IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO.35 OF 2015

BETWEEN

NANDLAL JIVRAJ SHAH

VIMAL NANDLAL SHAH

MEHUL NANDLAL SHAH (all trading as

JIVACO AGENCIES……APPELLANTS

AND

KINGFISHER PROPERTIES LIMITED……..… RESPONDENT

(Being an appeal from a Ruling of the High Court of Kenya at Mombasa (Kasango, J.) dated 23rd August, 2013 and 3rd March, 2015

in

***H.C.C.C. No. 6 of 2011*)**

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JUDGMENT OF THE COURT

By a notice to terminate tenancy dated 2nd March, 2010, the respondent as the landlord informed the appellants as tenants of its intention to terminate a controlled tenancy subsisting between them in respect of premises christened '**Manyara Building**', which sits on **Plot no. Mombasa/ Block 1/ 351**. The notice was given pursuant to the provisions of **Section 4** of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (*"The Act").* The reason given for the intended termination was the appellants' continued non-payment of rent wherever it became due and payable. The appellants protested the notice by filing a letter of objection, dated 9th March, 2010 addressed to the respondent. However, beyond this objection, the appellants took no other steps for instance by filing a reference to forestall termination of the tenancy. In fact, it is common ground that no reference was filed in the Business Premises Rent Tribunal *("the Tribunal")* by the appellants as by law required in the event that they were bent on challenging the notice.

Upon the lapse of the two months' notice period, the respondent deemed the notice to have taken effect

and commenced eviction proceedings against the appellants in **Mombasa High Court Civil Suit No. 6 of 2011**. In addition to an order of delivery of vacant possession of the premises, the respondent also sought rent arrears and mesne profits as well as costs of the suit and interest.

The suit was defended, vide the statement of defence dated and filed on 4th April, 2011. The appellants claimed that the suit was brought against a non-legal entity, the termination notice was irregularly served and that the High Court lacked jurisdiction to entertain the suit.

Upon being served with the defence, the respondent filed an application dated 8th March, 2012, seeking that summary judgment be entered as prayed in the plaint, on the premise that the defence raised no triable issues.

Hearing of that application proceeded on 11th July, 2013 albeit *ex parte*, as only the respondent's counsel was in attendance. This was despite the fact that the hearing date was fixed in court, by consent of both counsel. By a ruling delivered on 23rd August, 2013, the application for summary judgment was allowed in terms:-

> **"1. The Plaintiff is hereby granted vacant possession of the property known as Manyara Building/MBSA/BLOCK 1/351.**
>
> **2. Judgment is hereby entered for the Plaintiff against the Defendants for Kshs.232,000/- plus mesne profit at Kshs.46,400/- from 3rd July, 2010 until the Defendants vacate the property known as Manyara Building MSA/1/351.**
>
> **3. The Plaintiff is awarded interest on (1) and (2) above at court rates from the date of this suit until payment in full.**
>
> **4. The Plaintiff is awarded costs of this suit and costs of the Notice of Motion dated 8th March 2012."**

Following such a favourable outcome, the respondent in no time took steps to execute the orders aforesaid by, among other things, seizing and detaining the appellants' goods. This provoked the appellants into lodging a notice of appeal, on 3rd September, 2013, thereby intimating an intention to appeal against the said ruling and order. Shortly thereafter, they filed in the High Court an application dated 20th September, 2013 through which they sought injunctive orders to restrain further execution of the ruling and order, pending the hearing of the intended appeal. This application was opposed, but was heard and determined by a ruling delivered on 20th March, 2014 in which **Kasango J.,** dismissed the same with costs.

Aggrieved by this turn of events, the appellants yet again lodged another notice of appeal on 21st March, 2015, against that ruling and also filed another application dated 17th April, 2014. It is not immediately apparent what was sought in that application as a copy thereof does not form part of the record before us.

Be that as it may, the respondent is said to have opposed the said application and filed one of its own as well, dated 16th April, 2014, this time seeking that the police, through the office of the OCS, Mombasa Central Police Station, be ordered to assist it in effecting the eviction of the appellants in line with the summary judgment earlier issued.

The two applications were heard together, and by a Ruling delivered on 3rd March, 2015, Kasango J., dismissed the appellants' motion while granting the respondent's motion as prayed. Such is the chronology of events that led to the filing of the notice of appeal herein, dated 6th March, 2015 which is expressed to be against the ruling of 3rd March, 2015. However, the respondent continues to be in occupation of the premises, the aforesaid orders notwithstanding.

Before delving into what is before this Court, it is perhaps pertinent at this preliminary stage to interrogate the ambit of this appeal. As said earlier, the notice of appeal herein, indicates that the order sought to be impugned is that issued on 3rd March, 2015. On the other hand, the memorandum of appeal purports to be against both the summary judgment and the ruling of 3rd March, 2015.

Nothing has been said of the fate of the appeal against the summary judgment earlier on initiated vide the notice of appeal of 3rd September, 2013. Pursuant to the memorandum of appeal, the litigation before this Court therefore finds its roots in two separate orders. As per that memorandum, this appeal is now expressed to straddle two decisions; the summary judgment and the ruling of 3rd March, 2015.

No objection was raised by the respondent on the fact that the appellants chose to ventilate their appeal on summary judgment through the present appeal. It would indeed appear that the fact that the appellants elected to import their appeal on summary judgment into this appeal was entirely lost on the respondent. In such a case, and in the absence of any prejudice to the respondent, the court may in our view, readily rely on the provisions of **Section 3A** of the Appellate Jurisdiction Act and endeavour to breathe life into the appeal against the summary judgment by furthering the overriding objective through allowing the just and expeditious determination of the same notwithstanding that technicality. As in the case of **Abok James Odera T/A A.J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR**:-

> "……**where a defect does not occasion any prejudice on the parties, this Court will strive to cure the defect in the interests of justice and fairness, in a bid to have the appeal determined on merit."**

We now turn to the grounds of appeal. The appellants fault the trial court for issuing summary judgment without regard of the triable issues raised in their defence and replying affidavit; holding that the application for summary judgment was unopposed yet there was a replying affidavit on record; acting without jurisdiction as alteration of the terms of a controlled tenancy is within the exclusive jurisdiction of the Tribunal; and lastly, failing to reprimand the respondent for purporting to effect an unlawful and irregular eviction which amounted to preferential treatment of the respondent by the trial court. With the Court's leave, the parties were allowed to ventilate their respective arguments through written submissions, with a chance of oral highlights being given.

Ms. **Murage**, learned counsel for the appellants abandoned the grounds challenging the legality of the eviction and focused on the demerits of the summary judgment instead. She submitted that summary judgment should not have been entered in the face of the triable issues raised in the defence. In particular, that in their defence, the appellants had challenged the legality of the notice served by the respondent as service was effected on a business name which had no legal capacity in law. It was the appellants' case before this Court that by virtue of the defective notice, termination of the tenancy failed to take effect and as a result, the tenancy had not been terminated. Further, that given the subsisting tenancy, the High Court lacked jurisdiction to grant eviction orders as in so doing, the court in effect purported to terminate a controlled tenancy. Counsel submitted that under the Act**,** only the Tribunal had the exclusive jurisdiction to terminate a controlled tenancy. In counsel's view, jurisdiction and validity of tenancy notice were issues that could only be determined at trial and the court thus fell into error in determining the matter in a summary manner as it did. Lastly, counsel submitted that the court erroneously failed to consider the appellants' replying affidavit to the said application and in so doing, failed to appreciate the triable issues and evidence raised therein.

In response, **Mr. Ogunde,** learned counsel for the respondent began by conceding that contrary to the finding by the learned Judge a replying affidavit had indeed been filed by the appellants. He was however, quick to point out that neither the said affidavit nor the defence raised triable issues and that in fact, the replying affidavit was a mere reiteration of what was stated in the defence. Further, that the issue of validity of notice is a non-starter as the notice though addressed to Jivaco Agencies, a business name, it was nonetheless received by the appellants who traded under the said business name. Counsel emphasized that service of the said notice was thus regular because at the end of the day, the appellants ultimately got to learn of the respondent's intention to terminate the tenancy. Indeed, after they failed to file a reference

in time as required, the appellants brought a motion in the Tribunal seeking extension of time for them to file a reference out of time. The reason given for their failure to do so in time was that their counsel forgot to file the response. To counsel therefore, the appellants cannot speak from both sides of their mouths and claim that the notice was defective. Counsel submitted further that even if there was a misdescription of a party, it did not invalidate the notice. The appellants clearly understood the purport of the notice but only forgot to act. On the question of jurisdiction, counsel submitted that the Tribunal is sucked in once a reference has been filed. It does not act in vacuo. It was thus wrong for the appellants to have expected the respondent to move the Tribunal when there indeed was no reference filed by them challenging the notice and when infact there was no longer a Landlord/Tenant relationship owing to the taking effect of the notice to terminate the tenancy.

As earlier stated, it is common ground that a controlled tenancy existed between the parties and that a notice of termination of tenancy was issued upon the appellants through their business, Jivaco Agencies. It is also common ground that the appellants responded to the said notice solely by way of a letter of objection duly served upon the respondent. Parties were also in agreement that no reference was filed in the tribunal regarding the termination of the tenancy. In view of the above, and on the basis of the parties' respective arguments, the sole issue for determination is whether the High Court had jurisdiction to entertain the eviction proceedings and if so, whether the resulting summary judgment was properly entered.

The procedure of terminating a controlled tenancy is contained in the Act. Under **Section 4(1)** thereof, termination of controlled tenancies can only be undertaken under the purview of the Act as follows:-

> **"4(1) Notwithstanding the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be terminated, and no term or condition in, or right or service enjoyed by the tenant of, any such tenancy shall be altered, otherwise than in accordance with the following provisions of this Act.**
>
> **(2) A landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the tenant, any term or condition in, or right or service enjoyed by the tenant under, such a tenancy, shall give notice in that behalf to the tenant in the prescribed form. "** (Emphasis provided)

Such was the notice that was issued and served on the appellants in this case. The Act also dictates that the notice must indicate the reasons for the proposed termination of tenancy and must also give a period of one month within which the tenant may voice his objection (if any) to the proposed termination. This requirement is contained in **Section 4(5)** which provides *inter alia*:-

> "**A tenancy notice shall not be effective for any of the purposes of this Act unless it specifies the grounds upon which the requesting party seeks the termination, alteration or reassessment concerned and requires the receiving party to notify the requesting party in writing, within one month after the date of receipt of the notice, whether or not he agrees to comply with the notice."**

In the present case, such an objection was given by the appellant, pursuant to the letter dated 9th September, 2010. This leads us to the turning point in this appeal. Upon the issuance of the objection, what happens next? In this regard, **Section 6 (1)** of the Act is most important, as it clearly provides that:-

> **"A receiving party who wishes to oppose a tenancy notice, and who has notified the requesting party under** section (5) **of this Act that he does not agree to comply with the tenancy notice, may, before the date upon which such notice is to take effect, refer the matter to a Tribunal, whereupon such notice shall be of no effect until, and subject to, the determination of the reference by the Tribunal:**
>
> **Provided that a Tribunal may, for sufficient reason and on such conditions as it may**

> **think fit, permit such a reference notwithstanding that the receiving party has not complied with any of the requirements of this section."** (Emphasis provided)

For avoidance of doubt, **Section 2(1)** defines a "*receiving party*" as "*a tenant or a landlord of a controlled tenancy to whom a tenancy notice is given*".

From the aforesaid provision, therefore, the recipient of a tenancy notice may elect to do one of four things. Either:-

a. **Do nothing;**
b. **Serve an objection upon the requesting party voicing his disagreement with the changes proposed in the tenancy notice then do nothing further or;**

c. **Send an objection and lodge a reference before the tribunal for a formal determination of the dispute or;**
d. **Fail to send an objection but proceed to lodge a reference in the tribunal.**

Where a reference is lodged, as in (c) and (d) above, the tenancy notice is suspended from taking effect pending the hearing and determination of the reference by the tribunal. Conversely, where an objection has been served but no reference is filed, time in respect of the notice continues to run and upon the lapse of the stipulated notice period, the changes envisioned in the notice take effect by default. **Section 6(1)** above makes this abundantly clear. It is only the filing of a reference which suspends time with regard to the tenancy notice. (The only aspect that serves to suspend time with regard to the tenancy notice is the filing of a reference). Any other act short of lodging a reference not even service of an objection has no effect on the running of time stipulated in the notice

In our opinion, in the absence of a reference, duly lodged in the Tribunal and served by the appellant, the contention that a controlled tenancy continued to exist even upon the lapse of the stipulated notice period is erroneous. Without the reference, the controlled tenancy comes to an end the minute the notice period specified in the notice lapses, whereupon there will be no longer a Landlord/Tenant relationship. In the absence of such relationship, the Tribunal has no jurisdiction to entertain any dispute arising therefrom. As it were, the jurisdiction of the Tribunal is anchored on the existence of a Landlord/Tenant relationship between the parties. Consequently, at the time the respondent moved to the High Court, there was no longer a Landlord/Tenant relationship between the parties. This Court has in the past had occasion to consider a case very similar to this one. In **Jitendra Mathurdas Kahabar & 2 others v Fish and Meat Limited [1997] eKLR,** where a notice of tenancy was served upon a tenant who responded by serving an objection but failed to lodge a reference, this Court had this to say in respect of summary judgment proceedings subsequently commenced in the High Court by the landlord:-

> **"From what we have said above, once a reference in accordance with** section 6(1) **of the Act has not been made to the Tribunal and a tenancy notice to terminate the tenancy has taken effect from the date specified therein in terms of section 10 of the Act, the landlord/tenant relationship comes to an end. Thereafter, one can no longer talk of the existence of a controlled tenancy in terms of** section 2 **of the Act without which the Tribunal under the Act has no jurisdiction. In the instant appeal, the respondent's failure to refer the appellant's tenancy notice to the Tribunal in accordance with** section 6(1**) of the Act resulted in the cessation of its tenancy of the appellants' godown/warehouse with effect from 1st June, 1995 in terms of** section 10 **of the Act. Henceforth, there was no controlled tenancy to talk about in regard to the said godown/warehouse and the appellants became entitled to possession of the same which the respondent did not give to them. In these circumstances therefore, the appellants had to come to court to enforce their rights to their property…"**

The High Court was thus well within its jurisdiction to entertain the eviction proceedings.

Similarly, the proposition that a controlled tenancy continues to exist merely because the appellants are

still in occupation of the premises is, with due respect to learned counsel, preposterous. No provision of law creates controlled tenancies by virtue of mere occupation of premises and with non-payment of rent no less! The fact that the respondent is yet to evict the appellants does not serve to resurrect a controlled tenancy which has already run its course and been terminated. For the above reasons, the authorities of **Msa HCCC No. 363 of 2002; Mwai Limited & another v. Bridge-up Container Services Limited, Msa HC Misc. Appl No. 27 of 2010; and R v. The Chairperson Business Premises Rent Tribunal ex parte Kenya Safari Lodges and Hotels Limited & another** (citation) as cited by the appellant in support of this proposition fail to find any persuasive application in this appeal.

On the contention that the trial court determined the application for summary judgment without due consideration of the triable issues raised in the defence and replying affidavit; the duty lay with the appellants to show that they had an arguable case. No doubt there was a defence filed as well as a replying affidavit to the application for summary judgment. The trial court thus erred in holding that no replying affidavit to the application existed on record, since one appears to have been duly filed and served on 10th April, 2012, well before the hearing of the application on 11th July, 2013, a fact indeed conceded by the respondent's counsel. However, we agree with counsel for the respondent that not much turned on that replying affidavit. It simply reiterated what had been pleaded in the defence. It is trite law that where there are triable issues raised in a defence an application for summary judgment cannot be entertained. Indeed, there is no room for discretion and the court must grant unconditional leave to defend. (see. **Osodo v Barclays Bank International Limited [1981] KLR 30).** Did the replying affidavit and defence on record raise triable issues? The pertinent paragraphs of the defence and replying affidavit contested the jurisdiction of the High Court and the validity of the tenancy notice. As earlier discussed, the High Court had jurisdiction to entertain the eviction proceedings and its jurisdiction in this regard was thus not a triable issue, since there was no longer a Landlord/Tenant relationship between the parties. Similarly, for the reasons earlier discussed, the determination of the validity of the tenancy notice was an issue that could only be entertained by the tribunal. As the Act stipulates and as readily acknowledged by both parties, termination of controlled tenancies lies within the exclusive jurisdiction of the tribunal. So that even if the High Court was to say that validity of notice of termination was a triable issue before it, the court would still lack jurisdiction to determine such validity at the trial as this was an issue exclusively within the jurisdiction of the tribunal. But again there was no longer Landlord/Tenant relationship. This then cannot be a triable issue.

In a nutshell, the challenge to the notice to terminate tenancy from whichever angle was not a matter for determination by the High Court. Such a challenge could only have been mounted in the Tribunal. Having failed to do so, it could not be raised in the High Court as triable issues when all that the High Court was being called upon to do was to give vacant possession of the premises to the landlord on the basis that the Landlord/Tenant relationship had ceased to exist and the appellants had thereby become trespassers.

The appeal lacks merit and is accordingly dismissed with costs.

Dated and delivered at Mombasa this 4th day of December, 2015

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR