



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CIVIL APPEAL NO. 175 OF 2009**

**(Being an appeal from the judgment/Order of the Business Premises Rent Tribunal in
BPRT Case No. 20 of 2006 dated 3rd August 2009 - of Hon. Mochache D., Chairman)**

BETWEEN

DORCA ONDIEKI GISEGE APPELLANT

VERSUS

NYANKARANGANIA FARMERS

CO-OPERATIVE SOCIETY LTD. RESPONDENT

JUDGMENT

The appellant is a tenant of the respondent. The appellant was served with a notice of termination of tenancy on grounds that she had defaulted in paying rent for a period of two months after such payment had become due or payable and/or had persistently delayed in paying rent. It was also alleged that the tenant had committed other substantial breaches of her tenancy.

The respondent owns premises known as **Kisii Municipality/Block III/126**. The appellant filed a reference to the Business Premises Rent Tribunal.

During the hearing, the respondent's witness testified that the appellant had persistently defaulted in payment of her rent. I can do no better than highlight the relevant portion of his evidence:

“The other ground is that she is not paying rent regularly.

I have her accounts. At first she was paying Kshs.2,600/= in 2003. She paid rent in two months in November. She paid Kshs.8,000/= being rent for 4 months. The next rent was paid on 20th December 2003. She paid rent for May, June, July and August, Kshs.8,000/=. On 3/3/2004, she paid Kshs.6,000/= only for September –November 2003. She was paying in arrears. Seven days later, on 10/3/2004 she paid the balance of Kshs.2,004/= in December. On 16th August 2005 she paid Kshs.20,000/= being rent for January-October, 2004. Rent for November was paid but the year is not indicated. She paid Kshs.4,000/=.

In 2005 she did not pay any money/rent. The whole year she stayed without paying rent. On 15/11/2005 the Tribunal increased rent to Kshs.8,068.30. At the end of the year she owed me Kshs.169,000/=. So on 15/12/05 she paid by cheque Kshs.20,000/=, leaving a balance. We told her that we would not bank the money.

On February 2006 she gave me a cheque of 201,000/= plus 20,000/=making total 221,000/=. The cheque No. is 03080 and 03021. That covered the rent from January 2004-May 2005. The next amount was paid on 18/5/06 but the cheque was rejected (No.103411 for

Kshs.40,000/=) and returned to her. She replaced the cheque on 7th June 2006. She issued a cheque of 40,000/= which covered from June 2005 to 3rd of November 2005.

The next rent was paid on 13/9/2006. The money paid was 81,253.90 covering from part of November 2005-September 2006. That was paid after I had given the notice. As at the time when I gave the notice rent had not been paid. It was paid the following day but only a little. She's persistently in rent arrears."

The appellant did not testify in person. It is her partner, **Barley Nyandusi Gisege**, who is also the appellant's son who testified. Both operate a business known as Wall Mart Supermarket. The witness had been given a Power of Attorney by the appellant. He said that there was no tenancy agreement between the appellant and the respondent and the landlord used to collect rent from the supermarket. He alleged that payment receipts were not being issued immediately upon payment of rent. He further stated that between January 2004 and December 2006 the rent that was due was Kshs.290,458/= and over that period the appellant paid Kshs.303,253/= being rent upto December 2006. It is however apparent that the appellant's rent used to remain unpaid for long periods of time. This may be illustrated by some of the rents paid in the year 2006. The witness said on 18th May 2006 the appellant issued a cheque of Kshs.40,000/= and a cheque of a similar sum was also issued on 7th June 2006. On 13th September 2006 a further payment of Kshs. 81,253.90 was paid.

The witness further alleged that at the time when the notice of termination of tenancy was served, the appellant had made advance payment of rent amounting to Kshs.50,136.60.

In cross examination, the witness admitted that although the rent for the period of January 2004 to January 2006 was Kshs.8, 068.30, the payments were being made in arrears. That is why in 2006 they made three payments of Kshs.40,000/=, Kshs.40,000/= and Kshs.81,253.90 as aforesaid. He further admitted that the cheque of Kshs.40,000/= that was issued on 18th May 2006 was dishonoured upon presentation for payment.

In his judgment, the Chairman of the Business Premises Rent Tribunal noted that the tenant had admitted that at the time the notice of termination of tenancy was issued she was in arrears of rent and had to pay the rent arrears to the Auctioneers who had been appointed by the respondent to levy distress for rent. He went on to state as follows:

"It is admitted that rent for December 2003 was paid in March 2004, rent for January 2004 to December was paid on 16th August 2005; after 8 months. The foregoing reveals that the tenant is indeed a persistent defaulter. This tribunal only protects tenants who pay their rent in accordance. The law is meant to be used as a shield and not a sword to frustrate a landlord. The tenant having failed to meet her obligations under the Act, I lack any discretion to protect him. (sic)

Accordingly I find that the landlord's case is proved as required on a balance of (sic) and proceed to terminate the tenancy, allow the notice and order that the tenant to vacate the premises on 1.9.2009. Costs to the landlord."

Being aggrieved by the said judgment, the appellant preferred an appeal to this court.

When the appeal came up for hearing on 22nd July 2010, it was agreed by consent that the same be canvassed by way of written submissions. However, at the time of preparing this judgment, it was realized that only the respondent's advocate had filed submissions.

Under **Section 7 (1) (b) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301**, one of the grounds upon which a landlord may terminate tenancy is where the tenant has defaulted in paying rent for a period of two months after such rent has become due or payable or where the tenant has persistently delayed in paying rent which has become due or payable. One of the implied terms and conditions of any tenancy is that the tenant shall pay rent in

advance except where it is specifically agreed otherwise. Where there is no tenancy agreement as was the case herein the appellant was under an obligation to pay rent in advance.

From the evidence on record, there is no dispute that the appellant was persistently in arrears of rent and or delayed in payment of the same for several months. At the time of service of the notice of termination of tenancy, the appellant was in substantial arrears of rent. It matters not whether the rent arrears were cleared shortly thereafter.

In the circumstances, the respondent's notice of termination of the appellant's tenancy was justified in law and was well proved. I find no merit in this appeal and dismiss the same with costs to the respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 30TH DAY OF SEPTEMBER, 2010.

**D. MUSINGA
JUDGE.**

30/9/2010

Before D. Musinga, J.

Mobisa – cc

Mr. Sagwe HB for Mr. Bosire for the Plaintiff

Mr. Momanyi for the Defendant

Court: Judgment delivered in open court on 30th September, 2010.

**D. MUSINGA
JUDGE.**