Kiruja & 4 others v Mugambi Zakayo Nteere Ltd (Environment and Land Appeal 4 of 2020) [2023] KEELC 18347 (KLR) (21 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18347 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL 4 OF 2020

CK YANO, J

JUNE 21, 2023

BETWEEN

CYRUS KIRUJA .... 1ST APPELLANT

LUCY KIENDE .... 2ND APPELLANT

SILAS MURIUNGI .... 3RD APPELLANT

STEPHEN GATOBU MUKETHA .... 4TH APPELLANT

CHARLES KIOGORA .... 5TH APPELLANT

AND

MUGAMBI ZAKAYO NTEERE LTD .... RESPONDENT

JUDGMENT

1. The appeal herein arises from the judgment and decree of the Honourale chairman of the Business Premises Rent Tribunal Mr. Mbichi Mboroki in BPRT Case Nos 67, 68, 69, 70 and 71 of 2018 Meru Delivered on January 17, 2020, In those references, the respondent herein as landlord served the appellants who were tenants in the premises on plot No 127 Nkubu with notices dated February 16, 2018 seeking to terminate the tenancies of the tenants with effect from April 17, 2018 on the grounds that they defaulted in payment of rent for the premises.

2. The appellant did not wish to comply with the respondent's notices and filed the references in the tribunal under Section 6 of the *Landlord and Tenant (Shops, Hotels and catering establishments) Act* Cap 301. At the hearing, Zaverio Gatobu testified on behalf of the respondents while the appellants also testified in support of their respective cases, except for the 4th appellant where his wife, Naomi Njoki Macharia testified on his behalf.

3. Upon consideration of the evidence on record and the written submissions by the advocates of the parties, the Tribunal made the following findings-;

“ a. The record before the Tribunal established that all the tenants were in arrears of rent of least 2 months at the time of the landlord’s notices were served.

b. The record of payments of rent or shows that the tenants persistently delayed in paying rent when it was due and payable.

c. That at the time the parties were giving evidence show that some of the tenants in substantial arrears of rent i.e Tenants in BPRT 67/2018 and had arrears of rent of Kshs 53,000/= Tenant in BPRT 68/2018 – Kshs 40,0000/=. Tenant in BPRT 69/2018 Kshs 64,000/= Tenant in BPRT 70/2018 Kshs 218,000/= and tenant in BPRT 71/2018 – Kshs 39,000/=

d. The tenants did not file any complaint in the tribunal to the effect that the landlord had refused to accept rent.

e. There is overwhelming evidence on record to show that the landlord has proved the notices of termination in the above references.

4. Consequently, the tribunal made the following determination of the references.

“ Orders’

1. The tenants’ references herein are dismissed.

2. The landlord’s notices which are the subject matter of the references herein are allowed.

3. The tenants shall vacate and handover vacant possession of the suit premises on or before 31st Mach 2020 in default the landlord shall evict all the tenants without further references to the tribunal with the assistance of the O.C.S Nkubu Police station.

4. The Landlord is granted leave to levy distress and recover all outstanding arrears of rent from each tenant if not paid on or before March 31, 2020.

5. That each tenant shall pay the landlord costs of the reference assessed at Kshs 30,000/=

6. The costs shall be paid on or before January 21, 2020 in default, the same shall be recovered by way of distress.”

5. Being aggrieved by the said judgment and decree, the appellants filed the present appeal and set out the following grounds-;

i. That the learned chairperson erred in law and fact by failing to find that the notices to terminate tenancy dated February 16, 2018 were defective and incapable of terminating the tenancies for the reason that it gave the tenants a notice period of less than 2 months contrary to Seciton4 (4) of *Cap 301*.

ii. That the learned chairperson erred in law and fact by upholding the notices to terminate tenancy dated February 16, 2018 which gave no allowance for service of the notices and which

notice were never served upon the tenants whereas service is a strict requirement under section 4 of the *Cap 301*.

iii. That the learned chairperson erred in law and fact by failing to find that the ground for termination of tenancy to wit non-payment of rent was not proved in the light of the overwhelming evidence that the appellant had faithfully paid rent.

iv. That the learned chairperson erred in law and fact by failing to find that the respondents could not have their cake and eat it and were estopped from complaining about non- payment of rent for refusing to accept rent, failing to provide the appellant with Bank account details where to pay rent and failing to notify the appellants of the changes in the management of the premises.

v. That the judgment of the learned chairperson is unconscionable, irrational and against the weight of the evidence adduced before him.

6. The appellants pray that this appeal be allowed with costs and the judgment of the chairperson in BPRT case No 47 – 71/2018 – Meru dated January 17, 2020 be set aside and in lieu thereof this Honourable court be pleased to enter judgment for the appellants by allowing the tenant's references dated November 5, 2018 and dismissing the notices to terminate tenancy dated February 16, 2018.

7. Pursuant to directions issued by the court on November 22, 2022 the appeal was canvassed by way of written submissions which were duly filed by all the parties through their respective advocates on record.

The Appellants' Submissions

8. In their submissions dated January 12, 2023, M/s Mithega & Kariuki advocates for the appellants gave a brief introduction of the matter and submitted that the learned chairperson erred in law and fact by failing to uphold the express and explicit provisions of section 4 (4) of *Cap 301* which they cited. That in this regard, the notices are dated February 16, 2018 and purported to constrain the eviction of the tenants by the April 17, 2018. The appellant's counsel submit that this was within exactly two months whereas the two months count as of the date of service. It is the appellants' submissions that there was no proof of service and seeing that there were about ten (10) notices, to ten (10) different people (some of whom are the appellants while others never appealed), it is naturally not possible that the said notices were actually drafted, dated and served on the same date. The appellant's counsel argued that the learned chairperson should not have under played the validity of the notices with regard to service especially since there was no proof of service on record and when all the tenants refuted the fact of being served. That in fact all the tenants agreed that a dispute arose from a proposed rent increase and henceforth, they did not know where to pay rent. Counsel argued that the landlord must have clearly frustrated any interaction with the tenants and it would thus be unfair to assume that service of the said notice was effected properly with regard to notice period especially in the absence of proof. The appellants' advocates relied on the case of *Fredrick Mutua Mulinge t/a Kitui uniform v Kitui Teachers Housing Cooperative Society Limited* [2017] eKLR which cited the case of *Anne Mwaura and 9 others vs David Wagatua Gitau & 2 others* [2010] eKLR as follows-;

> "As regards the period of notice, I concur with the Court of Appeal holding in the said case of Caledonia Supermarket Ltd vs Kenya National Examinations Council (2002) 2EA 357 that ... Failure to comply with these mandatory requirements rendered the purported notice(s) null and void and incapable of enforcement."

9. It is also the appellants' submission that the notices dated February 16, 2018 and which required the tenants to vacate in exactly two months from the date they were drawn could not possibly have met the

statutory threshold under Section 4 of *Cap 301* and that there was no proof of service availed. Counsel for the appellants relied on the case of *Siamani Farmers Co. Ltd vs Japheth M. Nyaramba t/a Boburia Stores* [2008] eKLR.

10. It is also the appellants' submissions that the tenants had proved to have faithfully paid rent as at the time the notices were issued and that the learned chairperson did not address his mind to the Landlord's disputed unilateral rent increment. That all the tenants brought evidence of rent payment as at December, 2018 and therefore the notices of February, 2018 are severely contested by the tenants.

11. Further, the appellants submitted that the respondent frustrated the efforts of the tenants to pay rent the moment there arose a dispute with regard to payment of rent. That it is on record that the landlord would receive money from rent through MPESA and return it to the sender. That he also failed to furnish details of the change in management and did not furnish the new details of the Bank Account which money was to be deposited into, adding that at the hearing, the director representing the respondent admitted to not have verified some payments from the Bank while also admitting that some actually reflected. It is the appellants submission that the learned chairperson erred by upholding the notices of termination that were premised on alleged fact of non-payment of rent while it was clear that the respondent had frustrated the tenant's efforts of paying rent. Counsel for the appellants relied on the case of *Siamani Farmers Co. Ltd vs Japheth M. Nyaramba t/a Boburia Stores* (*supra*).

12. For the above reasons, the appellants implored the court to allow the appeal with costs.

The Respondent's Submissions.

13. The respondent filed submissions dated January 25, 2023 through the firm of Mwenda Mwarania, Akwalu & Co. Advocates. The respondent submitted that the record of appeal as filed by the appellants is incomplete in a material way that may render the appeal a mis-trial instead of it being so and that the best would be for the court to be guided by the best evidence rule under Section 119 of the *Evidence Act* Cap 80 by presuming that the material left out by the appellant if brought to the fore would be adverse to the appellants and proceed to dismiss the appeal with costs. The respondent's counsel submitted that from the reference contained at page 5 of the record of appeal, the same was expressed to be filed pursuant to leave granted on October 26, 2018 vide Nairobi BPRT case No 49 of 2018 Meru region. The respondent argued that the order or ruling in that case granting the leave was not filed and the pleadings in that case are similarly not filed and that the notice which was the subject matter of the reference is also not filed.

14. The respondent submitted that the parties to the BPRT case No 49 of 2018 are not disclosed and that its genesis is also not disclosed yet in that file all the primary documents are to be found. That the affidavit of service of the notice is also found there and the annexure number ZGM 2 to the affidavit in support of the reference by the respondent herein dated May 19, 2018 clearly shows that the notices dated February 16, 2018 were served on the same date at 4.30 p.m adding that the distance from Meru town to Nkubu market is hardly 30 minutes' drive and the surprise that a notice can be drafted in Meru town, be signed and served at Nkubu market within a single plot in the same day is superfluous.

15. The respondent further submitted that the appellants intentionally left out both the subject notices and the affidavit of service filed in the said BPRT case No 49 of 2018 in which they were granted extension of time to file the reference for ulterior motive. That however, upon time being extended over 8 months after the date of the notices, the time of service became irrelevant for purposes of the proceedings before the tribunal and this appeal.

16. The respondent further submitted that the appellants were not condemned for failure to file the reference within 30 days as by the law required and that at paragraph 4 of the 1st appellant affidavit in

BPRT case No 49 of 2018 while seeking extension of time dated July 16, 2018, he acknowledges that they became aware of the notices on June 21, 2018 in court and did not act on them until a month later and that since time was extended they should dwell on its merits and not the service or otherwise of the same on February 16, 2018, as per the filed affidavit of service. The respondent further submitted that after all in their evidence, none of the appellants disputed service of the notice dated February 16, 2018 and that similarly while cross examining the respondents witness who is said to have pointed out the appellant to the serving counsel, the issue of service on February 16, 2018 was not raised and therefore it cannot be brought up in the final submissions before the tribunal or in the court since it was too late in the day and over and above being superfluous in view of the extension of time.

17. On the merits of the notice dated February 16, 2018, the respondent submitted that the tribunal found as a fact that when the notices were served, all the appellants were in arrears for at least 2 months and in effect the respondent was justified to issue the notices.

18. The respondent submitted that the appellants appear to argue that the delay in paying rent is because the respondent refused to accept rent and returned it, but stated what was exhibited in the record of appeal are bank deposit slips in favor of the respondent with no corresponding deposit slips from the respondent showing return of the money. That the appellants never made any formal complaint to the respondent or the tribunal under Section12 (4) of *Cap 301* about any frustration in their endeavor to pay rent before the respondent moved the tribunal to enforce the notices via eviction orders in the said reference filed as Nairobi BPRT case No 49 of 2018 and that the tribunal found as much.

19. The respondent further submitted that even as at the date of hearing before the tribunal, all the appellants had rent arrears of varying amounts as captured in finding number 3 of the tribunal. The respondent submitted that as observed by the tribunal, the notice of termination of the tenancy on grounds of non- payment of rent is relatively easy to prove or dispose and to disprove all a tenant needs to do is to prove evidence that he had paid rent up to date as at the date the notice was issued. That in the current case, the tenants evidence clearly shows that they were in arrears of rent for at least 2 months as at the date the notices were issued and that all payments were done after July, 2018 after they filed an application for extension of time to challenge the notices. That without any formal complaint to the tribunal or the respondent on any difficulties in paying rent, there can in law be no justification for the arrears and the tribunal was justified to uphold the notices dated 16th February, 2018.

20. The respondent urged the court to find that the appeal has no merits and proceed to dismiss the same with costs and thereafter order the release of Kshs 150,000 deposited in court on March 8, 2021 to the respondent's advocate for onward transmission.

Analysis And Determination

21. I have perused and considered the record of appeal, the grounds of appeal and the submissions by the parties. This being a first appeal, I am conscious of the court's duty and obligation to evaluate, re-assess and re-analyse the evidence on record to determine whether the conclusions reached by the learned chairperson of the tribunal were justified on the basis of the evidence presented and the law. The issues for determination as I can deduce from the grounds of appeal and submissions are-;

    i. Whether or not the respondent properly served notice upon the appellants.

    ii. Whether or not the notices served conformed with the law.

    iii. Whether or not there was sufficient cause to terminate the tenancies.

    iv. Whether respondent frustrated the attempts to pay rent by the appellants in order to justify termination.

v. Whether the decision of the Tribunal was against the weight of the evidence.

22. Regarding the first and second issues, the appellants submitted that the tribunal failed to find that the notices to terminate tenancy dated February 16, 2018 were defective and incapable of terminating the tenancies for the reason that it gave the appellants a notice period of less than two months contrary to Section 4 (4) of *Cap 301*. The said section provides as follows-;

> "(4) No 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 therein: provided that-
>
> i. Where notice is given of the termination of a controlled tenancy, the date of termination shall not be earlier than the earliest date on which, but for the provisions of this Act, the tenancy would have, or could have been terminated;
>
> ii. Where the terms and conditions of a controlled tenancy provide for a period of notice exceeding two months, that period shall be substituted for the said period of two months after the receipt of the tenancy notice;
>
> iii. The parties to the tenancy may agree in writing to any lesser period of notice."

23. In this case, the notices issued are said to be dated February 16, 2018 and were to terminate the tenancies from April 17, 2018. The appellants argue that this is within exactly two months. If that be the case, then it goes without saying that the notices conformed with the provisions of Section 4 (4) of *Cap 301* since they were not for less than two months.

24. Whereas the appellants have also argued that there was no proof of service, I note that while testifying, the 2nd appellant stated that when the respondent's notices were served, she had no arrears of rent. The question then that arises is which notices were served? The only logical conclusion the court can reach is that the notices referred to by the said appellant were the ones dated February 16, 2018. I therefore find that the appellants were properly served with the notices to terminate the tenancies and their arguments to the contrary cannot be sustained. Moreover, it is apparent from the record that the appellants sought for extension of time to file reference, and leave was granted in BPRT case No 49 of 2018. Since none of the appellants disputed service and leave having been granted it is my view that the issue cannot be raised at this appeal stage and more so through submissions.

Even the argument that ten notices could not naturally possible to be served on the same date is not plausible especially where the parties to be served are located on the same premises. It is therefore my finding that notices were properly served and the same conformed with the requirements of the law under Section 4 (4) of *Cap 301*.

25. With regard to the issue whether or not there was sufficient cause to terminate the tenancies, the reason given to terminate the tenancies was the sole ground that the appellants defaulted in payment of rent. The tribunal found that the appellants were in arrears of rent. Whereas the appellants appear to argue that the delay in payment of rent was because of frustration from the respondent who refused to give bank details and/or refused to accept rent and returned it the court has perused the evidence adduced by the parties at the tribunal. There was no evidence to show that the respondent herein returned monies paid towards rent. Moreover, there is no evidence to show that the appellants made any complaints to the respondent or the tribunal about the alleged frustration to pay rent. If at all

the appellants were up todate in payment of rent and had no arrears, they could have disapproved the respondent's contention by providing evidence that show that they had paid all rent as at the date of the notices issued. In this case, there was no such evidence shown to the tribunal and this court has also not seen any. It is therefore my finding that there was sufficient cause to terminate the tenancies and I find no reason to fault the conclusion reached by the tribunal in this respect.

26. It is my view that based on the evidence that was adduced before the tribunal, and having found that the appellants were in rent arrears and therefore there was sufficient cause to terminate the tenancies, the tribunal was justified in arriving at the decision it made and I see no reason to interfere with the same.

27. The upshot is that I find this appeal as lacking in merit and the same is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 21ST DAY OF JUNE, 2023.

IN THE PRESENCE OF:

Court Assistant – V. Kiragu

Muriira holding brief for Mwenda Mwarania for respondent

Kiogora Nganga for appellants

C.K YANO

JUDGE