



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL APPEAL NO. 114 OF 2009

MICHAEL GATHUMBIIYA.....APPELLANT

VERSUS

AGNES MUTHONI.....RESPONDENT

JUDGMENT

This judgment is the result of the appeal against the decision of Mochache D., Chairman of Business Premises Rent Tribunal vide Nyeri Tribunal case no. 5 of 2008, delivered on 15/09/2009. The history of this appeal begun when **Michael Gathumbiyya**, the Appellant herein, filed a reference against **Agnes Muthoni**, the Respondent herein, whereof the appellant raised the following complaints and asked for the following orders:

1. **To investigate the allegation that the Respondent was using her daughter to interfere with his business by utilizing his verandah to run a similar business to that of appellant.**
2. **Issue an order to restrain the Respondent from using the appellant's verandah and from interfering with the appellant's business.**
3. **Costs.**

The Respondent filed a replying affidavit to respond to the reference. She denied the allegations levelled against her. She also argued that she was just the agent of her husband namely Francis Kibui Wachira as a Rent Collector. She accused the Appellant of being vexatious. The reference came up for hearing before the Chairman, Business Premises Rent Tribunal on 15th September, 2009. It would appear both parties beseeched the Tribunal to simply decide the dispute by looking into the photographs. In her decision, the Chairman concluded that the Respondent did not interfere with the Appellant's premises. In fact, the learned Chairman concluded that the tenant was jealous because the Respondent's daughter had established a similar business like that of the Appellant. The complaint was dismissed and the Appellant ordered to pay the Respondent Kshs. 3,000. Being aggrieved, the appellant preferred this appeal.

On appeal, the appellant put forward the grounds in his Memorandum of Appeal:

1. **The Business Premises Rent Tribunal erred in law and fact in allowing a stranger to conduct the respondent's case in the absence of the respondent.**
2. **The Business Premises Rent Tribunal erred in law and fact in failing to exercise its mind and carefully weigh the facts by rushing to write a judgment on the same day the case was heard.**

3. **The Business Premises Rent Tribunal erred in law and in fact in hearing and determining the case in the absence of the appellant.**
4. **The Business Premises Rent Tribunal erred in law and in fact in dismissing the appellant's complaint without giving the appellant's hearing.**
5. **The decision of the Business Premises Rent Tribunal was against the weight of the evidence.**
6. **The Business Premises Rent Tribunal erred in law and in fact in relying on extraneous factors thereby arriving at a wrong decision.**
7. **The Business Premises Rent Tribunal erred in law and in fact in failing to appreciate that ownership of premises is different and distinct from the relationship of landlord and tenant.**

When the appeal came up for hearing, learned counsels appearing in this appeal recorded a consent order to have the appeal disposed of by written submissions. I have considered the rival written submissions together with the material placed before this court. In the first ground of appeal, the appellant has argued that the Tribunal erred when it allowed the Respondent's husband to participate in the proceedings yet he was not a party. The Respondent stated that this ground cannot be sustained because Francis Kibui Wachira is the owner of the property where the suit premises stand. With respect, I think the ground is overtaken by events because Francis Kibui Wachira successfully applied to be enjoined as an interested party hence he is not a stranger.

The second and fifth grounds can be dealt with together which are to the effect that the learned Chairman did not give due consideration and attention to the case. It is said that the Chairman hastily and casually conducted and decided the case. The Respondent urged this court to find that the Tribunal investigated the complaint by looking at the photographs presented. It is the tribunal's finding that the structures complained of were in a road reserve and that there was no obstruction of the Appellant's premises. After a careful consideration of the competing arguments, it is clear in my mind that the Tribunal was given a lot of material in support of the complaint. There is no doubt that the Tribunal did not carry out a thorough investigation of the complaint. It is not just enough to look at the photographs annexed to an affidavit. There was need to critically interrogate those documents before making conclusions. The mandate to investigate the complaint is clearly set out at **Section 12 (4)** of the **Business Premises Rent Tribunal (Cap. 301 L.O.K)**. With respect, I agree with the submissions of the appellant that no serious consideration was given to the case. I do not think the appellant's complaint was properly dismissed. The material placed before the Tribunal was not seriously interrogated. In the circumstance, I am persuaded to refer back the complaint to be properly reconsidered.

I propose to deal with grounds 3 and 4 together. In those grounds it is argued that the appellant was not given a hearing. The Respondent on the other hand was of the view that there was no need to conduct a full hearing since it was sufficient to just look at the photographs availed. It is not in dispute that neither the Appellant nor the Respondent was heard in this saga. The law is categorical that the Tribunal was enjoined to hear the parties before going into any conclusion. I have looked at the photographs the tribunal relied in dismissing the appellant's complaint and I think, the tribunal fell into error. There was no determination of the authenticity and veracity of those photographs before relying on them. In this age and era, it is possible to manipulate photographs to suit someone's situation.

I am of the view that there is no need for me to consider the other grounds of appeal, which grounds tend to invite this court to examine the weight and credibility of the evidence relied upon. I have already stated that the Tribunal did not interrogate the affidavit evidence presented. It will be prejudicial if I proceeded in this appeal to analyze the evidence because I have come to the conclusion that the complaint should be re-heard.

In the end, the appeal is allowed. The Tribunal's decision to dismiss the Appellant's complaint dated 15/09/2009 is set aside. I order that the reference be re-heard afresh by another panel not comprising of Hon. Mochache D., Chairman. Costs of this appeal is awarded to the Appellant to be met

by the Respondent. Let the reference be re-heard on priority basis.

Dated, Signed and delivered in open court this 21st day of February, 2014.

.....

J.K.SERGON

JUDGE

In the presence of:

Mrs. Kahiga h/b for Mr. Waweru Macharia for the Appellant

N/A for S.K.Njuguna but with Notice