



Netcom Car Wash v Nazigi Savings and Credit Co-operative Society Ltd (Environment and Land Appeal E125 of 2022) [2023] KEELC 20991 (KLR) (19 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20991 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E125 OF 2022
AA OMOLLO, J
OCTOBER 19, 2023**

BETWEEN

NETCOM CAR WASH APPELLANT

AND

**NAZIGI SAVINGS AND CREDIT CO-OPERATIVE SOCIETY
LTD RESPONDENT**

(Being an Appeal from the judgment and order of Hon. Patricia May, Vice-Chairman of the Business Premises Rent Tribunal delivered on 11th November 2022 in BPRT Cause No. E426 of 2021)

JUDGMENT

1. The Appellants filed a memorandum of appeal dated 8th December 2022 on the grounds that
 - i. That the Honourable Vice chairman erred in law and fact by dismissing the tenant’s reference and upholding the landlord’s notice to terminate the tenancy against the weight of evidence.
 - ii. That the Honourable vice chairman erred in law and in fact in holding that the landlord had established that it had the financial capacity to established a petrol station at the suit premises when no such evidence was presented.
 - iii. That the Honourable vice chairman erred in law and in fact in holding that the landlord has obtained approvals for the establishment of a petrol station when no such evidence had been presented.
 - iv. That the Honourable the vice chairman in law and fact by failing to consider the tenant’s evidence in court.
2. The Appellant is seeking for the Court to grant him the following reliefs;



- a. That this Appeal be allowed
 - b. That this Honourable Court do set aside the judgement and subsequent order delivered and given on 11th November 2022
 - c. That the Reference filed by the Appellant at the Business Premises Rent Tribunal be allowed.
 - d. Any further order/relief that the Honourable court may deem fit to grant.
3. Directions was taken that the appeal be prosecuted by way of written submissions. The Appellants and Respondents filed submissions both dated 15th June 2023.
 4. On Grounds number 1 and 2, the Appellant submitted that from the evidence before the Tribunal, the Chairman erred both in law and fact in dismissing the Appellant/Tenant reference and upholding Respondent/landlord Reference. He argued that during the hearing the Respondent failed to establish that she had the financial capacity to construct a petrol station in terms of her notice to terminate the tenancy.
 5. In support of this argument, the Appellant referred the court to proceedings on 7 to 9 of the supplementary records of appeal, witness statement by Respondents witness James Kanyingi Wahome, and also reiterated their submissions dated 24th August 2022 filed in the Tribunal as found in page 98 to 100 of the records of appeal.
 6. On Grounds number 3 and 4 the Appellants submitted that there are several regulatory requirements for establishment of a petrol station such as approvals from institutions like Energy Regulatory Authority, NEMA, County Government approvals and Approved Architectural drawings. They referred to pages 1 and 2 of the supplementary records of appeal as well as page 14 to 17 of the records of appeal in which the Landlord/Respondents witnesses admitted to not having any of the required approvals for the establishment of a petrol station and that not even a basic drawing approved by the County Government of Kiambu was produced. In support they relied on the case of *Reborn v Barry* [1956]2 All ER 742 in submitting that there must be a legal ability to carry out the intention into effect.
 7. The Appellant submitted that the Landlord had failed the test established in *Stephen Thiongo Versus George Gor Choro* (2021) eKLR which stated that the court must be satisfied that the intention to reconstruct is genuine and not colourable: that it is a firm and settled intention, not likely to be changed. They submitted that the landlord failed to produce bank statements and that without corroborating evidence it is insufficient to establish the landlord's ability and capacity beyond reasonable doubt.
 8. The Respondent submitted that as the first appellate court, it has a duty to reconsider the evidence adduced before the trial court and re-evaluate it to draw on own independent conclusion and to satisfy itself that the conclusion reached by the trial court are consistent with evidence as noted in *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) E.A 123 and *Peters v Sunday Post Limited* (1958) E.A 424.
 9. They submitted that they had established their financial capacity to undertake the project for which the premises were required for as its Chairman testified before the Tribunal (pages 6-8 of Supplementary Record of Appeal). They stated that the suit property had been purchased in the year 2015 at a cost of Kshs.22 Million and the application for change of use from agricultural to light industries (petrol station) approved on 27th September 2016 (page 65-66 of Record of Appeal) after which quotations for the construction received (pages 67-71 of the record of appeal).



10. Further, that from the minutes of the Respondent's 2015 AGM meeting (page 61-64) of the record of appeal, it is clear at Min/AGM/02/11/2015, that the members had approved the construction of the petrol station at the premises which proceeded to bidding stage but was delayed by the onset of the Covid-19 pandemic.
11. The Respondents submitted that they are comprised of 300 members who have been unable to implement the purpose for which the suit premises were acquired and continue to suffer loss and damages which cannot be mitigated by the rental income paid by the Appellant.

Determination:

12. I have looked at the grounds of appeal relied on and the submissions rendered in support thereof. The Appellant is seeking this court to overturn the Tribunal's decision on the basis that the Respondent failed to demonstrate genuine and uncolorable intention to reconstruct a petrol station on the suit premise; which was the ground offered in support of notice to terminate the tenancy.
13. It is trite law that this court being the first appellate court, it has a duty to reconsider the evidence adduced before the trial court and re-evaluate it to draw its own independent conclusion while determining whether the Vice Chairman erred in the making the finding appealed against. In the case of *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2EA 212, this Court observed:

“on a first appeal from the High Court, the Court of Appeal should 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. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence...”
14. I have looked at the tribunal proceedings at page 7 to 9 as directed by the Appellant which contains the evidence of the Respondent's testimony that they had 21 Million in the bank and that they had authority to borrow resources to build the petrol station. The witness also stated that they had consulted an architect, applied for approvals but did not produce all these documents to support those claims.
15. The main ground on this appeal is whether or not the Respondent fulfilled the provisions of Section 7(1)(g) of the *Landlord and Tenant (Shops Hotels and Catering Establishments) Act*, Cap 301. Section 7(i)(g) of the Act provides;

“Subject as herein under provided, that on the termination of the tenancy, the landlord himself intended to occupy for a period of not less than one year, the premises comprised in the tenancy for the purposes or partially for the purposes of a business to be carried on by him therein, or as his residence”
16. As clarified by court in *Sohan Singh & Sons Limited v Parkview Properties Limited* [2004] eKLR, the need for a planning permission is not an insurmountable obstacle to establishing the landlord's intention. The court held,

“Where, as in the case before me, the landlord proposes to occupy the premises for his own business, I do not believe that he needs to obtain planning permission or produce professionally prepared sketch plans to demonstrate “a firm and settled intention” to do so.”



17. I am alive to precedent as laid in the Court of Appeal case in *Mkubee v Nyamuro* [1983] KLR, 403-415, at 403, Kneller & Hancox Ag JJA stated as follows:-

“ A Court of 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.”

18. Upon perusal of the lower court file and in particular the documents produced by the Respondent, there was intention to put up a petrol station demonstrated. For instance, the proceedings of their AGM held on 27th November, 2015 at minute 2(a) which stated thus;

“The management Committee proposes that this meeting approves the construction of a petrol station and Sacco office on the plot (Kiamumbi/581). The Committee is still negotiating with both National Oil Corporation, Delta Oil Company and other oil marketing company to put up the station. This proposal was approved as proposed by Paul Wamai Mno 207 and seconded by Winfred Gikonyo Mno 18.”

19. The Respondent went further to annex copies of emails exchanged in the period March to May 2021 with the oil companies seeking business partnership (pages 47 – 50 of the record) for a petrol station. These emails were sent before the notice to terminate was issued to the Appellant in July 2021. The Respondent also produced a letter dated 27th September 2016 from the Kenya Urban Roads Authority stating no objection for the change of user for the land Kianumbi/581 from agricultural to light industries (petrol station). They also produced a notification of approval from the county government of Kiambu given in November 2016.

20. Thus, the Respondent laid evidence before the Tribunal which showed that they had intention to put up a petrol station long before they leased the premises to the Appellant. Consequently, their serving the notice terminating the tenancy cannot be said to be colourable. In regard to proof of financial capacity, the Respondent stated that they had a big membership from which to raise funds from (which I find plausible since it is a SACCO); it had some funds in the bank totalling to Kshs 21m; and that it had authority to borrow funds.

21. In view of the above analysis, I am unable to fault the Vice Chairman of the Tribunal in its holding that found in favour of the Respondent. I will not interfere with judgement rendered on 11th November 2022 and instead proceed to dismiss this appeal because it lacks merit. The costs of the appeal awarded to the Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF OCTOBER, 2023

A. OMOLLO

JUDGE

