



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO 204 OF 2013

1. EDWIN NJENGA KIMANI

(t/a NEUTRAL PUB & RESTAURANT)

2. BUSINESS PROMOTERS LIMITED.....APPELLANTS

VERSUS

VIEW POINT LIMITED.....RESPONDENT

R U L I N G

1. The Appellants were month-to-month tenants of the Respondent in the suit business premises. Their tenancies were protected under the **Landlord and Tenant (Shops, Hotels & Catering Establishments) Act, Cap 301 (the Act)**. The Respondent acquired the premises while the Appellants were tenants of the previous owner.
2. The Respondent served the Appellants **with notices to terminate tenancy dated 23rd February 2012** under the Act. The notices were to take effect on 1st of May 2012. The ground for termination was that the landlord wished to reconstruct the entire ground floor of the premises into a shopping mall and required vacant possession of the same to do so.
3. The Appellants resisted the notices to terminate by filing necessary references before the **Business Premises Rent Tribunal (the Tribunal)**. The references were fully heard. The Appellants pleaded before the Tribunal that they had made “massive” investments in the renovation of the premises and that they stood to suffer massive losses if their tenancies were terminated.
4. In its **judgment dated and delivered on 22nd March 2013** the Tribunal was satisfied that the Respondent had proved a **bona fide and committed intention** to renovate the ground floor of the premises into a shopping mall in order to realize much better returns on its investment. The Respondent had produced before the Tribunal duly approved plans for renovation and evidence of necessary funding for the renovation. The Tribunal also found that the Appellants’ alleged investments in renovation of the premises were without the landlord’s consent, and in fact despite the landlord’s protest, and were in any event carried out **after** the notices to terminate the tenancies were served upon the Appellants. In dismissing the Appellants’ references the Tribunal gave them **until 1st May 2013 to vacate** the premises.
5. The Appellants then appealed in the present appeal against the findings and order of the Tribunal. They had an undoubted right of appeal. They lodged their memorandum of appeal on 19th April 2013.

6. The Appellants then applied by **notice of motion dated 23rd April 2013** for the main order of **stay of execution** of the order of the Tribunal pending hearing and determination of the appeal. That application is the subject of this ruling.

7. The application is brought under **Order 42, Rule 6** of the **Civil Procedure Rules** (the **Rules**). **Section 3, 3A and 63(c) and (e)** of the **Civil Procedure Act, Cap 21** are also cited.

8. The grounds for the application appearing on the face thereof include -

- (i) That the appeal is arguable and has overwhelming prospects of success.
- (ii) That the appeal will be rendered nugatory unless the stay sought is granted.
- (iii) That the application has been made without unreasonable delay.
- (iv) That the Appellants stand to suffer substantial loss upon their investments as they are unlikely to find alternative and appropriate premises for their businesses on account of the short notice to vacate.
- (v) That the Appellants are willing and able to provide appropriate security.

9. That application is supported by two affidavits. The 1st affidavit is sworn by the 1st Appellant. The second affidavit is sworn by one **George Timothy Kamau Kimani**, a director of the 2nd Appellant. They have basically re-urged their case as presented before the Tribunal.

10. The Respondent has opposed the application by **grounds of opposition dated 15th May 2013** and a **replying affidavit** of similar date sworn by one **Washington Nderitu**, a director of the Respondent. The grounds of opposition emerging from both documents include -

- i. That the Appellants do not have an arguable appeal with a probability of success.
- ii. That the Appellants' claimed substantial loss arises from investments made **after** they were served the notices to terminate their tenancies.
- iii. That Cap 301 is meant to protect tenants from arbitrary actions of landlords; it is not designed to oppress landlords or deny them economic returns on their investments.

The rest of the affidavit tends to argue the merits of the appeal.

11. In response to the replying affidavit the Appellants filed a **supplementary affidavit** sworn by the 1st Appellant. It essentially argues the appeal.

12. I have considered the submissions of the learned counsels appearing, including the cases cited.

13. In the course of his submissions on 12th June 2013, learned counsel for the Appellants stated that the Appellants were willing to vacate the premises at the expiration of six months from that date. Learned counsel for the Respondent then sought adjournment in order to seek instructions upon that new development. The matter was stood over for mention on 19th June 2013.

14. On that date the Respondent through its learned counsel accepted the Appellants' offer to vacate the premises at the expiration of six months from 16th June 2013. But alas! The Appellants' learned counsel stated that the Appellants were no longer interested in vacating the premises as earlier offered, and that they now wanted a six-year lease from the Respondent. Hearing of the application was then concluded on 23rd of July 2013.

15. One fact that the court must not lose sight of, is that the Appellants, though protected tenants, had month-to-month tenancies. The protection afforded them under Cap 301 was to ensure that they did not suffer any arbitrary action, like eviction, from the Respondent. Their tenancies could only be terminated after the due process set out under that statute. But the statute does not accord to tenants any rights to the premises they occupy that are superior to the rights of the landlord or owner of the premises! This is a reality of both law and life that all tenants ought always to remember.

16. Without in any way appearing to pre-judge the appeal, it must be noted that after due process under Cap 301 the Tribunal was satisfied that the Respondent had demonstrated a **genuine and committed intention**, and the wherewithal, to renovate the suit premises in order to realize a much better return on its investment. The same Tribunal found as a matter of fact that the Appellants had embarked on their unauthorized renovation of the premises (unauthorized because they did not have the Respondent consent to do so and despite the Respondent's protest) after they were duly served with the notices to terminate their tenancies.

17. In these circumstances, and again without pre-judging the appeal, the Appellants' undoubted right of appeal cannot be a right to perpetuate tenancies that clearly ought to come to an end. The notices to terminate were originally to take effect on 1st May 2012. That date was pushed to 1st May 2013, a year later, by the proceedings before the Tribunal. We are now coming towards the end of October 2013. From the time they were served with notices to terminate, the Appellants have had more than one-and-a-half years to look for alternative premises.

18. I am thus not satisfied that the Appellants stand to suffer substantial loss unless the stay of execution they seek is granted. The application is entirely without merit and is hereby dismissed with costs to the Respondent. The interim stay of execution now in place shall stand vacated on 31st December 2013. Those will be the orders of the Court.

DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF OCTOBER 2013

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 18TH DAY OF OCTOBER 2013