REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

MILIMANI LAW COURTS
Civil Appeal 532 of 2007

1. FRANCIS MUREITHI GITUKUT/A GITUKU ENTERPRISES

2. LOISE WANGUI MWANGI T/A JOHN'S CLUB…….APPELLANTS

AND

FRANCIS MWAURA MWEGA……. ……..RESPONDENT

J U D G M E N T

1. This appeal arises from the judgment of the Business Premises Rent Tribunal delivered on the 24/05/2007 in Tribunal Cases Numbers 335 and 336 of 2005 (consolidated), the two Tribunal cases were in respect of notices issued by the landlord, Francis Mwaura Mwega, (the respondent herein) to terminate the tenancies of the two appellants. The notices both dated 27/07/2005 were to take effect on 1/10/2005. Upon receipt of the notices, the two appellants filed their respective references which gave rise to the proceedings before the Tribunal. The judgment in dispute relates to those two references.

2. The notice to the 1st appellant, Francis Mureithi Gituku, was premised on the grounds that the landlord intended to carry out substantial works of construction on the suit premises by adding one floor, constructing supporting beams and making of self –contained rooms on the existing building. The landlord thus sought vacant possession. The 1st appellant filed his reference on 29/09/005, requesting the Tribunal to investigate the matter and to determine the issues involved. The reference was filed pursuant to section 6 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, (Cap 301) (hereinafter referred to as the Act).

3. The notice to the 2nd appellant was premised on similar grounds. The 2nd appellant also filed her reference pursuant to section 6 of the Act and asked the tribunal to investigate the matter and determine the issues involved.

4. At the hearing of the reference, the landlord (respondent) testified and said that he bought the suit premises in December, 2004 and found the two appellants were sitting tenants; that each of the appellants occupied some 1530 sq. feet of the main building while the backyard was not occupied by any of the appellants. The landlord also stated that his intention when purchasing the property was to construct a hotel since he was about to retire from the University of Nairobi where he worked as a lecturer. The landlord stated further that he had applied to Nairobi City Planning Department for building plans and that the plans were duly approved by the Council on 25/05/2004. The landlord also said that since he had

Kshs. Six Million (Kshs.6,000,000/=), on his account, he wanted to start construction immediately, hence the notices to the two appellants, but that the appellants sought and obtained an injunction. He denied that he ever sought to increase rent in respect of the two tenancies.

5. Referring to his letter to the appellants – MFID4 – after the appellants refused to enter into a new lease, the landlord stated that he did raise a complaint that the appellants were paying only Kshs.6,000/= instead of Kshs.30,000/=. He also admitted to saying in his letter marked MFID5 that the appellants were in arrears of rent and that the notice he had given to them to vacate the suit premises had expired.

6. During his further evidence on cross examination and re-examination, the landlord stated that the ground floor of the suit premises where the two appellants run the businesses would not be affected by the construction, and that he would run the proposed hotel on the first and second floors. He also testified that on completion of the construction, he would re-admit the two appellants as tenants.

7. The 2nd landlord's witness was Horace Maina Mwangi, an architect by profession. He stated that he was the one who submitted the building plans to the Nairobi City Council on behalf of the landlord. He also testified that it would not be possible for the landlord to carry out the construction with the tenants in occupation as it would be necessary to demolish parts of the 1st floor and also excavate the ground floor to allow for fixing of structural columns to support other floors and especially the 2nd floor.

8. Mr. Horace Maina Mwangi also stated that the building plans included a kitchen on the ground floor to serve the 1st and 2nd floors; toilets on the ground floor were to be increased and that the works on the 1st floor would affect the appellant's occupancy as beams would be introduced to support slabs.

9. The 3rd landlord's witness was Evans Orari Oriku, a structural engineer by profession. He stated that he did the structural works which he produced as Exhibit 6. He also stated that the calculations in respect of those works were approved on 22/08/2005. Mr. Oriku stated that for the landlord to achieve what he wanted to do, he would have to change the design of the building and that to do this, they would have to cut through the walls of the existing building and introduce beams as horizontal supports. Mr. Oriku also told the Tribunal that the works could not be done while the tenants were in occupation largely because of the danger from falling debri and dust.

10. The 1st appellant, Francis Mureithi, gave evidence and stated that he had been a tenant in the suit premises since 1981, and that he paid monthly rent of Kshs.6000/=. The 1st appellant also stated that when the landlord took over the premises in 2004, his problems started, including painting out his (1st appellant's) business name, demolishing part of the store, and blocking the 1st appellant's rear door, It was as a result of the landlord's conduct that the 1st appellant moved the court for and obtained injunctive orders against the landlord.

11. In his evidence on cross examination the 1st appellant denied that he had sold his business. He also stated that the landlord had refused to take his rent and further that he saw no good reason why he should vacate the suit premises. The 1st appellant urged the Tribunal not to terminate the tenancy.

12. The 2nd appellant, Loice Wangui Mwangi also testified. She said that she had been a tenant on the suit premises for upwards of 20 years and that around December, 2004, she received letters requiring her to vacate the suit premises. She said that upon receipt of these threats, she moved to the High Court and obtained orders declaring her a protected tenant. She also stated that she was willing to remain within the suit premises while the landlord carried out his construction. She asked the Tribunal to dismiss the landlord's notice to her and urged the Tribunal not to terminate the tenancy.

13. Before finalizing the hearing, the Tribunal visited the locus in quo after which the parties were ordered to put in their written submissions by 5/07/2006. The chairman of the Tribunal when evidence was taken was Mrs N.A. Owino. The hearing was completed on 26/06/2006 with the visit to the locus in quo and an order for written submissions. By 27/03/2007, the new chairman of the Tribunal was Mrs. D.

Mochache. Mrs. Mochache mentioned the matter again on 12/04/2007 when it was noted that neither counsel had put in their written submissions. As a consequence, Mrs. Mochache proceeded to write the judgment based on the evidence taken before Mrs. N.A. Owino.

14. In the judgment delivered on 24/05/2007, the Tribunal Chairman found that the landlord opted to give notice of termination after the two appellants resisted his attempts to enter into a new lease after the landlord bought the premises in 2004. The Chairman also found as a fact that the suit premises were old and dilapidated and required renovations. On the basis of those findings, the learned chairman found for the landlord and ordered the appellants to give vacant possession to the landlord upon one month's notice to allow the landlord to proceed with the proposed construction. The landlord also got costs of the suit.

15. Being aggrieved by the judgment and the orders made by the Tribunal on 24/05/2007, the appellants lodged this appeal premised on the following 9 grounds:-

1. The Learned Chairman erred in law and in fact in proceeding with the References and allowing the notices before disposing off earlier matters filed by the Tenants being B.P.R.T. Case Number 216/04, 119/05 and 131/05 whereas there was a clear High Court order directing that the aforesaid matters be heard before the Tenant's/Appellant's occupation and possession is interfered with.

2. The Learned Chairman erred in law and in fact in proceeding to write a Judgment on a matter that she had not heard without enquiring from the parties whether they would wish the matter to start de novo or to proceed from the stage where the last chairman reached and indeed proceeding to write and pronounce judgment when no consent had been recorded that the matter should proceed from the latter stage.

3. The learned chairman erred in law and in fact in failing to appreciate the evidence called by the Tenants/Appellants in opposition to the termination notices.

4. The learned chairman erred in law and in fact in dismissing the reference and allowing the termination notice inspite of the clear evidence militating against such findings.

5. The learned Chairman erred in law and in fact in allowing the notices when the Landlord/Respondent had not established a clear and settled intention in his move to terminate the tenancies and when it was clear from the chairman's own reasoning and judgment that the notices were issued for reasons other than what appeared in the face of them and were issued because the Tenants/Appellants refused to sign lease and/or to increase rent for the premises.

6. The learned chairman erred in law and fact in failing to dismiss the termination notices in their entirety whereas the same had been issued against the clear provisions of section 7(g) of the Landlord and Tenant (Shops, Hotels and Catering establishments), Act Chapter 301 Laws of Kenya in that the landlord adduced evidence that he intended to use the premises after the alleged construction yet he had purchased the same within 5 years of Tenancy notice.

7. The learned chairman erred in law and fact by dismissing the reference and allowing the notices

whereas the notices clearly contradicted with the evidence called in that the notices alleged that the Landlord would construct an extra floor on the existing building, whereas the building plans did not show such additional floor.

8. The learned chairman erred in law and in fact in finding as a fact that "it is not disputed that the construction work intended allowed to be carried on by the landlord cannot be done with the tenants in occupation "whereas these facts were highly disputed by the Tenants/Appellants and was the very reason for the references. (sic)

9. The learned chairman erred in law and in fact in failing to find that against the evidence on record that the alleged repairs could be done with the tenants in possession.(sic)

16. This appeal was heard by two Judges pursuant to directions given on the 20/02/2009 under section 79(c) of the Civil Procedure Rules. Mrs. Waweru appeared for the appellants while Mr. Makumi argued the appeal on behalf of the respondent.

17. Mrs. Waweru for the appellants abandoned ground 1 of the Memorandum of Appeal and argued ground 2 alone, grounds 3, 4, 5 and 6 combined and then grounds 7, 8 and 9 together. In support of ground 2 of the Memorandum of Appeal Mrs. Waweru contended that the Tribunal chair who wrote the judgment caused a miscarriage of justice by proceeding to write the judgment without giving directions on how to proceed after the former chair was transferred from the Tribunal.

18. On grounds 3,4,5 and 6 of the Memorandum of Appeal, Mrs. Waweru argued that the Tribunal chair erred in law and fact by terminating the appellants' tenancies when the landlord had not shown a firm intention of what he would do with the suit premises when he gave the notice to the appellants; namely that the landlord did not have a firm and settled intention to cause reconstruction of the suit premises after the appellants vacated. In this regard, Mrs. Waweru cited Auto Engineering Ltd. –vs- M. Gonella & Another [1978] KLR 248 in which it was held, inter alia:-

(a) Provided that the words of a notice to quit do not purport to curtail any of the tenant's rights, they do not necessarily need to repeat the words of the statute, but the language used must be adequate to convey to the receiving party what the landlord intends to do and why he wants vacant possession (Kammins Ballrooms Co. Ltd. –vs- Zenith Investments (Torquay) Ltd. [1971] AC 850, HL and Lall v Jepee Investments [1972] EA 512).

(b) A notice to quit, which purports to be based on the landlord's intention to construct or reconstruct the premises in accordance with section 7(1)(f) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, is not invalidated by the landlord's failure to show that the intention to construct or reconstruct is his only intention, and the need for planning permission is not an insurmountable obstacle to establishing the landlord's intention (Fisher –vs- Taylor Furnishing Stores Ltd. [1956)2 AII ER 78, C.A. explained).

(c) The burden of proof of establishing intention is placed on the landlord.

19. Mrs. Waweru argued further that from the evidence on record, and in particular the landlord's correspondence to the appellants dated 31/01/2005, it was apparent that if the appellants had conceded to entering into a new lease agreement, chances are that the quit notices would not have been issued by the landlord. Mrs. Waweru also argued, on the basis of the Auto Engineering case (above) that the landlord's assertion that he intended to use the premises for his own business should not have been allowed to hold sway in the matter since such an intention was contrary to the provisions of the Act, and that the landlord was simply using that excuse to oust the appellants from the suit premises.

20. Regarding grounds 7,8 and 9 of the Memorandum of Appeal, Mrs. Waweru contended that the landlord in this case was barred from issuing the quit notices since he had not owned the suit premises for more than 2 years. In this regard, Mrs. Waweru relied on Atkinson –vs- Bettizo (1955) 3 AII ER 340. In the case, the landlord purchased the reversion of a lease of a shop, a building on three floors, and two years later the tenancy being near its end, the tenant applied to the county court for the grant of a new tenancy under section 24(1) of the Landlord and Tenant Act, 1954. The landlord wished to use the shop for his own business and to put in a new arcaded shop front and to take down a wall at the back for the purpose, so he opposed the application under section 30(1)(f) of the Act on the ground that he intended to reconstruct part of the premises and that he could not reasonably do so without obtaining vacant possession of them. The county court judge found that the proposed work was not the reconstruction of a substantial part of the premises and granted the application for a new tenancy. On appeal, it was held that the landlord's opposition to the grant of a new tenancy failed for two reasons, that is to say —

(i) because the landlord's primary purpose was not to construct a substantial part of the premises but to use them for his own business (J.W. Smart (Modern Shoe Repairs), Ltd. –vs- Hinckley & Leicestershine Building Society [1952] 2 AII ER 846) applied and

(ii) because there was evidence on which the county court judge could and did find that the proposed work did not constitute the reconstruction of a substantial part of the premises, which was the question of degree and so of fact, and the court could therefore, interfere with his finding.

21. From the Atkinson case, it is to be noted that the onus is on the landlord who is opposing the grant of a new tenancy to show that a "substantial" part of the premises is to be reconstructed so as to bring the case within the relevant provisions of the Act. It was also noted that "the principle that the onus of proof is on the landlord extends, it seems to all grounds of opposition by a landlord" under the Act, and "the court shall not make the order if the landlord establishes any of those grounds to the satisfaction of the court." Based on the above grounds, Mrs. Waweru urged us to allow the appeal by refusing the landlord's notices issued to the appellants and to allow the appellant's references.

22. Mr. Mukami opposed the appeal. On ground 2 of the Memorandum of Appeal, he argued that it was too late in the day for the appellants to cry foul now when they had an opportunity to object to the procedure when M/s Mochache took over the matter from M/s N.A. Owino as Tribunal chair. Mr. Makumi also submitted that because the Tribunal's primary function is to inquire into the matters complained of, the Tribunal is not bound by strict rules of evidence. He relied on Lavington Green Bookshop Limited –vs- John Njoroge Kinuthia H.Ct. at Nairobi CA No. 389 of 1995. Section 9(1) of the Act is relevant on this point and it reads:—

"*9(1) Upon a reference a tribunal may after such inquiry as may be required by or under this Act, or as it deems necessary –*

(a) approve the terms of the tenancy notice concerned either in its entirety or subject to such amendment or alternation as the Tribunal thinks just having regard to all the circumstances of the case; or

(b) Order that the tenancy notice shall be of no effect; and in either case

(c) Make such further or other order as it thinks appropriate.

Mr. Makumi urged the court to find that this grounds of appeal has no merit and to disallow the same
23. Regarding ground 5 of the appeal Mr. Makumi contended that the intention for the termination in the instant case was in the final analysis to put up a hotel as an income generating venture for the landlord after retirement. He also said that the fact that the landlord did not initially intend to construct a hotel did not vitiate his final intention that was communicated to the appellants when the landlord gave the notice. Mr. Makumi contended further that the landlord used the service of an architect and an engineer both of whom gave evidence on the details involved in the construction of the proposed hotel including submission of building plans to the Nairobi city council. Mr. Makumi, referring to the Lavington Green Case (above) submitted that in addition to the evidence of the architect and engineer, the landlord

demonstrated before the Tribunal that he had the finances required for substantial construction of the hotel, and that it was necessary for the appellants to give vacant possession to facilitate the construction; that there was no doubt that the landlord was capable of carrying out what he intended.

23. As to whether or not the landlords termination notices contravened the provisions of section 7(g) of the Act (Ground 6 of Memorandum of Appeal), in that the landlord had owned the suit property for less than 5 years, Mr. Makumi submitted that the only notice required to be given by the landlord was only one month, and no more. He also contended that the old lease with the Appellants was not profitable to the landlord, hence the decision to construct a hotel. Mr. Makumi distinguished the Auto Engineering case (above) from the instant case on the basis that the tenancy in the Auto Engineering case was registered and had two more years to go by the time the dispute arose, as opposed to a periodic tenancy in the instant case.

24. On whether or not the 5 year rule after purchase was applicable in the instant suit it was contended on behalf of the landlord that the rule does not apply in a case where the landlord shows that his intention was genuine as in the instant case.

25. On grounds 7,8 and 9 of the Memorandum of Appeal, Mr. Makumi contended that the landlord's evidence that he wanted to construct a hotel on the suit property went unchallenged; the only point raised by the Appellants being that they were ready to remain in the premises during the construction.

26. We have carefully reconsidered and evaluated the evidence, the arguments and the submissions which were made before the Tribunal. We have also considered the submissions which were made before this court. The facts giving rise to this appeal are not in dispute. The only point of contention by the Appellants is that there was no justification to throw the Appellants out of the suit premises during the construction of the proposed hotel by the landlord. The landlord herein bought the suit premises in or about December 2004 and though he did so with vacant possession, the Appellants were sitting tenants at the time of purchase. On purchase, the landlord tried to increase rent, but his move was resisted by the Appellants. Then the landlord gave termination notice in which he indicated that he intended to add one floor to the existing building. The Appellants objected by filing their respective references.

28. The main issue for determination is whether the appellants have proved their complaints against the Tribunal's judgment of 24/05/2007. The Appellants' complaint in the second Ground of Appeal is that the Tribunal Chairman fell in error by proceeding to write the judgment without first of all inquiring whether the parties wished to have the matter start all over again. Mr. Makumi submitted that it was too late in the day for the Appellants to raise such a complaint on appeal; that they should have done so as soon as Mrs. Mochache took over the matter from Mrs. N.A. Owino. Order XVII Rule 10 of the Civil Procedure Rules, which we think applies to the proceedings from the moment Mrs. Mochache took over provides as follows—

"*10 (1) Where a judge is prevented by death transfer or other cause from concluding the trial of a suit or the hearing of any application, his successor may deal with any evidence, taken down under the foregoing rules as if such evidence had been taken down by him or under his direction under the said rules and may proceed with the suit or application from the stage at which his predecessor left it.*

(*2) The provisions of subrule (1) shall, so far as they are applicable, be deemed to apply to evidence taken in a suit transferred under S.18 of the Act."*

29. We agree with Mr. Makumi that if there was anything amiss with the procedure, the bells should have been rung while the matter was still before the Tribunal. In any event, we find no prejudice that accrued to the Appellants as a result of the procedure adopted by the Tribunal after Mrs. Mochache's predecessor left. The parties were given time to put in written submissions after Mrs. Mochache took over the matter and though neither party filed the submissions they each fully submitted themselves to the jurisdiction of the new chairman to proceed with the matter from where the predecessor left it and to write a judgment. This ground of the appeal therefore fails.

30. Grounds 3,4,5 and 6 of the Memorandum of Appeal concern the intention of the landlord in giving the notice to the Appellants. The Appellants contended that the landlord had no firm intention to bring to bear what he would do in the notice. From the evidence on record, the landlord amply demonstrated that he intended to construct a hotel on the suit property; that he had the finances; that he had sought and obtained approvals for the building plans; that a substantial part of the existing premises would have to be demolished and beams fitted to offer support for the constructions on the second floor. As per the holding in the Alkinson case the landlord showed that the proposed constructions would involve a substantial part of the existing premises and that such construction would not be possible unless the Appellants give vacant possession. It is our view that the Tribunal Chairman had sufficient evidence before her to reach the conclusions that she made. Grounds 3,4,5 and 6 of the appeal must therefore fail.

31. We have considered the submissions in respect of grounds 7,8 and 9 of the appeal in which the Appellants complaint is that there was no sufficient evidence before the Tribunal to support the notices issued by the landlord; that there was no evidence that a second floor existed according to the building plans and that there was no evidence to confirm that such construction work could not be done unless the Appellants vacated the premises. From the record, the landlord called two professional witnesses, namely Mr. Horace Maina Mwangi, an architect and Evans Oreri Oriku a structural engineer. Mr. Mwangi stated clearly that he prepared the building plans for the landlord, submitted the same for approval and got the approval on the 25/05/2004. Part of his evidence was that "It is not possible to do the construction when tenants are in possession". He also confirmed that the proposed construction would be from second floor since "currently the building has ground and 1st floor only" Mr. Mwangi also confirmed that demolitions in the 1st floor would be done and that to support other floors, especially the second floor, structural columns were required.

32. The structural engineer Mr. Oriku testified that "the landlord wants to put a second floor. This is an addition. --- We shall cut the floors of the existing building --- The walls of the 1st floor will also be cut to pave way for the columns. --- We shall require space for storing materials within the premises., and further that they would require to fence off the site." In our view, the proposed construction would require that no other persons, should be on site; that it would not be possible to carry out the construction with the tenants in possession. On the basis of the above, we find and hold that grounds 7,8 and 9 of the appeal lack merit and they must therefore fail.

33. The upshot of what we have said above is that this whole appeal lacks merit. The same ought to be dismissed and it is hereby dismissed with costs to the landlord/respondent.

It is so ordered.

Dated and delivered at Nairobi this 26th day of November, 2009.

H.M. OKWENGU **R.N. SITATI**

JUDGE **JUDGE**

Delivered in the presence of:

Mr. Wachira James for Waweru (present) For the Appellants

Mr. Waweru Gichuki (present) For the Respondent

Weche - court clerk