Erotekt (Kenya) Limited v Okech (Environment and Land Appeal E071 of 2021) [2023] KEELC 20320 (KLR) (28 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20320 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ENVIRONMENT AND LAND APPEAL E071 OF 2021

E ASATI, J

SEPTEMBER 28, 2023

BETWEEN

EROTEKT (KENYA) LIMITED .... APPELLANT

AND

MARY ADHIAMBO OKECH .... RESPONDENT

(Being an appeal from the Judgement and Decree of the Business Premises Rent Tribunal delivered on 8th day of September 2021 before Hon. P. May in Tribunal Case No. 40 of 2020 Kisumu)

JUDGMENT

Introduction

1. Vide the Memorandum of appeal dated October 28, 2021, the appellant appealed to this court and sought for orders that:

    a. The appeal be allowed;

    b. The judgement of the Hon P May dated, signed and delivered on September 8, 2021 be set aside;

    c. The honourable court do make any other order to satisfy the ends of justice as may deem fit;

    d. The costs of the appeal be awarded to the appellant.

2. The background of the appeal as can be gathered from the Record of Appeal is that the appellant is the Tenant and the Respondent the Land lady pursuant to a tenancy agreement(lease) dated March 1, 2019 in respect of land reference No 7473 situate at Ahero Township within Kisumu County. The Respondent issued the appellant with a 30 days' notice dated October 15, 2020 to vacate the premises citing breach of the lease.

3. Aggrieved by the Notice to vacate, the appellant filed a reference to the Business Premises Rent Tribunal pursuant to the provisions of section 6 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* Cap 301 (Cap 301). The Tribunal heard the Reference and vide its judgement delivered on September 8, 2021 made orders that:

    a. The Notice to vacate dated October 15, 2020, is hereby dismissed. The Landlord shall be at liberty to issue a fresh notice of termination that conforms with the provisions of 301.

    b. Each party shall bear their own costs.

4. Dissatisfied with the judgement, the appellant proffered the present appeal on the grounds that:

    a. The learned trial Tribunal erred in law and in fact and was fundamentally wrong to make a finding that the appellant had a duty to prove that there was a joint inspection before the renovations commenced and misinterpreted article 6 of the lease agreement which does not impose any duty on the Tenant for a joint inspection to the repairs of a temporary structure.

    b. The learned trial Tribunal erred in law and in fact and was fundamentally wrong in failing to interpret article 6 of the lease agreement in the appellant's favour which empowers the said appellant/Tenant to effect any necessary and reasonable improvements and renovations not structural in nature to make the premises more suitable for the bar and restaurant and any other legal business.

    c. The learned trial Tribunal was wrong and proceeded to make an error of law and fact in failing: -

        i. to appreciate and note that the appellant/tenant pursuant to article 6 of the lease agreement fabricated temporary structures as a way of reclaiming space that used to be waterlogged outside the compound and which action acted as a measure to keep off small traders that had invaded the front of the premises facing the main Kisumu-Kericho road.

        ii. that the appellant/tenant has concreted the muddy parts of the compound to ensure ambience and the car park to attract motorists to reduce dust and also waterlogging in the car park during rains.

        iii. the appellant/tenant in furtherance of its business interests undertook improvements on an empty space within the lease area without interfering with the existing building.

        iv. the Respondent/Landlord ignored/refused to repair the premises that were existing at the commencement of the tenancy resulting in the building in serious state of disrepair and health risk

5. Directions were taken on April 26, 2023 that the appeal be canvassed by way of written submissions.

Submissions

6. Written submissions dated May 2, 2023 were filed on behalf of the appellant by the firm of Wachakana & Co advocates. Learned Counsel submitted that it was on record from the evidence of Erastus Ochele, a director of the appellant Company sworn on December 9, 2020 that under article 6 of the lease agreement, the lessee/appellant shall effect any necessary and reasonable improvements and renovations not structural in nature to make the premises more suitable for the intended bar and restaurant business. That it is evident that the Respondent/Landlord failed or ignored to undertake any repairs on the leased premises including the leaking old building and septic tank and urinal pit which collapsed making it difficult for the appellant to do business. That by consent of the

Respondent/Landlord and in the year 2016 the appellant commenced reclaiming empty space in the compound which was waterlogged by filling stones, murraming, compacting, culminating in fabrication of sheet metal structures in line with the appellant's business design, remodelling and reengineering as affirmed by clause 5 of the lease at the appellant's cost.

7. That it was after 95% of the renovations were done that the Respondent wrote to the appellant complaining. That it was a misdirection of law for the Tribunal to find that the appellant was under a duty to prove that there was a joint inspection before the tenant commenced the renovations. That in paragraph 17 of the judgement the Tribunal erred in making a finding that the Respondent was justified to breach the terms of the tenancy and that the Tribunal failed to find that the appellant duly informed the Respondent/Landlord of the improvements all along and further ignored the appellant's evidence that the fabrication was part of the business modelling to segregate the alcohol takers from the non-alcohol takers.

8. It was submitted further that the Tribunal failed to appreciate that the lease was for a term of five (5) years hence the Landlord's action to issue notice to vacate was unlawful, unilateral and in breach of the lease agreement.

9. Written submissions dated May 24, 2023 were filed on behalf of the Respondent/Landlord by the firm of Rachier & Amollo LLP Advocates. Counsel submitted that clause 6 of the tenancy agreement placed an obligation on the appellant/tenant to ensure that there was a joint inspection prior to any repairs or improvements being undertaken by the Tenant/applicant. That further, there is an implied condition in a lease agreement that consent of the landlady is required before undertaking any fundamental structural changes in the landlady's premises. That the appellant /tenant did not obtain such consent.

10. That it is trite law that structural changes in a rental premises is the responsibility of the landlord and not the tenant. That the conduct of the tenant of bringing down some walls and carrying out main repairs without seeking consent from the landlady amounted to material breach of the tenancy agreement. Counsel relied on the case of *National Bank of Kenya Ltd vs Pipe Plastic Samkolit (K0 Ltd (2002) 2 E.A 503 (2011) eKLR* to submit that a court of law cannot rewrite a contract between parties and that parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.

11. Counsel submitted that the burden of proof lay with the appellant as the party who alleged that a joint inspection had been conducted in accordance with article 6 of the tenancy agreement.

12. That the right to property is constitutionally protected under article 40 of the *Constitution*.

Issues for determination

13. From the record and the submissions made, the issues that arise for determination in this appeal are: -

    a. whether or not the Tribunal erred in holding that the appellant had a duty to prove that there was joint inspection before the renovations were done;

    b. whether or not the Tribunal erred in finding that the renovations carried out by the appellant on the Tenancy premises were not in accordance with the lease agreement;

    c. whether or not the Tribunal erred in making a finding that the landlord shall be at liberty to issue a fresh notice of termination of tenancy that conforms with the provisions of Cap 301 and

    d. who pays the costs of the appeal?

Analysis and determination

14. The first issue for determination is whether or not the appellant had a duty to prove that there was a joint inspection before the renovations were done. Cause 6 of the tenancy agreement provided that

> ' the Lessee shall effect any necessary and reasonable improvements and renovations not structural in nature to make the premises more suitable for the intended bar and restaurant business. However, expenses incurred on the current want of reparation shall be borne by the Lessee and recovered from the rent. The parties shall perform a joint inspection prior to the repairs being effected.'

15. The appellant's complaint as contained in ground 1 of the appeal is that the Tribunal erred in law and in fact and was fundamentally wrong to make a finding that the appellant had a duty to prove that there was a joint inspection before the renovations commenced and misinterpreted article 6 of the lease agreement which does not impose any duty on the Tenant for a joint inspection to the repairs of a temporary structure. It was submitted on behalf of the appellant that the Tribunal was fundamentally wrong in holding that the appellant had such duty and in failing to appreciate that the Respondent was aware of the repairs all along.

16. In respect of this issue, the Tribunal had observed and held its the judgement that

> ' I am guided by the above decisions from the superior courts and will proceed as follows; it is not disputed that the tenant carried out renovations and modifications on the demised premises. The tenant has made spirited argument that the renovations were necessitated by the need to make the premises more economically viable. The parties agreed in their agreement that they shall perform a joint inspection prior to the renovations by the tenant. The tenant has stated that there was a joint inspection before the renovations were carried out. The landlord denied the same. Section 107 of the *Evidence Act* places a burden of proof on the party alleging the existence of a fact. The tenant was under a duty to prove that there was a joint inspection before the renovations commenced. The tenant has not convinced the Tribunal as no report has been filed, neither did they file a statement by the expert who carried out the inspection. The tenant has therefore failed to discharge their duty as imposed by statute.'

17. I have read and considered the submissions. It is clear from the lease agreement that the parties agreed that prior to undertaking of the renovations or improvement on the tenancy premises, there be a joint inspection. It was the appellant's case that such inspection took place and that the Respondent was aware of the repairs all along. The Tribunal rightly pointed out and found that the Tenant as the party alleging that article 6 of the tenancy agreement had been complied with had a duty to so prove under the provisions of section 107 of the *Evidence Act*. I do not find any evidence of misinterpretation of article 6 of the tenancy agreement by the Tribunal. The duty referred to by the Tribunal is the duty imposed by section 107 of the *Evidence Act*.

18. The second issue is whether or not the Tribunal erred in finding that the renovations carried out by the appellant were not in accordance with the tenancy agreement. According to the tenancy agreement, renovations and improvements could only be carried out if they complied with clause 6 of the said agreement. Clause 6 gave the tenant liberty to effect any necessary and reasonable improvements and renovations to make the premises more suitable for the intended bar and restaurant business. But the liberty was conditional on two conditions namely; that the renovations were not to be structural in nature and secondly, before the renovations are effected the parties had to conduct a joint inspection

of the repairs to be effected. There is no evidence that these conditions were complied with by the Tenant/ appellant.

19. On whether or not the trial court erred in making an order that the landlord shall have the liberty to issue a fresh notice of termination of tenancy that conforms with the provisions of Cap 301. The Tribunal did find that the notice to vacate that had been issued by the Landlord was not compliant with section 4(2) of Cap 301. The Tribunal observed that the spirit of Cap 301 was to create a balance between protecting the interests of both the Landlord and the Tenant and proceeded to dismiss the Landlord's notice to vacate. The right to issue a fresh notice after the first one is dismissed is provided for in section 9 (3) of Cap 301 subject only to the Landlord issuing such notice within the timelines given therein. Whether or not the Tribunal made the order, the right to issue fresh notice existed.

20. In conclusion, I find that the grounds of appeal have not been proved. As such I find no reason to interfere with the findings and decision of the Tribunal. As was held in *Mkube Vs Nyamuro [1983] KLR, 403-415, at 403*: -

> ' A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.'

21. On costs, the law as contained in section 27 of the *Civil Procedure Act* is that costs of any action, cause or other matter, or issue follow the event.

22. For the foregoing reasons I find that the appeal lacks merit. Appeal is dismissed. Costs to the Respondent.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 28TH DAY OF SEPTEMBER, 2023 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI

JUDGE.

In the presence of:

Maureen: Court Assistant.

Wakasa for the Appellant

Ongoro for the Respondent.