Makeup Training Institute Limited v Nekolly K. Limited (Tribunal Case E069 of 2024) [2024] KEBPRT 782 (KLR) (21 May 2024) (Ruling)

Neutral citation: [2024] KEBPRT 782 (KLR)

REPUBLIC OF KENYA

IN THE BUSINESS PREMISES RENT TRIBUNAL

TRIBUNAL CASE E069 OF 2024

N WAHOME & JOYCE MURIGI, MEMBERS

MAY 21, 2024

BETWEEN

MAKEUP TRAINING INSTITUTE LIMITED ..... APPLICANT

AND

NEKOLLY K. LIMITED ..... RESPONDENT

RULING

1. The Applicant filed the Reference dated 19.1.2024 said to be founded on Section 12(4) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* (Cap 301) hereinafter referred to "the Act.". The Complaints by the Applicant are that;-

    i. The Landlord's illegal notice to vary the rent upwards in respect of the said shop number 7 Block B L.R. No. 209/11119/4.

    ii. The Complaint is further anchored on the Landlord's illegal and defective two (2) months' notice to vacate the premises issued on the 12.1.2024; and

    iii. The Complaint is further anchored on the Landlord's illegal and defective two (2) months notice to vacate the premises which notice is not anchored under Section 7 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* (Cap 301).

2. The Reference was accompanied by a motion of even date which sought that the Respondent be restrained from interfering with the Applicant's quiet possession of the demised premises or increasing the rent payable thereof.

3. The Applicant thereafter and in compliance with the directions of the court filed the submissions dated 20.3.2024 and the further or supplementary affidavit dated 20.3.2024.

4. The Landlord in response filed the Replying affidavit sworn by Nolly Sodi Patel on the 1.3.2024. It also filed the submissions dated 9.4.2024 together with the list and bundle of authorities of even date.

5. The court has perused all the materials placed before it including the respective parties written submissions and cited case law and is of the view that the issues to help determine this case are the following;-

   A: Whether this court has jurisdiction to adjudicate over the matters herein.

   B: Whether the Respondent's two notices to increase rent and termination are lawful.

   C: Whether the Applicant's Application has merit.

   D: Who should bear the costs of this suit

Issue No. A: Whether this court has jurisdiction to adjudicate over the matters herein

6. The jurisdiction of this court is conferred by Section 2(1) of the Act. The same provides that;-

> " 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 (5) years, or
>
> ii. Contains provision for termination otherwise than for breach of covenant, within five (5) years from the commencement thereof."

7. The gravamen of the Respondent's assertion that this Tribunal has no jurisdiction are two (2) pronged. One, that the tenancy is for a term exceeding five (5) years and that the arbitration clause had not been exhausted. Respectfully, this court does not agree with the Respondent.

8. Clause 3(j) of the parties agreement dated 15.3.2022 and marked "ESM1" provides that;-

> " Either party to this agreement shall be entitled on or any time after six (6) months of occupation upon giving the other party two (2) months' notice in writing of his intention to do so determine the said term and shall until the time of such determination perform and observe all the covenants and agreements herein contained. Should the lessee fail to provide the requisite two (2) months notice of termination, he/she will be liable to pay two (2) months rent in lieu of notice."

9. By that clause, the Tenancy agreement was squarely brought under the governance of Section 2(1) of the Act. The court of Appeal in the same circumstances in the case of Khalif Jele Mohamed & Another vs The Chairman Business Premises Rent Tribunal [2019] EKLR held that;-

> " 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 six (6) years term of tenancy. In effect, it could be invoked by either party, and either party could terminate the tenancy within the first five (5) years of the term or even five (5) years after commencement of the tenancy. In effect, as worded, the termination clause did not exclude termination of the tenancy within the first five (5) years of the term...to that extent we are satisfied that the termination clause 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."

10. This court therefore determines that it has the jurisdiction to preside over this matter. On the question of whether this matter should have been presented for arbitration, we respectfully also disagree. Section 3(6) of the Act provides that;-

> " Any agreement relating to, or condition in, a controlled tenancy shall be void is so far as it purports to-
>
> a. Preclude the operation of this Act."

11. The Arbitration clause in the otherwise controlled tenancy was therefore a nullity in law ab initio and of no legal effect nor consequence.

Issue No. B: Whether the Respondents twin notices to increase rent and termination are lawful

12. The Respondent in the letter dated 18.12.2023 clearly indicated that the amount to be paid above the initial rent of Kshs. 65,000/= at 16% thereof was to cater for value added tax (VAT). It further clarified that it was obligated by the law to charge the same. Part of the letter read as follows;-

> " To facilitate a smooth transition, we will be issuing you with an Etims (Electronic tax invoice management system) reflecting the updated rental amount inclusive of the 16% VAT. The invoice will provide a clear breakdown of the rental amount and the applicable tax."

13. This cannot obviously be a notice to increase rent as envisaged under Section 4(2) of the Act and Regulation 4(1) of the Regulations to the Act. It was merely a response to a taxation measure by parliament. It is the view of this court that the question of taxation should be addressed by amendment of Section 12(1)(d) to incorporate the element of taxation. It provides that;-

> " 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."

14. In this case, the court determines that the landlord was entitled to ask for the payment of 16% in VAT over and above the rent chargeable, on the demised premises at Kshs. 65,000/=.

15. The Respondent issued a purported notice dated 12.1.2024 to terminate the tenancy. On the face of it, that is not a notice known to the law. Section 4(2) of the Act provides that;-

> " 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 landlord in the prescribed form."

16. That form is provided under Regulation 4(1) of the Regulations to the Act which provides that;-

> " A notice under Section 4(2) of the Act by a landlord shall be in form A in the schedule to these Regulations."

The letter by the landlord dated 12.1.2024 did not satisfy the requirements of the law in terms of form and content and therefore a nullity in law ab initio and of no legal effect.

The court on the same issue in the case of; Lall vs Jeypee Investments Ltd- Nairobi HCCA No. 120 of 1971 [1972] EA 512 held that;-

> " The *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* is an especially enacted piece of legislation which creates a privileged class of tenants for the purpose of affording them the protection specified by its provisions against ravages of predatory landlords. Such protection can only be fully enjoyed if the provisions of the Act are observed to the latter. Otherwise, the clearly indicated intention of the legislative would be defeated. Inorder to be effective in this fashion the Act must be construed strictly no matter how harsh the result.... The landlord and Tenant Act laid down a code which Parliament intended to be followed and if a landlord does not give notice of termination as prescribed, then the notice will be ineffectual. This may seem a technical and unmeritorious defence, but there is no doubt that the court has no power to dispense with these time limits if the defendant decides to object at the proper time. This is an Act which requires, in so far as the giving of the notice is concerned, absolute and complete not merely substantive compliance with the peremptory provisions."

Issue No. C: Whether the Applicant's Application has merit

17. The Applicant's Application dated 19.1.2024 has mixed outcomes. On the one hand it misapprehended the levy of statutory taxes as an increment of rent. In that regard, it has been determined that it is incumbent upon the Respondent to effect the same and for the Tenant to comply.

18. On the other hand, the purported notice to terminate the tenancy by the Respondent by the letter dated 12.1.2024 has been found not to find recognition under the law. In that respect, the Tenant has registered partial success in the Application.

19. To that end, the Tenant's Application has failed in the limb challenging the levy of statutory taxes in the Complaint and guise that the landlord was arbitrarily increasing rent. On the other hand, the Tenant's challenge on the notice of termination of tenancy has been upheld. Therefore, the said Application will be allowed in those terms.

20. A perusal of the Reference herein speaks to the prayer to determine or resolve two issues. That is the purported notice to increase rent and the purported notice of termination. Both issues have been determined with finality in this Application. There is nothing more left in the Reference for adjudication. The court therefore resolves the Reference dated 19.1.2024 in the same terms with the Application of the same date.

Issue No. D: Who should bear the costs of the suit

21. As determined, the Landlord had a statutory obligation to collect value added tax (VAT) from the Tenant. The Tenant had no grounds or inherent right to challenge the same. It was merely a shot in the darkness. On the other hand, the Tenant had recourse to move this court by challenging the illegal termination notice. In the circumstances, I would direct that each party do bear own costs.

22. In the upshot of all the above, I make the following orders;-

    i. That the landlord's notice of termination by the letter dated 12.1.2024 is unlawful and of no legal effect.

    ii. That the Respondent's information to the Tenant by the letter dated 18.1.2024 is not a notice to increase rent and the same is legitimate and lawful.

iii. That the Tenant will be allowed quiet possession of the demised premises unless otherwise lawfully disturbed.

iv. That the Reference dated 19.1.2024 is determined in the same terms with the Application of the even date.

v. That each party shall bear own costs of this suit.

Those are the orders of the court.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF MAY, 2024.

HON. NDEGWA WAHOME, ... MEMBER

BUSINESS PREMISES RENT TRIBUNAL

MBS HON. JOYCE MURIGI,.....MEMBER

BUSINESS PREMISES RENT TRIBUNAL

Delivered in the presence of Mr. Etemere for the Tenant/Applicant.

The firm of Mbogo & Company Advocates are present for the Respondents

Court: The parties to be supplied with a certified copy of the Ruling on payment of the requisite court fees.