



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MIGORI**

**ELC APPEAL NO. 10 OF 2018**

**(Formerly Migori HCCA NO. 49 OF 2018 & Kisii BPRT 26B of 2016)**

**TONCAP INVESTMENTS..... APPELLANT/TENANT**

**-VERSUS-**

**LUORE MANAGEMENT.....RESPONDENT/LANDLORD**

**(Being an appeal from the Order of Honourable Mbichi Mboroki ,Chairman Business Premises Rent Tribunal issued on 27<sup>th</sup> March 2018 at Nairobi in Kisii BPRT No. 26'B of 2016)**

**JUDGMENT**

**Introduction**

1. The instant Appeal avails an opportunity to revisit the decision of the Business Premises Rent Tribunal (hereinafter referred to as “**The Tribunal**”) to terminate the Appellant’s tenancy on plot number 1432/546 in Homa Bay Town (the suit premises). The Tribunal’s decision was rendered by Mbichi Mboroki (Chairman) on 27<sup>th</sup> March 2018.

2. The Appellant is represented by learned counsel, Mr. H. Kabiru. The respondent is represented by learned counsel Mr. Samwel Nyauke.

3. By a memorandum of appeal dated 6<sup>th</sup> April, 2018 in the record of Appeal of even date and filed on 19<sup>th</sup> April 2018, the appellant appealed the tribunal’s decision on the grounds that :-

*a) The Honourable Chairman erred in fact by proceeding to issue Orders ex-parte, without establishing that the Appellant had no notice of the hearing date.*

*b) The Honourable chairman erred in law and in fact in ignoring the appellant’s application dated 28<sup>th</sup> April 2016 and going ahead to render a determination ex-parte on 27<sup>th</sup> March 2018.*

*c) The Honourable Chairman erred in law and fact in sitting to render a determination in a matter where the initial notice to vacate had just been withdrawn three months ago.*

*d) The Honourable chairman erred in law in overlooking a determination the tribunal had made only three months ago.*

*e) The Honourable chairman erred in law in deeming the tribunal’s determination made on the 18<sup>th</sup> March 2016 not to be determination within the meaning of the Government Act.*

*f) The Honourable chairman erred in law and in fact in issuing an order in favour of the Respondent who had withdrawn his notice before the lapse of the requisite 12 months after the first order.*

4. Thus, the appellant has sought the following orders;-

**a) That this appeal be allowed and the order set aside**

**b) Costs be awarded to the appellant.**

**The Appellant’s Case**

5. The genesis of this dispute arose when the Respondent issued a tenancy termination notice upon the Appellant. Dissatisfied with the move, the Appellant filed a reference before the Tribunal to challenge the notice. The Appellant's counsel filed submissions dated 8<sup>th</sup> February 2019 and contends that the said reference was heard and determined on 27<sup>th</sup> March 2016 without his participation. That orders to surrender occupation of the suit premises were issued accordingly.
6. The Appellant further contends that upon making a reference to the Tribunal, the Chairman made a determination to withdraw the termination of tenancy by an order dated 18<sup>th</sup> March 2018. The Appellant also contends that upon such determination by the Honourable Chairman of the Tribunal, the respondent was bound by **section 9(3) of the Landlord & Tenant (Shops, Hotels and catering Establishments) Act, Cap 301**, not to issue a further termination notice in respect of the suit premises until the lapse of twelve (12) months. The appellant further argues that before twelve (12) months elapsed, the Honourable Chairman of the Tribunal made another determination in respect of the same premises pursuant to a fresh termination notice drawn by the Respondent requiring the Appellant to vacate the premises. The appellant submits that the decision by the Honourable Chairman of the Tribunal was defective in law.
7. The second limb of the appeal is based on the Tribunal's failure to accord the appellant an opportunity to be heard. The appellant contends that the Respondent did not communicate the date, time and venue of hearing of the matter inspite of being tasked with the responsibility of issuing a hearing notice. That the Appellant was only served with an eviction Order from the Tribunal, a fact which violated his constitutional right guaranteed under **Article 50(1) of the Constitution of Kenya 2010**, to the effect that the dispute be heard and resolved by the application of the law in a fair and public hearing before a court or an impartial tribunal or body. The appellant further contends that there was violation of **Article 159(2)(d)** of the same Constitution when the Respondent paid undue regard to procedural technicalities by making an adverse decision in the absence of the appellant hence substantive justice was not administered. Reliance was placed on the decision in **John Peter Kiria & Alice M. Kanyithia -vs- Pauline Kagwiria ( 2013) eKLR.** The Appellant further found support in the case of **Wachira Karani -vs- Bildad Wachira (2016) eKLR.**

### **The Respondent's Case**

8. The crux of the Respondent's case revolves around incompetence of the appeal and the Appellant's misrepresentation of facts aimed at misleading the court. The respondent's counsel filed submissions dated 8<sup>th</sup> March 2019 and contends that the appeal is incurably defective for having been brought to court without proceedings of the Tribunal and the judgment appealed against. To that end, the Respondent makes reference to **section 15(1) and (2) of the Landlord and Tenant (shops, Hotels and Catering Establishments) Act (Cap 301)** which enjoins Order 42 rule 13(4) of the **Civil Procedure Rules** that governs the procedure for appeals. In particular, the Respondent contends that the Appellant failed to comply with the requirements of **Order 42 Rule 13(4)** (ibid) by failing to file the **pleadings, the notes of the trial magistrate made during the hearing** and the **judgment appealed from**. Submitting that the Appellant was not excused from filing the documents, the Respondent found support in **Ndonga Kamau t/a Side view Garage -vs- Fredrick Isika Kalumbo [2016] eKLR** and **Charaik Management Limited -vs- Fund Board Trustees and another (2012) eKLR**.
9. On misrepresentation of facts, the Respondent submits that the allegation by the appellant that there had been a decision by the Honourable chairman of the tribunal to withdraw the Respondent's termination notice dated 23<sup>rd</sup> November 2014 on 18<sup>th</sup> March 2016 thereby rendering him functus officio with respect to the premises for a period of 12 months, is tainted with falsehood. He submits that during trial of **Tribunal Case No. 51/2014** (the initial reference filed by the appellant contesting termination notice), it was realized that there was an error on dating of the notice. That whereas the notice for termination was issued on 18<sup>th</sup> March 2016, the filing stamp thereon indicated that it was filed on 23<sup>rd</sup> October 2014. Essentially, that the error was that the filing of the Reference occurred before notice of termination was issued. This was the basis upon which the Honourable Chairman withdrew the Notice with leave to the Respondent to file a fresh notice.
10. The Respondent further submits that a fresh notice dated 13<sup>th</sup> June 2016 in **Tribunal Case No. 26'B of 2016** was duly filed. Accordingly, judgment was entered on 25<sup>th</sup> March 2018 requiring the appellant to vacate the premises.
11. Challenging the argument that the Appellant was not accorded an opportunity to prosecute it's case, the Respondent submits that the Reference was not heard in the year 2018 but in the year 2016 where the director of the Appellant participated in the proceedings. The Respondent maintains that the Appellant's director was served with a hearing Notice dated 25<sup>th</sup> May 2016 and an affidavit of service thereof filed accordingly.
12. The Respondent relied on the words of Sir Georges CJ in **Essanji and another -vs- Solanki [1968] EA 218** at page. 224, that:-

***“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that error and lapses should not necessarily debar a litigant from the pursuit of his rights.”***

13. The respondent further urged that the tribunal did not pronounce itself in Tribunal case No. 51 of the 2014. That it would not grant leave to the respondent to file a fresh reference as it was done in Tribunal case number 26 B of 2016 in contravention of **section 9 (2) (3) of the land Lord and Tenant Act (supra)**.

14. The respondent urged this court to exercise it's discretion and order the security for costs deposited by the Appellant to be released to it to ameliorate it from the suffering and losses incurred in the proceedings before the Tribunal, the instant appeal and the continued occupancy of the appellant in the suit premises. To that end, the respondent relied on Judicial Hints on **Civil Procedure 2nd Edition page 101** by Justice (Retired) Kuloba.

15. Notably, the order of the Honorable Chairman of the Tribunal was issued on 27<sup>th</sup> March 2018 and it reads:-

***“The tenant shall vacate and hand over vacant possession of the suit premises on or before 30<sup>th</sup> April, 2018 in default an***

*eviction order shall issue without further reference to the tribunal”*

16. I have considered all the grounds of appeal, the summary of the respective parties’ cases, submissions including all authorities cited therein and the findings of the tribunal. From the foregoing discourse, the issues that emerge for determination are as follows:-

*a) Is the instant appeal competent in light of the grounds of appeal?*

*b) Did the Tribunal accord the appellant a fair hearing?*

*c) What orders should this court make?*

#### **Analysis and Determination**

17. On the issue of competence, the respondent contends that this appeal is incompetent for failure to comply with order **42 Rule 13 (4) (supra)**. I note that the order appealed against is on page 3 of the record of Appeal. However, there are no notes of the honourable chairman of the tribunal taken during the inquiry of the reference. Therefore, there is limited record in terms of items 1 to 7 in the record of Appeal to assist this court in re-evaluating and reconsidering the Tribunal’s decision; see **Selle and another –vs- Associated Motor Boat Company Limited and others (1968) EA 123**.

18. Moreover, the documents itemised as numbers 3,4,5,6 and 7 relate to another reference namely Tribunal case No. 51 of 2014 Kisii (Migori) and not the order appealed from in Tribunal case no. 26B of 2016. Clearly, the order given on 18<sup>th</sup> March 2016 and itemised as document number 3 in the record of Appeal, rendered notice to terminate dated 18<sup>th</sup> April, 2016, withdrawn as the Tribunal directed that the respondent was at liberty to serve the appellant with a fresh notice.

19. Does the order given on 18<sup>th</sup> March 2016 amount a determination of the reference filed by way of notice dated 23<sup>rd</sup> November 2014? **Black’s Law Dictionary 10<sup>th</sup> Edition** defines the term “**Determination**” thus:-

*“ The act of deciding something officially especially a final decision by a court or administrative agency” (Emphasis added)*

20. In view of the foregoing, the Tribunal did not determine the respondent’s reference in Tribunal case no. 51 of 2014. The same was a withdrawal of notice with an option for the respondent to file a fresh reference.

21. Be that as it may, only ground 1 in the memorandum of appeal relates to the Tribunal case no. 26 B of 2016, the proper subject of this appeal. In the circumstances, I am of the considered view that the rest of the grounds of the instant appeal are based on Tribunal case no. 51 of 2014 which is not the subject of this appeal. Accordingly, I find the appeal partially incompetent.

22. In spite of the appeal being partially incompetent, this is a court of law and a court of equity I am therefore bound to deliver substantive rather than technical and procedural justice. The reliefs, orders and directions given in this judgment are aimed at delivery of substantive justice to all parties having legal and equitable interest in the suit premises as noted by the Court of Appeal in the case of **Macharia Mwangi Maina and 87 other vs- Davidson Mwangi Kagiri (2014) eKLR**.

23. In respect of ground number one (1), was the appellant accorded an opportunity to be heard by the Tribunal in Tribunal case number 26B of 2014? I am guided by **Articles 50 (1) and 23 (c) of the Constitution of Kenya, 2010** on the un curtailed right to fair hearing.

24. In **Re Hebtullah Properties Ltd (1976-80) 1KLR 1195 at 1209**, Cheson J (as he then was ) on fair hearing held that:-

*“This Tribunal had a duty to hear the landlord on the objection. It did not hear the landlord. There was in my opinion a violation of the audi alteram rule”*

25. It is abundantly clear from the record of Appeal and the respondent’s replying affidavit sworn on 3<sup>rd</sup> May 2018, that the appellant was duly notified of the hearing and determination of the reference. It is so discerned in affidavits of service sworn on 17<sup>th</sup> June 2016 and 27<sup>th</sup> April, 2018. Therefore the Constitutional rights of the Appellant were not violated. To that end, I find ground one (1) of the instant appeal unmeritorious. I dismiss the same.

26. Having found the instant appeal partially incompetent and since ground one of the appeal fails, the appellant is not entitled to the orders sought in the appeal. The entire appeal is without merits.

27. In the upshot, the substantive justice of this appeal craves for the following final orders:-

*a) This appeal filed on 19<sup>th</sup> April, 2018 by way of a record of appeal dated 6<sup>th</sup> April 2018 be and is hereby dismissed.*

*b) The order issued on 27<sup>th</sup> March 2018 by the Tribunal in Tribunal case No. 26B of 2016 is hereby upheld.*

*c) The stay order issued on 26<sup>th</sup> September 2018 in this appeal is hereby lifted.*

d) On costs, by dint of the proviso to section 27 (1) of the Civil Procedure Act (Cap 21) and the decision in *Rai and 3 others –vs- Rai and 4 others (2014)*, it is hereby ordered that :-

i. *Costs of the respondent in the instant appeal and in the Tribunal below be borne by the appellant.*

ii. *The sum of Kshs. 300,000/= being security for costs deposited in this court on 20<sup>th</sup> November 2018 by the appellant further to order of 26<sup>th</sup> September 2018, shall be applied to ameliorate the respondent's costs accordingly*

**DELIVERED, DATED and SIGNED at Migori this 30<sup>th</sup> July day of 2019**

**G.M.A ONGONDO**

**JUDGE**

**In presence of:-**

Mr. Migele holding brief for Nyauke learned counsel for the appellant

Mr. Odoni Awino holding brief for Kabiru learned counsel for the respondent.

Tom Maurice – Court Assistant