



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

ELC CIVIL APPEAL NO. 25 OF 2014

DAVID WAINAINA GIKURU.....APPELLANT

VERSUS

ALICE NYAMBURA WAMAI.....RESPONDENT

***(BEING AN APPEAL FROM THE JUDGMENT OF MBICHI MBOROKI THE CHAIRMAN
BUSINESS PREMISES RENT TRIBUNAL NAIROBI IN TRIBUNAL CASE NO. 47 OF 2014 –
EMBU DELIVERED ON 3RD OCTOBER 2014)***

JUDGMENT

The respondent herein (**ALICE NYAMBURA WAMAI**) as the landlady and owner of stall No. 59 2nd Bus Park Embu (the stall) issued a notice to the appellant (**DAVID WAINAINA GIKURU**) as the tenant dated 24th April 2014 requiring him to vacate with effect from 1st July 2014. The ground on which the respondent sought to terminate the tenancy was so as to enable her do major renovations to the stall. The appellant did not wish to comply with the said notice and filed a reference with the Business Premises Rent Tribunal on 13th May 2014 challenging the same.

After hearing both parties, the Chairman to the Tribunal allowed the respondent's notice dated 24th April 2014 and dismissed the appellant's reference dated 13th May 2014 and by his judgment dated 3rd October 2014, it proceeded to order the appellant to give vacant possession of the stall on or before 31st December 2014 with each party bearing their own costs.

Aggrieved by that decision, the appellant filed this appeal in which he has raised the following four grounds:-

1. ***The learned Chairman erred in law and fact by failing to appreciate the defence evidence but instead proceeded to give his judgment against the appellant thus occasioning a miscarriage of justice.***
2. ***The learned Chairman erred in law and fact in that he never considered the fact that the appellant has been a tenant for the last eleven years and the business is the only source of income as the business is operated by both the appellant and his wife. A miscarriage of justice was occasioned.***
3. ***The learned Chairman erred in law and fact by failing to appreciate that the termination notice issued by the respondent was issued in bad faith as she issued it immediately after owning the stall without giving the appellant adequate time to look for alternative stall to relocate his business. A miscarriage of justice was occasioned.***
4. ***The learned Chairman erred in law and fact in failing to consider the fact that the appellant will suffer irreparable damage by losing his customers which he has made for the last eleven years. Miscarriage of justice was occasioned.***

Wherefore the appellant seeks that the appeal be allowed and the judgment of the Chairman of Business Premises Rent Tribunal be set aside with costs.

This being a first appeal, this Court must reconsider the evidence, evaluate it and draw its own conclusion though bearing in mind that it neither saw nor heard the witnesses and therefore due regard must be given to that aspect. However, this Court is not bound to necessarily follow the trial Court's finding of fact if it appears that the trial Court failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally – see **SELLE VS ASSOCIATED MOTOR BOAT CO. 1968 E.A 123** and also **JIVANJI VS SANYO ELECTRICAL COMPANY LTD (2003) K.L.R 425.**

The appellant and the respondent were the only witnesses to their respective cases in the trial Court.

The appellant's evidence was that she had been a tenant in the stall since 2003 which is his only source of income for his family which includes two children and a third who was due in December 2014. He did not believe that the respondent who had two other stores needed to renovate the stall subject to this appeal. He felt that the respondent only wanted to benefit from the goodwill which he (appellant) had built over the 11 years that he had been a tenant.

On her part, the respondent confirmed that he had bought the stall from the previous owner **DAVID WAINAINA GIKURU** in March 2014 but had issued the appellant with a notice dated 24th April 2014 to vacate as she wanted to renovate the premises and put up a concrete wall to reinforce security plus putting tiles on the floor and the wash basin. She produced approved plans by the County Government of Embu (Exhibit 1) which were going to cost her Ksh. 300,000 of which she already had Ksh. 241,946.20 as per her Bank statement (Exhibit 2). She added that she had no grudge against the appellant whom she could allow to re-occupy the premises upon completion of the renovations.

I have considered the appeal and the submissions by the appellant who was acting in person and those of Mutitu and Thiongo advocates for the respondent.

Grounds 1 and 2 of the Memorandum of Appeal can be considered together. It is alleged that the appellant's evidence was not considered by the Chairman Business Premises Rent Tribunal especially the fact that the appellant had been a tenant for eleven years. The record shows that the Chairman of the Tribunal did consider that the appellant did not have any serious issue with the proposed renovations and had admitted that the respondent was the new owner of the stall. The Chairman did also consider that the stall was the appellant's only source of income and he needed at least one year to vacate the premises. The Chairman similarly considered that the respondent genuinely needed to renovate the stall to fetch higher income. It is therefore clear from the record that the Chairman considered the evidence by both parties and the record shows as much. On the issue that the Chairman never considered the fact that the appellant had been a tenant for the last eleven years and that the stall was his only source of income, that was considered and the Chairman addressed it as follows:-

“It is not the business of a landlord to ensure that the tenant have alternative premises to relocate his business upon termination of tenancy”

Grounds 1 and 2 must therefore fail.

On ground 3, the appellant alleges that the Chairman erred in law and fact in failing to appreciate that the termination notice was issued in bad faith as it was issued soon after the respondent had owned the stall without giving him adequate time. There was no evidence placed before the Chairman to demonstrate bad faith on the part of the respondent in issuing the termination notice. The appellant was a month to month tenant paying Ksh. 5,000 per month. He was given a notice dated 24th April 2014 to vacate from 1st July 2014 i.e. three months notice. That was adequate notice as per **Section 4 of Chapter 301 Laws of Kenya** and proper in the circumstances.

The notice was not in bad faith as the Chairman was shown approved plans by the Embu County

Government for the renovation of the stall. No evidence of bad faith was demonstrated. That ground similarly fails as Section 7 (1) (f) of Chapter 301 Laws of Kenya permits it.

On ground 4, it is claimed that the Chairman erred in law and fact in failing to consider the fact that the appellant will suffer irreparable damages by losing his customers acquired for the last eleven years. Once a proper notice is issued under the provisions of Section 4 (4) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Chapter 301 Laws of Kenya, it cannot be said that the tenant will suffer irreparable damages. The law considers that notice period to be sufficient to enable the tenant reorganize himself. Otherwise, no landlord would ever be in a position to issue a notice to a tenant because every notice to vacate must of necessity come with some collateral loss. In any event, during the proceedings in the Tribunal on 1st September 2014, the appellant informed the Chairman that he required at least one year to vacate. Having obtained a stay of execution of the Tribunal's judgment on 17th December 2014, he has now been in the stall for over two years since the notice was issued to vacate in April 2014. He has therefore had more than the time he sought to vacate. That ground similarly fails.

Ultimately therefore, upon considering this appeal, I find it wholly un-meritorious. The same is dismissed with costs to the respondent.

B.N. OLAO

JUDGE

9TH JUNE, 2016

Judgment delivered, dated and signed in open Court this 9th day of June 2016.

Mr. Muyodi for Mr. Mutitu for the Respondent present

Appellant absent.

B.N. OLAO

JUDGE

9TH JUNE, 2016