Johana v Warre (Environment and Land Appeal 7 of 2020) [2023] KEELC 16554 (KLR) (23 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16554 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ENVIRONMENT AND LAND APPEAL 7 OF 2020

YM ANGIMA, J

MARCH 23, 2023

BETWEEN

DAVID NJOROGE JOHANA .... APPELLANT

AND

MOHAMMED SALAT WARRE .... RESPONDENT

(Appeal against the judgment and decree of the Business Premises Rent Tribunal (The Tribunal) in Nyahururu BPRT Case No. 14 of 2019)

JUDGMENT

A. Introduction

1. This is an appeal against the judgment and decree of the Business Premises Rent Tribunal (The Tribunal) in Nyahururu BPRT Case No. 14 of 2019 – *Mohammed Salat Warre -vs- David Njoroge Johana* dated 28.02.2020. By the said judgment, the Tribunal dismissed the Appellant's notice dated 23.01.2019 to terminate the tenancy and allowed the Respondent's reference challenging the notice of termination.

B. Background

2. The material on record shows that the Respondent was the Appellant's tenant at Room No. 002 on L.R. No. Nyahururu Municipality Block 6/403. The record shows that the parties signed a lease dated 06.02.2012 for a period of 5 years and one month with effect from 01.01.2013. The said tenancy was a controlled tenancy because it contained a clause for termination thereof other than for breach of covenant.

3. The material on record shows that vide a notice dated 23.01.2019 the Appellant gave a notice to the Respondent to terminate the tenancy on the ground that he intended to occupy the premises a period of not less than one year for the purpose of carrying out his own business. The notice was in the nature

of the statutory form issued under the provisions of Section 4(2) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* (Cap. 301) (the L & T Act).

4. The Respondent did not wish to comply with the notice hence he filed a reference before the Tribunal pursuant to Section 6 of the *L & T Act* opposing the intended termination of the tenancy by the Appellant. He consequently requested the Tribunal to investigate the matter and determine the issues involved.

C. The Tribunal's Decision

5. Upon hearing evidence from both parties, the Tribunal dismissed the Appellant's notice to terminate the tenancy and allowed the Respondent's reference opposing the termination. The Tribunal found and held that the Appellant had failed to demonstrate that he had the necessary financial resources to undertake the business he intended to carry on. The Tribunal also found that the notice of termination was not given in good faith since the Appellant had previously sought to terminate the tenancy on different grounds.

D. The grounds of appeal

6. Being aggrieved by the said judgment of the Tribunal the Appellant filed a memorandum of appeal dated 17.03.2020 raising the following 5 grounds of appeal:

    a. The learned chairman erred in law and fact by dismissing the Appellant's notice to terminate tenancy dated 23rd January, 2019, which had merit as the Appellant intended to use the demised premises for his own benefit as a landlord.

    b. The learned chairman erred in law and fact by failing to find that the Respondent ought to have been ordered to give vacant possession of the demised premises as there was sufficient grounds.

    c. The learned chairman erred in law and fact by finding that the Respondent's reference dated 5th February, 2019 had merit.

    d. The learned chairman erred in law and fact by failing to find that the Tribunal did not have jurisdiction to determine the reference before it as the tenancy in question was not a controlled tenancy at the time the Appellant issued the notice dated 23rd January, 2019.

    e. The learned chairman erred in law and fact by failing to award the Appellant the costs of the reference.

7. As a result, the Appellant sought the following reliefs in the appeal:

    a. That the judgment of the Tribunal delivered on 28.02.2020 be set aside.

    b. The Appellant's notice dated 23.01.2019 to terminate the tenancy be allowed and the Respondent be ordered to give vacant possession of the demised premises.

    c. The Appellant be awarded costs of the appeal and of the proceedings before the Tribunal.

E. The Respondent's Response to the Appeal

8. The Respondent filed grounds dated 29.11.2022 affirming the judgment of the Tribunal. The Respondent listed the following grounds in support of the judgment:

    a. The Appellant admitted in his testimony before the Tribunal that the suit premises which is a two storey building comprises 52 rooms in total apart from offices on the 1st and 2nd floors.

The Appellant was not able to discharge the burden of proof or demonstrate any justification whatsoever why he only wanted a single tiny room number 002 (out of 17 on the ground floor leased to the Respondent) and /or out of 52 or 82 others.

b. This was a pure act of bias, discrimination, prejudice and lack of utmost good faith. Why he settled on the Respondent's room No.002 on the ground floor out of 17 other shops or why he never chose any of the 17 shops on the 1st floor or any of the 18 shops on the 2nd floor leaves a lot to be desired. The notice to terminate one tenancy out of 52 or 82 was a clear Constitutional violation of the rights of the Appellant and the Tribunal rightly rejected the flimsy reason given by the Appellant why he selected room No. 002 and not any of the 52 other rooms.

c. By virtue of the Landlord's notice to terminate or alter terms of tenancy there was confusion as to which of the two options the notice sought to achieve either termination or alteration of terms.

d. By virtue of the duplex notice, the landlord/Appellant admitted the existence of the tenancy which he sought to terminate and cannot now turn around and try to negate its existence.

e. The notice gave the tenant a mere 59 days less than 60 days which is illegal as per the Act (The *Landlord and Tenant (shops, Hotels and Catering establishments) Act* Cap 301 Laws of Kenya.

f. The reasons given in the notice being to occupy the room for carrying on own business was too general and lacking in evidential basis or factual basis as the sort of business being undisclosed and unspecified as to lead the chairman of the Tribunal to conclude that the Appellant merely wanted to get rid of the respondent out of room 002 on the ground floor in view of the chequered history of the two.

g. The said notice was rightfully dismissed for being unmeritorious in that the Appellant did not have any experience or history of doing business he sought to do in said single room number 002.

h. There was only one ground which was insufficiently proven for the chairman to have upheld the Landlord's notice or to order the tenant to be evicted or give up possession of the room No.002.

i. The respondent's reference had merit and it was rightfully upheld

j. On the issue of jurisdiction, I wish to state the following:-

    a. The Appellant moved or urged the notice under the Act thereby believing that the Tribunal had the requite jurisdiction to deal with the matter. Otherwise why did he issue the standard but duplex notice in the first place knowing too well that a reference was likely to be filed as is normally the case.

        i. Why didn't the Landlord issue any other notice under their tenancy agreement with the tenant rather than under the *Act*?

        ii. The exhibited lease for room No. 002 dated 6-12-2012 for 5 years and one month with effect from 1-1-2013 would have terminated by expiry of time on or about 1-2-2018 The essence of the lease period of 5 years and one month was strictly to oust the jurisdiction of the Tribunal-over the tenancy.

        iii. It therefore meant that as at the date of the notice, the jurisdiction ousting lease had expired by effluxion of time and when the Appellant issued the notice

dated 23/1/2019 to take effect on 1-4-2019, the jurisdiction of the Tribunal was available and it was seized of the matter as though there existed a month-to-month tenancy of a shop between the parties.

iv. It is therefore not correct that as at 23-1-2019, the tenancy was not controlled or that the Tribunal lacked jurisdiction to hear and determine the matter.

v. The costs of the successful reference ought to have been awarded to the respondent but the chairman ordered each party to bear own costs.

F. Directions on Submissions

9. When the appeal was listed for directions it was directed that the same shall be canvassed through written submissions. Consequently, the parties were granted timelines within which to file and exchange their respective submissions. The record shows that the Appellant's submissions were filed on 12.01.2023 whereas the Respondent's were filed on 12.01.2023.

G. The issues for determination

10. Although the Appellant raised 5 grounds of appeal, the court is of the opinion that they can be summarized into the following 3 grounds:

a. Whether the Tribunal had jurisdiction to entertain the Respondent's reference.

b. Whether the Tribunal erred in fact and in law in allowing the Respondent's reference.

c. Who shall bear costs of the appeal.

H. The Applicable Legal Principles

11. This court as a first appellate court has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court were summarized in the case of *Selle & Another –vs- Associated Motor Boat Co. Ltd & Others* [1968] EA 123 at P.126 as follows:

> " ...Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally."

12. Similarly, in the case of *Peters –vs- Sunday Post Ltd* [1958] EA 424 Sir Kenneth O' Connor, P. rendered the applicable principles as follows:

> " ...it is strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion..."

13. In the same case, Sir Kenneth O'Connor quoted Viscount Simon, L.C in *Watt –vs- Thomas* [1947] A.C. 424 at page 429 – 430 as follows:

> " My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the class of cases in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of court, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a Tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other Tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

14. In the case of *Kapsiran Clan -vs- Kasagur Clan* [2018] eKLR Obwayo J summarized the applicable principles as follows:

> " (a) First, on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
>
> b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
>
> c. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time."

I. Analysis and Determination

a. Whether the Tribunal had jurisdiction to entertain the Respondent's reference

15. The court has considered the material and submissions on record on this issue. The Appellant submitted that the Tribunal had no jurisdiction to entertain the reference for at least two reasons. First, it was contended that the tenancy between the parties was not controlled because the lease was a period of 5 years and 1 month and the parties had recorded a consent in Nyahururu CMCC No. 262 of 2016 allowing the Respondent to retain the demised premises until expiry of the lease dated 06.12.2012. Second, that, in any event, the lease dated 06.12.2012 had already expired by effluxion of time since it was never renewed by the parties. The Appellant relied upon the cases of *Cotton Roots Fashions Ltd -vs-*

Veeral Shah & Another [2021] eKLR and *Kenya Ports Authority -vs- Modern Holdings E.A. Limited* [2017] eKLR on the issues of jurisdiction.

16. The Respondent, on the other hand, submitted that upon expiry of the lease dated 06.12.2012 on or about 31.01.2018 there was a periodic tenancy from month to month between the parties for about one year before the Appellant issued the notice to terminate the tenancy dated 23.01.2019. It was further submitted that the Appellant had himself recognized the existence of a controlled tenancy between the parties hence the reason he issued a notice of termination under Section 4(2) of the *L & T Act*. Finally, it was contended that the Appellant did not object to the jurisdiction of the Tribunal at any moment during pendency of the proceedings before it hence he could not raise it after judgment.

17. There is no doubt on the basis of the material on record that the lease dated 06.12.2012 between the parties was to run for 5 years and one month with effect from 01.01.2013. There is no dispute that the Respondent enjoyed the full term and that the lease expired on or about 31.01.2018. It is common ground that the Respondent did not apply for renewal of the formal lease and the Appellant did not grant any. It is also common ground that the Respondent was still in occupation of the demised premises as at 23.01.2019 when the Appellant issued the notice to terminate the tenancy. It is also common ground that the Respondent was not in any rent arrears at the time of the hearing of the reference before the Tribunal.

18. So, if there was no tenancy or controlled tenancy between the parties, why did the Appellant issue the notice of termination dated 23.01.2019 under Section 4(2) of the *L & T Act*? What tenancy or arrangement was sought to be terminated? On what basis was the Respondent continually paying his rent and on what basis was the Appellant accepting the same after 31.01.2018? Section 2 of the *Landlord and Tenant Act* defines a controlled tenancy as follows:

> " 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 years; or
>
> ii. contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or
>
> iii. relates to premises of a class specified under subsection (2) of this section
>
> Provided that no tenancy to which the Government, the Community or a local authority is a party, whether as landlord or as tenant, shall be a controlled tenancy."

19. The court is satisfied on the basis of the material on record that there existed a periodic tenancy between the parties upon expiry of the base dated 06.12.2012 hence the reason why the Respondent continued in possession and the Appellant continued accepting rent. Accordingly, the court finds and holds that the Tribunal had jurisdiction to entertain the Respondent's reference.

b. Whether the Tribunal erred in fact and in law in allowing the Respondent's reference

20. The court has considered the material and submissions on record on this issue. The Appellant faulted the Tribunal for holding that he had not issued the notice of termination in good faith and that he had failed to demonstrate his financial ability to undertake the electronics business he intended to carry on.

21. According to the material on record, the Tribunal found that the Appellant had not acted in good faith because he had previously sought to terminate the tenancy vide a letter dated 01.08.2016 on different grounds. The Tribunal also found that there was a tenant who had previously vacated a shop on the ground floor of the same building but the Appellant did not take it for his own business but rented it out to a different tenant. The court's own evaluation of the evidence on record is consistent with the finding of the Tribunal on the issue of good faith. The Appellant had previously unsuccessfully sought to obtain possession of the demised premises without success. No explanation was given as to why the Appellant did not take advantage of the vacant shop to carry on his intended business but instead let it out.

22. The court also finds no fault with the Tribunal's finding and holding that there was no credible evidence before it to demonstrate that the Appellant had the financial ability to undertake the proposed business of dealing in electronics. There were no bank statements, audited accounts, or offer financial accommodation from a third party to demonstrate the Appellant's ability to finance the intended business. The mere fact that he was a landlord could not, of itself, constitute evidence of financial ability to undertake the proposed business. A landlord can have heavy financial obligations to the extent of being unable to finance a business plan like the one placed before the Tribunal. The court is thus satisfied that the Tribunal came to the right conclusion on the issue of the Appellant's ability to finance and undertake his business plan.

(c) Who shall bear costs of the appeal

23. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason why the successful litigant in this matter should be deprived of costs. Accordingly, the court shall award the Respondent costs of the appeal. The court shall not disturb the Tribunals order on costs since the Respondent did not cross appeal on the issue.

J. Conclusion and Disposal Order

24. The upshot of the foregoing is that the court finds no merit in the appeal. Accordingly, the Appellant's appeal is hereby dismissed with costs to the Respondent.

25 It is so decided.

JUDGMENT DATED AND SIGNED AT NYAHURURU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 23RD DAY OF MARCH, 2023.

Y. M. ANGIMA

JUDGE

In the presence of:

Mr. Nderitu Komu for the Appellant

Mr. Joel Sigilai for the Respondent

C/A - Carol