



**Bomkam Ventures v Kirika & another (Environment and Land Appeal E016 of 2023) [2024] KEELC 13380 (KLR) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13380 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT AND LAND APPEAL E016 OF 2023  
A OMBWAYO, J  
NOVEMBER 21, 2024**

**BETWEEN**

**BOMKAM VENTURES ..... APPELLANT**

**AND**

**PETER KIMANI KIRIKA ..... 1<sup>ST</sup> RESPONDENT**

**PYRETHRUMPROCESSING CO. LTD. .... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. This is an appeal arising from the ruling of Honorable Gakuhi Chege delivered on 28th July, 2023 in Nakuru BPRT Case No. E016 of 2022.
2. The Appellant filed a Memorandum of Appeal dated 12th September, 2023 appealing against the said ruling on the following grounds: -
  1. That the Tribunal had no jurisdiction to handle this matter.
  2. That the Tribunal misdirected itself by making a finding that the Appellants and the Respondent had a controlled tenancy when the lease agreement was for a period of 20 years thereby removing it from the jurisdiction of the Tribunal.
  3. That the Tribunal erred in law and in fact in failing to appreciate that after termination of the 1stRespondent's lease, the Appellant had been granted their lease and were in actual occupation of the land.
  4. That the Tribunal erred in law and in fact in disregarding the Appellant's pleadings and evidence on the 2nd Appellant being a state corporation.
  5. That the Tribunal erred in law and in fact in failing to consider and/or judicially evaluate the totality of the evidence record, both produced by the Appellants and the Respondent herein.



6. That the Tribunal erred in law and in fact in failing to appreciate the effect of the order was to cause the Appellants to pay double rent to the Respondents herein.
  7. That the Tribunal erred in law and in fact in awarding an excessively high amount as costs to the Respondent herein.
3. The Appellants seek orders setting aside the tribunal's decision ruling and an order that the tribunal did not have jurisdiction in the matter.

## **BRIEF FACTS**

4. The 1st Appellant filed a reference dated 10th February, 2022 against the Respondents in which he sought for an injunction prohibiting the Respondents from illegally terminating the subject lease agreement and interfering in any way with the suit property. The tribunal thereafter delivered its ruling on 28th July 2022, where it found that the 1st Respondent was the lawful lessee of the suit property. The Appellant being dissatisfied with the ruling lodged the instant appeal before this court which was canvassed by way of written submissions.

## **Submissions**

5. Counsel for the Appellant filed his submissions dated 22nd October, 2024 where he gave a background of the case and identified two issues for determination. The first issue was whether the appeal is merited. On grounds 1, 2 and 4 of the memorandum of appeal he submitted that the 2nd Respondent entered into a lease agreement with the 1st Respondent. He submitted that the terms of the lease was for a period of 20 years commencing 1st April, 2018 and ending on 31st March, 2038 renewable as parties would agree. He further submitted that the 1st Respondent failed to pay the rent agreed and as a result the 2nd Respondent was forced to terminate the lease to avoid further losses. He went on to submit that the tribunal lacked the jurisdiction to hear and determine the reference since the lease was not a controlled tenancy. He relied on Section 2(1) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* and the case of Esther Adede Obura V Pandi Holdings Limited (2015) eKLR.
6. It was counsel's submission that the lease was for 20 years thus not a controlled tenancy whose period does not exceed 5 years. He added that the Landlord is a state corporation which is subject to the *State Corporations Act* Cap 446 Laws of Kenya. He also submitted that the relationship between the parties was that of a lessor and lessee and not landlord tenant. Counsel cited the case of Republic V Business Premises Rent Tribunal & Another Exparte Davis Motor Corporation Ltd (2013) eKLR which cited with approval the case of Pritam V Ratilah & Another Nairobi HCCC 1499 of 1970 (1972) EA 560.
7. On grounds 3 and 6, counsel submitted that the lease was terminated on account of breach of contract. He added that the 1st Respondent failed to pay the rental arrears as requested in the two notices dated 1st July, 2021 and 11th January, 2022 and thus the lease automatically terminated. He submitted that the 1st Appellant leased the property to the 2nd Appellant who currently collects rent from the sub lessees 3rd to 6th Appellants.
8. On the final issue of costs, he relied on the case of Orix Oil Limited V Paul Kabeu (2014) eKLR and urged the court to grant them costs of the appeal.
9. The 1st Respondent's counsel filed his submissions dated 6th November, 2024 where he identified four issues for determination. The first is whether the Honourable Tribunal had jurisdiction over the dispute in the suit property. He relied on the case of Owners of the Motor Vessel "Lillian S" V Caltex Oil (Kenya) Ltd [1989] eKLR and Section 12 (1) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* (Cap 301). He argued that the lease may have been for 20 years, but it



established a clause of termination that the same may be terminated at any time during the pendency of the lease by giving a 3-month notice to the other party. It was his argument that the said clause places the lease within the confines of a controlled tenancy.

10. It was his submission that the Appellants failed to produce the CR12 to confirm that the 2nd Respondent was a State Corporation. He also submitted that in the event the court finds the 2nd Respondent to be a state corporation, it does not exempt them from entering into a controlled tenancy. He cited the cases of *Greenstar Systems Limited V Kenyatta International Conventional Centre (KICC) and 2 others* ( (Petition E161 of 2021) [2022] KEELRC 1117 (KLR) (25 January 2022) (Judgment) and *Ubah Ismail Mohamed V Gapco Kenya Limited & Another* (2019) eKLR. He submitted that the relationship between the Respondent was that of a controlled tenancy therefore within the jurisdiction of the Business Premises Rent Tribunal.
11. The second issue was whether the tenancy relationship between the 1st and 2nd Respondents was unlawfully terminated. Counsel relied on Section 4 (1) and (2) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*. He submitted that a notice to terminate the lease ought to be made in the prescribed form and presented before the tribunal for endorsement. He argued that the 2nd Respondent served two notices upon the 1st Respondent seeking the termination of the lease agreement. He further argued that the two notices were not in the prescribed form. He submitted that the notices were therefore null and void meaning that the lease agreement was never terminated. He added that the subsequent agreements entered into by the 2nd Respondent and the Appellants are unlawful.
12. The third issue on whether the appeal is merited, he submitted that the Appellants have approached this Honourable Court seeking to benefit from their own illegal actions having failed to do their due diligence. He argued that the Appellants should not be awarded for their own indolence in failing to follow due procedure and entering into void and unlawful agreements. He submitted that the appeal is thus devoid of merit and ought to be dismissed.
13. In conclusion, he urged the court to award the 1st Respondent costs of the appeal.

### **Analysis and Determination**

14. Having considered the court record, memorandum of appeal and the issues set out by the parties' submissions, and condensed the grounds of appeal as follows:
  1. Whether the tribunal had jurisdiction to determine the suit.
  2. Whether the appeal is merited.
  3. Who should bear the cost of the appeal.
15. Being a first appeal, this court relies on a number of principles as set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123:

“...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ...”



16. On the first issue of determination, Section 12 of the Landlord and Tenant (shops, hotels and catering establishments) Act Cap 301 Laws of Kenya 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;
    - b. to determine or vary the rent to be payable in respect of any controlled tenancy, having regard to all the circumstances thereof;
    - c. to apportion the payment of rent payable under a controlled tenancy among tenants sharing the occupation of the premises comprised in the controlled tenancy;
    - d. where the rent chargeable in respect of any controlled tenancy includes a payment by way of service charge, to fix the amount of such service charge;
    - 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;
    - f. for the purpose of enabling additional buildings to be erected, to make orders permitting landlords to excise vacant land out of premises of which, but for the provisions of this Act, the landlord could have recovered possession;
    - g. where the landlord fails to carry out any repairs for which he is liable—
      - (i) to have the required repairs carried out at the cost of the landlord and, if the landlord fails to pay the cost of such repairs, to recover the cost thereof by requiring the tenant to pay rent to the Tribunal for such period as may be required to defray the cost of such repairs, and so that the receipt of the Tribunal shall be a good discharge for any rent so paid;
      - (ii) to authorize the tenant to carry out the required repairs, and to deduct the cost of such repairs from the rent payable to the landlord;
    - h. to permit the levy of distress for rent;
    - i. to vary or rescind any order made by the Tribunal under the provisions of this Act;
    - j. to administer oaths and order discovery and production of documents in like manner as in civil proceedings before the High Court, to require any landlord or tenant to disclose any information or evidence which the Tribunal considers relevant regarding rents and terms or conditions of tenancies, and to issue summons for the attendance of witnesses to give evidence or produce documents, or both, before the Tribunal;
    - k. to award costs in respect of references made to it, which costs may be exemplary costs where the Tribunal is satisfied that a reference to it is frivolous or vexatious;
    - i. to award compensation for any loss incurred by a tenant on termination of a controlled tenancy in respect of goodwill, and improvements carried out by the tenant with the landlord's consent;



- j. to require a tenant or landlord to attend before the Tribunal at a time and place specified by it, and if such tenant or landlord fails to attend, the Tribunal may investigate or determine the matter before it in the absence of such tenant or landlord;
  - k. to enter and inspect premises comprised in a controlled tenancy in respect of which a reference has been made to the Tribunal.
17. Further, Section 2 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* Chapter 301 (Laws of Kenya) defines “controlled tenancy” to mean 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;
    - iii. Relates to the premises of a class specified under sub section (2) of this section; provided that no tenancy to which the government, the community or local authority is a party whether as landlord or as tenant shall be a controlled tenancy.”
18. From the above, it is trite law that the business premises rent tribunal jurisdiction is in respect of controlled tenancies touching on tenancy of a shop, hotel or catering establishment and where the tenancy has not been reduced into writing or if it is written it is for a period no exceeding five years. In the present case, it is not in dispute that the Respondents entered into a lease agreement dated 1st April, 2018 for a period of 20 years. This court is of the view that since the lease herein is for a period of 20 years, by virtue of the provisions of Section 2(a) (i) and (ii) of Cap 301, the tenancy did not qualify to be a controlled tenancy. It therefore follows that the Business Premises Rent Tribunal lacked the jurisdiction to entertain any dispute arising out of the lease.
19. Consequently, I find that the appeal merited and the same is allowed as prayed. The upshot of the foregoing is that the ruling by the tribunal dated 28th July, 2023 is hereby set aside. Costs of the appeal to the appellant. It is so ordered.

**DATED AND DELIVERED AT NAKURU THIS 21<sup>ST</sup> DAY OF NOVEMBER 2024**

**SIGNED BY: HON. JUSTICE ANTONY O. OMBWAYO**

**THE JUDICIARY OF KENYA.**

**NAKURU ENVIRONMENT AND LAND COURT**

**ENVIRONMENT AND LAND COURT DATE: 2024-11-21 09:48:37**

