate our earlier stand but since the tribunal’s orders were nonexistent, they were and still were incapable of enforcement.”

On the basis of these principles we wish to reiterate our earlier stand that since the Business Premises Tribunal orders were based on nonexistent tenancy, they were, and still are incapable of enforcement. Finally, on whether the parties were bound by the contract of sale, we have already said that the contract of sale remained in existence until determined by either of the parties, and that for this reason the sale contract remains valid and enforceable. This being the case the parties remain bound to perform their obligations thereunder. The appellant has stated that she paid an amount of Kshs. 60,000 to the respondent through her advocate and that a further amount of Kshs. 80,000 was paid into court as a condition for the grant of a stay of execution.

The agreement provided that upon payment of the balance, the appellant would be entitled to the transfer of the half portion of the suit property into her name, or in the event of non-payment, the amount was to be recovered as a civil debt.

Had the courts below considered the terms of the agreement, they would have either ordered specific performance of the contract as prayed by the appellant, or would have directed that either party was at liberty to terminate the contract, so that the appellant would be obliged to recover the sums paid as a civil debt.

In the circumstances, having regard to the existing terms of the agreement we order that:

- i. The appeal is allowed;
- ii. The ruling of the Business Premises Tribunal of 3rd January 1994 is declared to be null and void, and of no consequence;
- iii. The judgment of the High Court dated 19th April 2002 be and is hereby set aside, and substituted with an order allowing with costs the appellant's appeal against the judgment and decree of the Principal Magistrate dated 22nd December, 1997, in Principal Magistrate's Court at Milimani Commercial Courts Civil Suit No 947 of 1994;
- iv. Upon payment of the balance of the purchase price, an order of specific performance of the Sale Agreement dated 7th September 1990 shall issue;
- v. Payment of the sums mentioned in number (iv) above shall be by way of release to the respondent of funds paid to the appellant's advocate of Kshs.60,000/= and Kshs.80,000/= deposited in court as security.
- vi. Cost of the appeal to be borne by the respondent.

DATED and DELIVERED at NAIROBI this 30th day of JANUARY, 2015.

R. NAMBUYE

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JUDGE OF APPEAL

D. MUSINGA

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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

