**Cause Impact Limited v Tawfiq Trust Registered Trustees & 2 others (Tribunal Case 435 of 2021) [2023] KEBPRT 1289 (KLR) (8 December 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 1289 (KLR)

**REPUBLIC OF KENYA**

**IN THE BUSINESS PREMISES RENT TRIBUNAL**

**TRIBUNAL CASE 435 OF 2021**

**CN MUGAMBI, CHAIR**

**DECEMBER 8, 2023**

**BETWEEN**

**CAUSE IMPACT LIMITED ..... TENANT**

**AND**

**TAWFIQ TRUST REGISTERED TRUSTEES ..... LANDLORD**

**AND**

**TYSONS LIMITED ..... AGENT**

**AND**

**SANNEX ENTERPRISES AUCTIONEERS ..... AUCTIONEER**

**RULING**

## Introduction

1. The Tenant's application dated 2.6.2022 seeks orders that the Tribunal be pleased to review, vary and/or set aside its ruling dated and delivered on 24.9.2020 and the orders made therein on 18.11.2020 upholding the preliminary objection dated 25.8.2021. The Tenant has also sought orders restraining the Respondents from disposing of or selling the Applicant's properties/office equipment in the Respondent's custody pending the hearing and determination of the suit. The Applicant has finally prayed that this matter be set down for hearing on the merits.

2. The application is based on the grounds set out on the face of the application and which include inter alia;

    a. That the decision of the Tribunal contains an error on the face of the record and therefore ought to be reviewed and/or set aside.

    b. That there are sufficient reasons for which the impugned decision ought to be reviewed.

c. That the application has been brought timeously and without undue delay.

d. That following the impugned ruling, the Respondents have in purporting to levy distress for rent, carted away the tenant's goods putting the tenant in a position of undue difficulty.

**The Tenant's depositions**

3. The tenant/Applicant's affidavit in support of the motion may be summarized as follows hereunder:-

a. That the Applicant's lease expired on 20.10.2020 and in July 2021 the Applicant received an offer for a new lease beginning August 2021.

b. That following the expiry of the lease, the tenant continuous to occupy the premises as a protected tenant.

c. That the Respondents in this case raised a preliminary objection before the matter could be heard on merit which the Tribunal erroneously upheld.

d. That the impugned ruling of the Tribunal has placed the tenant in undue difficulty with the possibility that it could loose its properties currently being held by the Respondents.

e. That the tenant is aggrieved by the impugned orders of the Tribunal and has brought this application without delay and in good faith.

f. That following the ruling of the Tribunal and the purported distress for rent by the Respondents, the tenant has vacated the premises although the tenant was not in any rent arrears to warrant the impugned distress for rent.

4. The application is opposed by the Respondents affidavit sworn by Wycliffe Ongwae on 22.6.2022.

**The Applicant's submissions**

5. The Applicant's submissions may be summarized as follows:-

a. That the Tribunal draws its jurisdiction from the provisions of the *Landlord and Tenant (shops, hotels and catering establishments) Act* Cap 301.

b. That given the dispute herein emanated during the subsistence of a lawful protected tenancy arrangement between the parties, the Tribunal then has jurisdiction to hear and determine this matter.

c. That the Respondents arguments that the Tribunal lacks jurisdiction on the basis that the Applicant is no longer a tenant, is bad in law and a misconstruction of the relevant statute.

d. That order 9 Rule 9 talks about a Judgment and not a ruling.

e. That this matter is not res judicata as CMCC No. 11425 of 2021 was withdrawn while ELC Appeal No. E90 of 2021 was an application that got struck out and the said cases were therefore not heard or determined on their merits.

f. That the courts in the case of; *Nyamogo & Nyamogo vs Kogo* [2000] eKLR, *Edison Kanyabwera vs Pastori Tumwebaze* [2005] UGSC 1, have clearly set out what amounts to an error on the face of the record.

g. That the Tribunal erred in discerning the genesis and ambit of the dispute herein and this led the Tribunal to make an obvious mistake in law by muddling between a lease and a protected tenancy.

h. That the rationale by the Tribunal that the Applicant entered into a lease agreement upon signing the offer of lease dated 8.7.2021 is bad in law as the parties remained in negotiations pending settlement of terms and execution of the formal contract.

i. That the application, in its circumstances, cannot be deemed to have been filed after an unreasonable time.

j. That it is trite that disputes that raise bonafide triable issues need to be heard and determined on their merits.

k. That the Applicant has satisfied the guiding principles set out in *Giella vs Cassman Brown* [1973] EA 358 warranting the grant of the injunction reliefs sought.

l. That the dispute herein raises bonafide triable issues warranting the matter to be set down for hearing and determination on merits.

**The Respondent's submissions**

6. The Respondent's submissions may be summarized as follows:-

a. That the Tribunal lacks the jurisdiction to hear and determine this matter as there is no longer a landlord-tenant relationship between the parties.

b. That the letters dated 17.1.2022 and 24.1.2022 written by the Applicants Advocates and annexed to the tenant's supporting affidavit clearly show that the tenant has vacated the leased premises. The Tribunal in the circumstances does not have jurisdiction to hear and determine this dispute.

c. That the above submissions by the Respondents are made without prejudice to the Tribunal's findings that the tenancy between the parties is not a controlled tenancy.

d. That after the Tribunal held it had no jurisdiction, the Applicant filed Appeal No. E90 of 2021 and also CMCC No. 11425 of 2021.

e. That the Advocates now on record for the Applicant are erroneously on the record having not obtained the leave of the court as the instant application is a post judgment application when there was a different firm of Advocates on record previously.

f. That the instant application is an abuse of the court process as the Applicant filed ELC Appeal No. E090 of 2021 appealing against the ruling whose review is now sought, the said appeal was struck out for being filed out of time.

g. That a person cannot exercise both the right of appeal and review at the same time or one after the other.

h. That the Applicant has not met the threshold for the grant of the review orders sought.

i. That the sub grounds raised by the Applicant are grounds for appeal and not for review.

j. That the application for review has been made after an unreasonable delay of over nine (9) months.

k. That the Tribunal should award punitive costs against the Applicants while dismissing its application for reasons of its conduct which amounts to an abuse of the court process.

**Analysis and determination**

7. The only issue I have to determine at the very outset is whether the tenant/Applicant is entitled to the orders of review it has sought in its application under consideration.

8. The ruling the Applicant seeks to review is the one delivered on 24.9.2021. the tenant's main ground is that the Tribunal made a mistake by muddling between a lease and a protected tenancy. The argument advanced is that the Tribunal fell into error when it determined that the letter of offer contained the contractual relationship between the parties. While dealing with this aspect in its ruling delivered on 24.9.2021, the Tribunal stated as follows:-

> " 11. I agree with the landlord that the current relationship between the parties herein is not a controlled tenancy. The letter of offer and the acceptance thereof by the tenant seals the contract between the parties, the same is in writing and for a period of six years. It is not correct as suggested by the tenant that the fact that the lease agreement has not been executed, then it is unwritten."
>
> 12; Clause 23 of the letter of offer is in the following terms
>
> > " By accepting the terms of this letter of offer as produced herein, the tenant is deemed to approve the conditions contained herein and agrees to execute a formal lease of the premises upon receipt of the same. The lease shall be in standard form applicable to all tenants at the property as no material amendments thereto will be accepted."
>
> 13;
>
> > " the tenant by accepting the terms in the letter of offer was deemed to have approved the conditions contained therein. I am satisfied that the letter of offer forms the basis of the agreement between the parties herein and is binding on them."
>
> 16;
>
> > " The controlled tenancy between the parties herein ended when the parties contracted outside the definition of a controlled tenancy when they signed the letter of offer for a period/term of six years. They are no longer subject to the provisions of Cap 301 of the Laws of Kenya."

9. It is evident that for the reasons given above and in the ruling sought to be reviewed, the Tribunal arrived at the decision that it did not have jurisdiction. Did this decision amount to an error on the face of the record? I do not think so!

10. In the case of; *National Bank of Kenya Ltd vs Ndung'u Njau* [1997] eKLR, the court while dealing with the issue of an error apparent on the face of the record stated as follows:-

> "A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of the law. Misconstruing a statute or other provision of law cannot be a ground for review."
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> Further, in the case of; Nyamogo & Nyamogo vs Kogo [2001] EA 170, the court stated as follows:-
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> > "An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of undefinitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out.
>
> An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again if a view adapted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal."

11. The Applicants argument is that the Tribunal proceeded on a wrong exposition of the law when it determined that the letter of offer contained the agreement between the parties and thereby reached an erroneous conclusion of the law. It is clear from the above decisions that the kind of conclusion reached by the Tribunal cannot be a subject of review. I am of the view also that the conclusion adopted by the Tribunal in its impugned decision is a possible one and the alleged error on the part of the tribunal is not the only possible view. I do not find any error on a substantial point of law staring the court in the face.

12. It is admitted that upon the Tribunal making the impugned decision, the Applicant herein proceeded to file an appeal being Appeal No. E090 of 2021. The argument by the Applicant is that in the appeal, an application was struck out and the same has never been appealed against. The issues raised in the appeal were therefore never determined on merits. I do not think the issue for consideration is whether or not the appeal was heard fully on its merits but rather whether the tenant filed an appeal against the decision of the Tribunal. The Applicant in the ELC Appeal had applied that it be granted leave to file its appeal out of time and that the memorandum of Appeal dated 16.11.2021 be deemed to be properly on record. The Applicant failed in this quest and therefore no appeal was eventually filed.

    In these circumstances, "where no appeal was eventually filed", I do not think that the Applicant was barred from seeking the orders of review as it did. I think the tenant in this instance was entitled to the benefits of the law under order 45 rule 1 of the *Civil Procedure Rules,* Section 80 of the *Civil Procedure Act*.

13. The orders sought to be reviewed emanate from a ruling delivered on 24.9.2021. The said ruling was delivered in the presence of Counsel for the parties. The application for review is dated 2.6.2022. This is a period of more than eight (8) months. Is this unreasonable delay? The Applicant has submitted that what is unreasonable delay is dependent on the surrounding circumstances of each case. It is the Applicant's further submission that after the impugned ruling, the Applicant sought to change its then Advocates to the ones currently on record and the subsequent back and forth between the Applicant and its then Advocates took time and derailed the Applicants desire to have the application filed forthwith. The Respondent on the other hand has submitted that the Applicant has not attempted to explain the delay which in the Respondent's view is unreasonable.

    I am inclined to agree with the Respondent that in the circumstances of this case, where distress is said to have taken place and goods of the tenant taken away, the period of more than eight months constitutes unreasonable delay in bringing the instant application.

14. It is also admitted as between the parties that the tenant has already vacated the premises. The consequence of this is that, even if the Tribunal were to order that the matter proceeds on merit, it would be doing so without jurisdiction.

15. In the case of; *Republic vs Business Premises Rent Tribunal & Another – Ex parte Thande Holdings Limited* [2020] eKLR, the court stated;

> " The final decision was however delivered on 27th January 2012. According to the Applicants, the Interested party had voluntarily vacated the premises. The Interested party's position is that it is still in occupation of the suit premises. If at the time of the delivery of its decision there was no longer a landlord tenant relationship between the Applicant and the Interested party, then it would follow that the Respondent ceased to have any jurisdiction in the matter and as soon as it became known that it had no jurisdiction, it ought to have downed its tools."

16. In view of the foregoing, I am not convinced that the application for review by the Applicant/Tenant has any merits and the same is hereby dismissed with costs. Having arrived at this conclusion, I do not need to consider whether the tenant has satisfied the requirements for the grant of injunctive relief it has sought.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 8TH DAY OF DECEMBER 2023.**

**HON. CYPRIAN MUGAMBI CHAIRPERSON**

**8. 12.2023**

In the presence of Mr. Mugo holding brief for Mr. Mbaabu for the Respondents

In the absence of the Applicant and Counsel