



REPUBLIC OF KENYA

BUSINESS PREMISES RENT TRIBUNAL

TRIBUNAL CASE NO. 48 OF 2013 (KISII)

ANNE ONDIEKI.....LANDLADY /APPLICANT

VERSUS

ANNE NYABOKE & OTHERS.....LANDLORD/RESPONDENT

AND

ELIJAH NYAKUNDI MOINDI.....INTERESTED PARTY

RULING

Parties and Their Representative

1. The Tenants/ Respondents, rented shop spaces on the property situated on Land Reference Kisii Municipality/Block II/66 and in particular the 1/3 portion thereof, Kisii for business (*hereinafter referred to as the "Tenants"*)
2. Learned Counsel G.M. Nyambati & Co. Advocates represent the Tenants and the Landlord. (*nyambatai@yahoo.com.com*)
3. The Applicant Anne Ondieki is the registered owner and Landlord of the suit premises rented out to the Tenant. (*hereinafter referred to as the "Landlord"*)
4. Learned Counsel Oguttu Mboya, Ochwal & Partners Advocates represent the Landlord. (*ooadvocates@gmail.com*)

The Dispute Background

5. On various dates, the Tenants filed references challenging the termination of their tenancies by the landlady on the grounds that Anne Ondieki is not the Landlady to the Tenants and that the Tenants have been paying rent to Sospeter Moindi who is the Landlord.
6. On **19th September 2014** the Tribunal gave orders in favor of the Tenants restraining the Landlord from interfering with their quiet possession until the determination of the lawful Landlord in the Environment and Land Court Civil suits and stayed the hearing of Termination Case Nos. 43-50 of 2013 pending the hearing and determination of the dispute in respect of the title to the property.
7. On **22nd October 2019** the Landlady filed an application under Certificate for this Court to set aside the order dated **19th September 2014** following the Judgement of ELC No.93 of 2014 dated **9th October 2019**.
8. On **24th October 2019**, the Court gave orders for the application dated **22nd October 2019** to be served and set a hearing date for the Application for **30th October 2019**. Due to various reasons the same was stood over to **1st March 2021**.
9. On **1st March 2021** the Court gave direction that the Applications dated **22nd October 2019** to be heard by way of written submissions on **30th March 2021**. The submissions filing was confirmed on **21st June 2021** and the matter set for ruling on **6th August 2021**.
10. The Application therefore coming for ruling is the Landlord's application dated **22nd October 2019**.

The Dispute Background

11. The Landlady acquired ownership of the suit premises through a sale agreement dated **31st January 2013** entered between herself and

Julius Moracha Matundra.

12. It is the Tenants claim that the Landlady is not the lawful owner of the suit premises as the same is being disputed in ELC 93 of 2014 and ELC 1200 of 2016 and that the latter's judgement is before the Court of Appeal in Appeal no. 226 of 2019.

13. It is the Landlord's claim that the Court's order dated **19th September 2014** has been overtaken by events as the Environment and Land Court, in ELC 93 of 2014, passed a judgement that affirms her ownership over the suit premises.

The Claim and Defence

14. The Tenants filed various references i.e No. 43-50 challenging the termination of their Tenancies by the Landlady. On 19th September 2014 the Court gave an order that the Tenants are to continue to enjoy quiet and peaceful enjoyment of the suit premises until when their tenancy will be terminated by the lawful landlord after the determination of the ELC suits and stayed termination cases 43-50 of 2013 pending the hearing and determination of the dispute in respect of the title to the property.

15. The Tenants case is that there's a pending appeal i.e Appeal no. 226 of 2019 with regards to the title of the suit property, hence it will be premature for the Court to review its order of **19th September 2014**.

16. The Landlady's case is that the Environment and Land Court through the judgement of ELC no 93 of 2014 delivered on **9th October of 2019** affirmed her ownership over the suit premises hence the order dated **19th September 2014** issued by this Court have needs to be reviewed.

Matters Not in Dispute

17. There is no dispute that there was a Tenant and Landlord relationship governed by the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Chapter 301 Laws of Kenya**. (Controlled Tenancy) and

List of Issue for Determination

18. The parties raised certain issues for determination in their submissions and the tribunal shall proceed to distill the issues discussed by parties and their counsels who submitted in writing as below:

a) Whether the orders dated **19th September 2014** have been overtaken by events?

b) Whether the outcome of the decision in ELC 93 of 2014 warrants a review of the order dated **19th September 2014**?

Analysis and Findings

Whether the orders dated 19th September 2014 have been overtaken by events?

19. In their submissions the Tenants point out that it will serve the interest of justice therefore that by the doctrine of pendency and the provisions of **Section 6** of the **Civil Procedure Act sub-judice** this proceeding be stayed pending the determination of Kisumu Civil Appeal no. 226 of 2019.

20. Section 6 of the Civil Procedure Act provides as follows; **"No Court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or other Court having jurisdiction in Kenya to grant the relief claimed"**

21. The Supreme Court in **Advisory Opinion Reference No. 1 of 2017, Kenya National Commission on Human Rights vs Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR** handled the issue of sub-judice. The Court observed as follows;

[67] *The term 'sub-judice' is defined in Black's Law Dictionary 9th Edition as: "Before the Court or Judge for determination." The purpose of sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed between later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.*

22. On the **19th of September 2014** this Court issued an order which saw the References before the Tribunal stayed pending the determination of the ownership of the suit premises by the Court with the relevant jurisdiction. This led to ELC 93 of 2014 where the legality of the title held by the Landlady was challenged and the Court ruled in a favor of the Landlady via a judgement dated **9th October 2019**, where the challenge to her title was dismissed and the court confirmed that she had acquired legal title.

23. The other matter before the Environment and Land Court was ELC 1200 of 2016 in which the Landlady was neither a party nor was her title being challenged. The subject matter of the above case was the inclusion of the late Siro Mogaka as co-owner of the land parcel Kisii Town/Block II/66.

24. The matter that lies before the Court of Appeal under Appeal no. 226 of 2019, is the judgement of the Court given in **ELC 1200 of 2016**. The Tenants claim that as a result of the same appeal the stay of proceedings in this tribunal should be upheld by dint of **Section 6 of the Civil Procedure Act**.

25. This argument cannot be sustained because;

1. The circumstances do not fall under the umbrella of sub-judice. The matter before the court of appeal and that before this Court are two distinct matters. The matter in Appeal no. 226 of 2019 is on the inclusion of Siro Mogaka as a co-owner and the matter before this Court is the termination of tenancy between the Landlady and the Tenants. The Landlady's ownership over the suit premises was affirmed in ELC 93 of 2014 which has not been appealed. In the case of **Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR**, the learned judge made reference to JR No. 146 of 2020 which stated "... sub-judice would only apply if there is identity of the matter in issue, meaning thereby, that the whole of the subject-matter in both the proceedings is identical." As discussed it is clear that not only the subject matter but also the parties in the two suits are different and will not affect the decision of the Termination proceedings before this court.

Whether the outcome of the decision in ELC 93 of 2014 warrants a review of the order dated 19th September 2014?

28. The Court gave the order on **19th September 2014** on the wisdom that it is not clothed with the jurisdiction under the **Landlord and Tenant (shops, Hotels and Catering establishments) Act, Cap 301** to determine the ownership of the suit premises. The same was filed in the Environment and Land Court, ELC 93 of 2014 and through a Judgement dated **9th October 2019**, the court found the Landlady to have legally acquired title over the suit premises hence confirming her ownership.

29. The abovementioned judgement changes the circumstances under which the order of **19th September 2014**, as the ownership of the suit premises by the landlady has been confirmed by the same and is no longer in dispute. This warrants a review of the order of **19th September 2014** which stayed the Termination case nos. 43-50 of 2013 pending hearing and determination of the dispute in respect to the title of the property.

30. Due to the change in circumstances it is within the Landlady's right to ask this court to review the orders of **19th September 2014** as her ownership over the property is no longer in doubt.

ORDERS

For the reasons given above I ORDER as follows that:

- a) The Tribunal's order dated **19th September 2014** is hereby set aside and all consequential orders therefrom.
- b) Parties to fix Termination references no. 43-50 of 2013 for hearing on merits on the next session in Kisii.
- c) Costs in cause.

ANDREW MUMA

VICE CHAIR

BUSINESS PREMISES RENT TRIBUNAL

Ruling dated, signed and delivered this **10th** day of **August 2021** in the presence of **Mulisa** for the **Landlady/Applicant** and **Okemwa Steve** holding brief for **Nyambali** for the **Tenant**.

ANDREW MUMA

VICE CHAIR

BUSINESS PREMISES RENT TRIBUNAL