REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAIROBI

ELC APPEAL NO. 41 OF 2019

APA INSURANCE LIMITED.....APPELLANT

VERSUS

CHOPSTICK LIMITED & BURGER CHEF LIMITED.....RESPONDENTS

(An Appeal from the Judgement/Order of the Business Premises Rent

Tribunal at Nairobi (Hon. Chairman Mr. Mbichi Mboroki) given on 26th

day of April 2019 in BPRT Cases No. 211 of 2014 and No. 212 of 2014 (Consolidated))

JUDGMENT

Introduction:

1. The Appellant is the owner of premises known as APA Arcade (hereinafter referred to only as "the Arcade") situated in Hurlingham Nairobi and erected on L.R No. 209/377/11, L.R No. 209/377/12 and L.R No. 209/377/13. The Respondents are tenants of the Appellant in Shop No. 4/01A and Shop No. 16/01A (hereinafter together referred to as "the suit properties" and separately as "Shop 4/01A" and "Shop 16/01A" respectively). The Respondents are controlled tenants under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301 Laws of Kenya (hereinafter referred to only as "the Act").

2. On 19th March 2014, the Appellant served the Respondents with notices of its intention to terminate the Respondents' tenancies in respect of the suit properties with effect from 1st June 2014. The reason for termination that was given in the said notices both dated 5th March 2014 was that the Appellant wished to take over and occupy Shop 4/01A for its own business as a liaison office and Shop 16/01A as a satellite office for a period of not less than 12 months.

3. On 4th April 2014, the Respondents filed separate references at the Business Premises Rent Tribunal (hereinafter referred to only as "the tribunal") namely; Tribunal Case No. 211 of 2014 and Tribunal Case No. 212 of 2014 respectively challenging the said notices.

4. The tribunal consolidated the two references and heard the same together. The tribunal took oral evidence from the witnesses of both parties and also visited the suit properties to ascertain the facts that were in contention between the parties. At the trial, the Appellant's legal officer who gave evidence on its behalf reiterated that the Appellant required the suit properties for its own use. The Appellant produced in evidence its Annual Report and Accounts for the year 2013. The Appellant also produced its bank statement to show that it had sufficient funds to convert the suit properties to offices for its own use. The Appellant also produced proposals that it had prepared to convert the suit properties to liaison and satellite offices and the approvals it had obtained from the Insurance Regulatory Authority. The Appellant also tendered in evidence photographs showing that Shop 16/01A had remained closed since 2013. The Appellant told the court that the suit properties were the most ideal for the business it wished to undertake.

5. The Respondents share directors. Firozali Kassam a director of both Respondents gave evidence on their behalf. He told the tribunal that he had been a tenant on the suit properties for 32 years and that he had established a lot of goodwill. He stated that there were about 6 to 7 shops on the ground floor of the Arcade where the suit properties are situated which were vacant. He stated that the Arcade was a 4 storey building and it had several offices which were vacant. He stated that there were also tenants whose leases had expired and were renewed by the Appellant. He urged the tribunal to dismiss the Appellant's notices with costs.

6. In cross examination, he admitted that he was running three shops at the Arcade. On Shop 16/01A that was said to have been closed for several years, he stated that he was using the shop for storage purposes to support the business being undertaken in Shop 4/01A. He admitted however that there was a notice that the shop was closed and that it had remained closed since 2013. He stated further that in his view, the notices that were served upon the Respondents were malicious in that the Appellant had several shops that were vacant and which it could use for the business it intended to undertake.

7. After the close of oral evidence, the tribunal went for site inspection on 27th September 2018 after which the advocates for the parties made written submissions. The handwritten notes in the file that were taken during the site visit shows that a number of shops were found vacant on the ground floor, 1st floor and 2nd Floor of the Arcade.

8. The tribunal rendered its judgment on 26th April 2019 in which it allowed the 1st Respondent's reference (Tribunal Case No. 211 of 2014) and dismissed the Appellant's notice to terminate tenancy in respect of Shop 4/01A. The tribunal also allowed the 2nd Respondent's reference (Tribunal Case No. 212 of 2014) in respect of Shop 16/01A but conditionally. The tribunal ordered the 2nd Respondent to re-open and commence business in the shop on or before 31st December 2019 in default of which the Appellant was to be at liberty to evict the 2nd Respondent from the premises with effect from 1st January 2020.

9. In its judgment, the tribunal made the following findings after evaluating the evidence that was before it and also visiting the suit properties;

a) That there were shops on the ground floor which had been vacated and had been occupied by new tenants and that there were empty offices in each floor of the Arcade.

b) That the premises occupied by the 2nd Respondent was closed in 2013 and had remained closed even during the proceedings of the previous tribunal case between the parties in respect thereof.

c) That the Tenant was still paying rent although the premises was closed.

d) That there was no evidence to show that the 2nd Respondent was using the premises for storage purposes or to support the business of the 1st Respondent.

e) That the Appellant had sufficient resources to partition the suit properties and use the same for its own purpose.

10. In conclusion, the tribunal held that the termination notices by the Appellant were not issued in good faith. The tribunal stated that during its inspection of the Arcade, it was satisfied that the Appellant had enough space particularly on the 1st to 4th floors of the Arcade that it could use to establish the two offices that it wished to set up. The tribunal also held that the continued closure of Shop 16/01A was not in the best interest of the Appellant. The tribunal held that the Appellant had not proved its notices to the required standard and proceeded to make the orders that I have referred to above.

The Appeal to this court:

11. The Appellant was dissatisfied with the whole decision of the tribunal in the two references. By a Memorandum of Appeal dated 23rd May 2019 filed herein on the same date, the Appellant challenged the decision of the tribunal on the following grounds;

a) The learned Chairman erred in law and in fact in finding as he did that the Appellant issued the notices in Tribunal Case No.211 of 2014 and Tribunal Case No. 212 of 2014 with malice and without good faith.

b) The learned Chairman erred in law and in fact in finding as he did, that the Appellant did not take into account the interest of the Respondent.

c) The learned Chairman erred in law and in fact in making an order that the Respondent in Tribunal Case No.212 of 2014 was to re-open the premises and commence business on or before 31st December 2019 and that the Appellant could only get vacant possession in the event that the said Respondent defaulted.

d) The learned Chairman erred in law and in fact by failing to base his decision on the facts and evidence on record and in particular the evidence adduced by the Appellant herein.

12. The Appellant prayed for the following reliefs it its Memorandum of Appeal;

a) The Appeal be allowed.

b) The Judgement/Order of the tribunal delivered on 26th April 2019 in Tribunal Case No.211 of 2014 and Tribunal Case No. 212 of 2014 be set aside and be substituted with an order upholding the Appellant's respective termination of tenancy notices dated 5th March 2014 for termination of the tenancies in respect of Shop 4/01A and Shop 16/01A in the Arcade.

c) The Appellants be granted the costs of this Appeal and before the tribunal.

Submissions:

13. On 19th October 2020, the court gave directions that this appeal be argued by way of written submissions and gave timelines within which each party was to file its submissions. The Appellant filed its submissions dated 16th April 2021. As at the time the court reserved the

judgment date for today on 22nd July 2021, the Respondents had not filed their submissions. To date there is no submissions on record for the Respondents.

14. In its submissions the Appellant reiterated the grounds upon which it sought the termination of the Respondents' tenancies. The Appellant submitted that it intended to carry out its general insurance business separately from life insurance business hence the need for offices which were not adjacent to each other.

15. The Appellant submitted that there was no evidence tendered before the tribunal by the Respondents in support of the alleged malice on the part of the Appellant in issuing the notices that were the subject of the cases before the tribunal.

16. The Appellant submitted that there was no requirement placed upon it by law to ensure that the Respondents obtained alternative premises for their businesses before vacating the Appellant's premises. In support of this submission, the Appellant cited David Wainania Gikuru *v* Alice Nyambura Wamai [2016] eKLR.

17. The Appellant submitted that although Shop 16/01A had remained closed since 2013 to the time of tribunal's judgment; a period of about 9 years which closure was adverse to its interest a fact that was observed by the tribunal in its decision, the tribunal still ordered the Respondent to re-open the premises and commence business.

Analysis and determination.

18. I have considered the record of the tribunal, the Memorandum of Appeal and the submissions by the Appellant's advocates. The Appellant's notices terminating the Respondents' tenancies were given under Section 7(1)(g) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301 Laws of Kenya ("the Act") which allows a landlord to terminate a tenancy on the ground that:

> **".....on the termination of the tenancy the landlord himself intends to occupy for a period of not less than one year the premises comprised in the tenancy for the purposes, or partly for the purposes, of a business to be carried on by him therein, or as his residence."**

19. It follows therefore that what the tribunal was supposed to determine was whether the Appellant had established that the it required the suit properties for the business that it intended to carry out therein. The tribunal's finding on this issue was in the negative.

20. In Auto Engineering Ltd. *v* M Gonella & Co. Ltd [1978]eKLR, that was cited by both parties before the tribunal, the court stated that:

> **"They accordingly sought possession under section 30(1)(f). It is clear that it was against this background that the Court of Appeal went into the genuineness of the landlord's intention to reconstruct (as Morris LJ said "Intentions can easily be asserted: their genuineness must be established"), for Denning LJ said, at pages 79, 80:**
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> **The sort of case which I had in mind [ie *Atkinson v Bettizon* [1955] 3 All ER 340 was where a landlord wants to get possession of a shop for his own business and for that reason buys it over the tenant's head a year or so before the lease comes to an end. He knows that he cannot oppose a new lease under section 30(1)(g) because he bought the property less than five years before the end of the tenancy. So he puts forward a case for reconstruction under section 30(1)(f), hoping to get possession on that ground. In such circumstances the Court must be careful to see that section 30(1)(f) is fully satisfied before it allows him to get possession. For this purpose 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: that the reconstruction is of a substantial part of the premises, indeed so substantial that it cannot be thought to be a device to get possession; that the work is so extensive that it is necessary to get possession of the holding in order to do it; and that it is intended to do the work at once and not after a time. Unless the Court were to insist strictly on these requirements, tenants might be deprived of the protection which Parliament intended them to have. It must be remembered that, if the landlord, having got possession, honestly changes his mind and does not do any work of reconstruction, the tenant has no remedy. Hence the necessity for a firm and settled intention. It must also be remembered that the Act is intended for the protection of shopkeepers, and that this protection would be nullified if a big concern could buy the property and get possession by putting in, say a new shop-front. Hence the necessity for the work being substantial."**

21. The burden was on the Appellant to prove that it needed to occupy the suit properties for the business that it intended to carry out therein. The Appellant had to satisfy the tribunal that the intention to carry out business on the suit properties was genuine and that the notices to terminate were not issued for ulterior motives. The tribunal after analysing the evidence adduced by the parties and those gathered at the site during the site visit held that the notices to terminate the Respondents' tenancies were not issued in good faith. The tribunal held that the Appellant had failed to establish that it required the premises for its business. The tribunal made a finding that the Appellant had alternatives premises at the same building in which it could carry out the business that it wanted to carry out on the suit properties and as such there was no need to terminate the Respondents' tenancies.

22. This being a first appeal, the court has a duty to consider and re-evaluate the evidence on record and to draw its own conclusions although it has to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified before the tribunal. See, the case of Verani t/a Kisumu Beach Resort *v* Phoenix of East Africa Assurance Co. Ltd [2004] 2 KLR 269 and Selle *v* Associated Motor Boat Co. Ltd. [1968] E.A 123 on the duty of the first appellate court.

23. It is also well established that an appellate court will not ordinarily interfere with the findings of fact by the trial court unless they were not based on evidence at all, or on misapprehension of the evidence or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, Peter *v* Sunday Post Ltd. [1958] E.A 424 and Makube *v* Nyamuro[1983] KLR 403. After carefully reviewing

the evidence that was placed before the tribunal, I am unable to disturb the findings of the tribunal on the issues that were before it for determination.

24. From the material that was before the tribunal, the tribunal cannot be faulted for finding that the Appellant's notices for termination of the Respondents' leases were not issued in good faith. In addition to the evidence that was tendered by the parties, the tribunal visited the Arcade, made observations and took notes. The tribunal noted that there were several shops that were vacant that could be used by the Appellant for its new business venture. The Appellant did not give convincing explanation before the tribunal and before this court why it could not make use of the available shops. The available shops were scattered. There were shops in the ground floor, 1st, 2nd, 3rd and 4th floors. The shops were of various sizes. The Appellant's argument that it did not want shops that were adjacent to each other did not make sense.

25. With the evidence that the Appellant had alternative shops that it could use, I cannot see how the tribunal can be faulted for denying it possession. With regard to Shop 16/01A, I am in agreement with the Appellant that its continued closer was not in the interest of the Appellant. However, the tribunal cannot be faulted for declining to grant possession of the shop to the Appellant. The Appellant sought termination on the ground that it wanted to use the shop for its own business. The Appellant did not seek possession of Shop 16/01A because it had been abandoned by the 2nd Respondent. The tribunal could not be expected to allow termination of tenancy on the ground other than for which termination notice was issued by the Appellant.

26. Due to the foregoing, I find no merit in the Appellant's appeal. The appeal is dismissed with no order as to costs since the Respondents did not file submissions. The Respondents' advocates wrote to the court on 11th February 2022 a few days before the delivery of this judgment that they did not intend to file submissions.

DELIVERED AND DATED AT NAIROBI THIS 17TH DAY OF FEBRUARY 2022

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Ochieng for the Appellant

Mr. Kithinji for the Respondents

Ms. C.Nyokabi-Court Assistant