



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**

**AT MOMBASA**

**Coram: Gicheru, Shah JJ.A. & Bosire, Ag. J.A.)**

**CIVIL APPEAL NO. 267 OF 1996**

**BETWEEN**

**1. JITENDRA MATHURDAS KANABAR**

**2. JAYANTILAL MATHURDAS KANABAR**

**3. MATHURDAS K. KANABAR.....APPELLANTS**

**AND**

**FISH AND MEAT**

**LIMITED.....RESPONDENT**

**(Appeal from an Order of the High Court of Kenya at**

**Mombasa (aMbogholi, J.) dated 7th November, 1995**

**in**

**H.C.C.C. NO. 501 OF 1995)**

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**JUDGMENT OF THE COURT:**

***Section 10 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act***, Chapter 301 of the Laws of Kenya, hereinafter referred to as the Act, is in the following terms:

"10. Where a landlord has served a notice under section 4 of this Act on a tenant, and the tenant fails to notify the landlord within the appropriate time of his unwillingness to comply with such notice or to refer the matter to a Tribunal, then, subject to section 6 of this Act, such notice shall have effect from the date therein specified to terminate the tenancy, or terminate or alter the terms and conditions thereof or rights or services enjoyed thereunder."

At all material time, the respondent was the appellants' monthly tenant of their godown/warehouse erected on their piece of land known as Sub-division NO. 574 of Plot NO. 316/4 of Section NO. V. Mainland North, Mombasa at a monthly rental of K.Shs. 20,000/- payable quarterly in advance in each year.

On 21st March, 1995 the appellants gave notice to the respondent under the provisions of **section 4(2)** of the Act terminating the latter's tenancy of their godown/warehouse with effect from 1st June, 1995 on the grounds specified therein, namely; that the respondent was persistently in arrears of rent and was as on the date of the notice in arrears of a balance of rent for the period 1st November, 1992 to 31st March, 1995 amounting to K.Shs.320,000/- which it had yet to pay and in respect of which the appellants had filed **Civil Suit NO. 239 of 1995** in the Mombasa Chief Magistrate's Court against the respondent and for which the latter had already been served with summons to enter appearance. That notice was in the prescribed form and in compliance with the **section 4(5)** of the Act and it required the respondent to notify the appellants in writing, within one month after the date of receipt of the same, whether or not it agreed to comply with the said notice.

By a letter dated 6th May, 1995 the respondent through its advocate, H.M. Wasilwa, notified the appellants through their advocate, Anil Suchak, that it did not agree to comply with their tenancy notice and that in due course it was to file a reference to the Tribunal opposing the notice. By or after 1st June, 1995 when the tenancy notice was to take effect, no reference had been made to the Tribunal by the respondent in accordance with section 6(1) of the Act which provides that:

"6.(1) A receiving party who wishes to oppose a tenancy notice, and who has notified the requesting party under section 4(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."

On 5th July, 1995 therefore, the appellants filed **Civil Suit NO. 501 of 1995** in the High Court of Kenya at Mombasa seeking judgment of that court **inter alia** requiring the respondent to vacate and hand over to the appellants vacant possession of their godown/warehouse; and the payment by the respondent to the appellants the sum of K.Shs.40,000/- being arrears of rent for the two months of April and May, 1995 due and owing by the respondent to the appellants in respect of the aforesaid godown/warehouse and mesne profits at the rate of K.Shs. 20,000/- per month for the said premises from 1st June, 1995 until vacant possession of the same was handed over by the respondent to the appellants.

By a Notice of Motion under **Order XXX V rules 1 and 7 and Order L rule 1 of the Civil Procedure Rules** dated and filed in the High Court of Kenya at Mombasa on 2nd August, 1995, the appellants **inter alia** sought summary judgment in regard to the reliefs set out above. Before that Motion came up for hearing, counsel for the respondent gave notice of preliminary objection on a point of law in

that the said Motion and the appellants' entire suit in the superior court were improperly before the said court whose jurisdiction had been statutorily divested. That preliminary objection was heard by the superior court on 16th October, 1995 and in his ruling dated 7th November, 1995 Mbogholi Msagha, J. upheld the preliminary objection holding that:

"Even where the Tenant does not comply with the requirements of the Act in relation to the Notice the Tribunal has power vested upon it to determine the question in dispute. I am unable to find any provisions that says the jurisdiction of the Tribunal is ousted when the period of Notice expires.

This was a controlled tenancy. The Notice was given under the Act. Only the Tribunal can determine the issues at hand. In the end I respectively agree that this court lacks jurisdiction to hear this suit and the application. Since I am only seized of the application for summary judgment I shall only limit myself thereto and declare that the same is hereby dismissed with costs".

That holding is the basis of the appellants' present appeal to this Court.

In the light of what we have attempted to outline above, at the hearing of this appeal on 24th April, 1997, counsel for the appellants confined himself to the interpretation of **section 10** of the Act as is set out at the beginning of this judgment and submitted that notwithstanding the respondent's notification in writing to the appellants of its unwillingness to comply with the appellants' tenancy notice, it nonetheless did not file a reference to the Tribunal in accordance with **section 6(1)** of the Act and in terms of **section 10** of the said Act, the aforesaid notice had the effect of terminating the respondent's tenancy of the appellants' godown/warehouse with effect from 1st June, 1995. From that date therefore, the landlord/tenant relationship between the appellants and the respondent ceased. Without that relationship, the provisions of the Act were inapplicable and according to counsel, it was herein that the learned judge erred in his holding that there still existed a controlled tenancy to which the Tribunal under the Act had jurisdiction to deal with.

Miss Ali whose application to withdraw from appearing for the respondent was rejected by this Court principally because on 24th February, 1997 she and counsel for the appellants were party to taking this appeal's hearing date by consent opted not to respond to the submission of counsel for the appellants.

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. It is on account of the foregoing that we think the learned judge was in error when he held that the Tribunal under the Act had jurisdiction to deal with the respondent's tenancy of the appellants' godown/warehouse notwithstanding the non-compliance with the requirements of the Act by the respondent in relation to the appellant's tenancy notice and thereby

upholding the respondent's preliminary objection referred to earlier in this judgment with the resultant dismissal with costs of the appellants' application for summary judgment. Consequently, we allow the appellants' appeal, set aside the order of the superior court dismissing with costs their application under **Order XXXV rules 1 and 7 and Order L rule 1 of the Civil Procedure Rules** and order that the said application be restored to hearing in the High Court of Kenya at Mombasa. The appellants shall have the costs of this appeal.

**Dated and delivered at Nairobi this 2nd day of May, 1997.**

**J.E. GICHERU**

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**JUDGE OF APPEAL**

**A.B. SHAH**

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**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

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**AG. JUDGE OF APPEAL**

**I certify that this is a true copy of the original.**

**DEPUTY REGISTRAR**



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