**Caledonia Supermarket Ltd v Kenya National Examination Council**

**Division:** Court of Appeal of Kenya at Nairobi

**Date of judgment:** 22 December 2000

**Case Number:** 184/99

**Before:** Kwach, Shah and O’kubasu JJA

**Sourced by:** LawAfrica

**Summarised by:** W Amoko

*[1] Landlord and tenant – Protected tenant – Termination – Landlord threatens unlawfully to terminate*

*the tenancy – Whether the tenant can apply to the High Court for an injunctive relief.*

*[2] Landlord and tenant – Protected tenant – Termination – Manner in which a protected tenancy may*

*be properly terminated – Section 4 – The Landlord and Tenant (Shops, Hotels and Catering*

*Establishments) Act.*

**JUDGMENT**

**KWACH, SHAH AND O’KUBASU JJA:** These two appeals have been consolidated and heard together. For the purposes of this judgment we invited counsel to restrict their submissions to civil appeal number 184 of 1999.

The Kenya National Examinations Council, the Respondent in this appeal (hereinafter called “the

Council”) is the registered owner of a property known as Plot LR Number 209/357/1 Dennis Pritt Road,

Nairobi (hereinafter called “the premises”) consisting of shops and flats. For many years Caledonia

Supermarket Ltd, the Appellant (hereinafter called “the Appellant”), occupied as a tenant one of the shops in which it operated the business of a supermarket. Before the Council acquired the premises they were owned by two gentlemen who sold and transferred them to the Council on or about 17 July 1998.

Upon acquiring title to the premises, the Council decided that it needed to occupy them for its own purposes and issued a notice through its advocates requiring the Appellant to vacate the premises and deliver vacant possession. The notice dated 11 August 1998 required the Appellant to vacate the premises within 30 days.

It is common ground that the Appellant was a protected tenant under a controlled tenancy within the meaning of section 2(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act

(Chapter 201) (“the Act”).

Such a tenancy could not be terminated or its terms altered to the detriment of the Appellant otherwise than in accordance with the provisions of section 4 of the Act.

When the Council served the Appellant with notice to vacate, the Appellant refused to comply and immediately filed a suit against the Council in the superior court seeking, among other reliefs, an injunction to restrain the Council from terminating its tenancy and damages. Simultaneously with the filing of the suit, the Appellant applied by chamber summons under Order 39 of the Civil Procedure

Rules for a temporary injunction restraining the Council from evicting it from the premises pending the hearing of the suit or further order. The application was supported by an affidavit sworn by Anastacia

Wariara Wagiciengo, a director of the Appellant. The Council contested the application and filed a lengthy affidavit in reply sworn by its Deputy Secretary in charge of Finance and Administration, one

Ahmed Sheikh Abdullahi, in which he deponed *inter alia*:

“(24) That I am advised by the Council’s advocates on record which I verily believe to be true that the

Defendant, the Kenya National Examinations Council is a government body established by an Act of

Parliament namely Chapter 225A of the Laws of Kenya.

(25) That I am advised by the Council’s advocates which I verily believe to be true that the Defendant is lawfully registered as owner of the property herein and the notices issued are lawful, legal and valid.

(31) That I am advised by the Council’s advocates which I verily believe to be true that the Plaintiff is not a protected tenant who cannot be disturbed for 5 years. They further advise me that there is nothing in law as protected tenant and only tenancies can be controlled. The Plaintiff’s premises are not controlled within the meaning of Chapter 301 Laws of Kenya”.

The Council filed a defence denying the Appellant’s claim to be a protected tenant and also claimed to be a government body and a state corporation in the Ministry of Education to which the provisions of the

State Corporations Act apply.

The application was heard by Kuloba J. He held that the Appellant had not made out a *prima facie* case with probability of success and dismissed the application. He also made an order requiring the Appellant to vacate the premises on the last day of February 1999. It is against that decision that the Appellant has now appealed.

Although the decision of the Learned Judge has been challenged on several grounds, we asked Mr M

G *Sharma*, for the Appellant, to address us only on the issue whether the Appellant enjoyed a controlled tenancy, and if so, whether it had been terminated in accordance with the relevant provisions of the Act.

Although statutory protection was pleaded and urged at the hearing, the Learned Judge did not address it in his ruling. All he said was:

“It is not established on any affidavit evidence that the Respondent purchased the property subject to any encumbrances or rights and interests of third parties. It is not suggested that the Respondent was a party to any tenancy agreements between the Applicants and the previous owner of the property who sold it to the Respondent. It is not said that by its conduct or otherwise the Respondent has led or misled the Applicants to be and to remain in possession as tenants in the suit premises. In the absence of proof of these matters, it appears doubtful whether the Applicants will have a good case to restrain the Respondent by a permanent injunction at the trial such as the one they seek in the suit itself. On an interlocutory application such as this one, I cannot express a conclusive opinion as to the parties’ respective chances of success or failure; but, on the material presently before the court, and speaking neutrally so as not to hinder the free and unprejudiced consideration of the case on full evidence at the trial, I state that as of now, the Respondent: as a purchaser for value of the premises free of encumbrances and with no contractual clauses saving the interests of the sitting tenant, is free to take vacant possession of the premises and the Applicants, probabilities of success are not demonstrated”.

Mr *Sharma* submitted that since the Appellant’s tenancy was a controlled tenancy it could not be terminated or its terms altered to the detriment of the Appellant except as provided by section 4 of the

Act, the relevant parts of which provide:

“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 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 added).

( 4) N o tenancy notice shall take effect until such date, not being less than two months after the receipt thereof by the receiving party, as shall be specified thereon (emphasis added).

( 5) 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”.

Mr *Sharma* submitted that the notice of termination issued by the Council dated 11 August 1998 was not in the prescribed form. The prescribed form is Form A in the Schedule to the Act. It is plain beyond argument that the notice given by the Council did not satisfy this statutory requirement. Secondly, instead of the Council giving the Appellant not less than two months’ notice it purported to give it only 30 days to vacate. The Council was not entitled, by virtue of the proviso to section 7(1)(*g*) of the Act to oppose a reference if filed by the tenant, assuming a valid notice of termination of tenancy had been given. Lastly, the notice did not require the Appellant to indicate within 30 days whether or not it agreed to comply with the notice. The Council’s failure to comply with these mandatory statutory requirements rendered the purported notice null and void and incapable of enforcement.

Mr *Ibrahim* did not seriously dispute these contentions but he submitted that once the premises were sold and transferred to the Council, the Appellant automatically lost its statutory protection under the Act and he relied on the proviso to section 20 of the Act which states that no tenancy to which the government or a local authority is a party, whether as a landlord or as a tenant, shall be a controlled tenancy. On this ground, he maintained the notice issued by the Council was valid.

The Act was passed to protect the tenants of business premises from eviction and exploitation. Upon acquiring title to the premises, the Council had a clear choice. If the acquisition was subject to file tenancy, the Council was obliged to comply with section 4 of the Act to obtain vacant possession. The fact that the Council had not accepted rent was irrelevant. But even assuming for the sake of argument only that the Appellant had lost its status of a protected tenant as urged by Mr *Ibrahim*, then even in that situation the Council was obliged by law to issue a proper notice of termination in accordance with section 106 of the Transfer of Property Act of 1882. The notice given by the Council did not comply with this statutory provision either. It was not a valid notice.

Faced with what was clearly an illegal eviction, the Appellant could not seek protection from the

Business Premises Tribunal because the notice given being an invalid notice deprived the Tribunal of the power to intervene. In any case the Tribunal has no power to issue an injunction. That left the Appellant with only one course of action. It had to seek redress from the High Court. In the case of *Tiwi Beach*

*Hotel Ltd v Julian Ulrike Stamn* [1990] 2 KAR 189 where a protected tenant applied to the High Court for an injunction when, as in the present case, she was threatened with an illegal eviction, Kwach JA put the matter beyond dispute when in the course of his judgment he said at page 200:

“Although Mr Lakha stressed that both these letters constituted an offer for a lease, in my judgment it is plain beyond argument that they were a demand by a landlord for rent from a tenant in possession. The tenant claimed, quite properly in my view, statutory protection under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act and the Appellant, as landlord of the premises was therefore obliged to comply with the statutory procedure under the Act if it was its intention either to terminate the tenancy or alter its terms to the detriment of the Respondent. If the Appellant thought that those letters were notices, it must disabuse it: of that notion by stating at once that they were not: in the prescribed form and consequently had no effect on the Respondent’s tenancy. For this reason alone the Respondent was entitled to an order restraining the Appellant and the judge was therefore perfectly justified in making the order”.

Mr *Ibrahim* sought to rely on the proviso to section 2(1) of the Act. There is an averment in paragraph 12 of the defence filed by the Council claiming that the Council is a government body and a state corporation in the Ministry of Education of the government of Kenya and the provisions of the State Corporations Act (Chapter 446) apply to it. This averment was also repeated in the replying affidavit of Ahmed Sheikh Abdullahi to which we have already alluded. The problem with this submission is that it has been made without any attempt to place before the Court any evidence to back it up. Section 3 of the State Corporations Act gives the President the power, by order, to establish a state corporation as a body corporate to perform the functions specified in the order. We were not shown any legal notice issued by the President establishing the Council as a state corporation. In the absence of any such order the

Council’s claim to be a state corporation must be rejected and are completely baseless.

For all these reasons we allow this appeal and set aside the ruling and order of Kuloba J dated 9

December 1998. As the Appellant has already vacated the premises and given the Council vacant possession, it would not be just to issue an order of injunction against the Council. We declare that on the material placed before the judge the Appellant was entitled to an injunction and the Learned Judge erred in refusing to grant it. The result of that denial was that the Appellant’s tenancy was illegally terminated.

It is therefore entitled to recover damages from the Council for the loss and damage it suffered. We remit the case to the superior court for assessment of damages as the issue of liability has been determined in favour of the Appellant. The exercise will be undertaken by a judge other than Kuloba J. The Appellant will have the costs of this appeal.

For the avoidance of doubt the orders we have made in this appeal will also apply to civil appeal number 129 of 2000.

For the Appellant:

*Mr MG Sharma*

For the Respondent:

*Mr Ibrahim*