



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI LAW COURTS)
CIVIL APPEAL 837 OF 2003

BERNARD NYAGA KIMOTHO..... APPELLANT

VERSUS

NJUGUNA DANIEL NGANGA.....RESPONDENT

J U D G M E N T

Bernard Nyaga Kimotho (hereinafter referred to as the appellant), is a tenant in premises owned by Njuguna Daniel Nganga (hereinafter referred to as the Landlord/respondent). On the 12th November, 2003 the Business Premises Rent Tribunal at Nairobi, delivered a judgment in Tribunal case No.161 of 2001, in which the tribunal allowed the tenancy termination notice dated 6th June, 2001 issued to the appellant by the landlord/respondent to take effect. Being dissatisfied by this judgment the appellant filed a memorandum of appeal raising eleven grounds. During the hearing of the appeal, pages 25 to 28 of the record of appeal were struck out as they contained documents relating to HCCC No.820 of 1995 which documents did not form part of the record of the lower court. The appellant thereafter opted to abandon grounds 2, 3, 4, 5 and 6 of the memorandum of appeal leaving the following grounds which were argued together:

- (1) The Honourable Chairman erred both in law and fact in considering only the evidence of the respondent selectively and ignoring the evidence of the appellant in determining the dispute before it.
- (7) The Chairman erred by failing to consider that the appellant was not a tenant of the respondent in view of the fact that at all material times the appellant had been paying rent to Monica Wambui Thande who was the Landlord of the appellant and who died on 26th August, 2002, and the rent allegedly claimed by the respondent had already been paid to the deceased.
- (8) The Chairman erred in considering the Notice of termination of tenancy issued by the respondent on 6th June, 2001 which Notice is not only null and void but also defective and false. According to the judgment and the evidence on record, "the tenant stopped paying rent in September, 2001". It is obvious that in September 2001 during which time the tenant is alleged to have stopped paying the rent, the Notice of termination of tenancy had already been issued 3 months earlier on 6th June, 2001 when the tenant was still paying rent.

(9) The appellant being dissatisfied with the orders of the Tribunal appeals against the whole judgment and decree.

(10) The appellant prays for an order that the judgment and the decree of the Tribunal be set aside.

(11) The appellant prays for costs of the appeal and the costs in the Business Premises Rent Tribunal

In support of the appeal, it was submitted that the notice of termination issued by the Landlord/respondent was not valid as there was no default by the appellant in payment of rent at the time the notice was issued. The court was referred to the evidence of the Landlord/respondent in the lower court wherein the landlord conceded that the appellant had paid rent up to September, 2001. It was therefore maintained that as at June, 2001, when the notice was issued there was no rent due. The court was therefore urged to set aside the judgment of the tribunal and award the appellant costs of the appeal.

Counsel for the Landlord/respondent noted that the Landlord/respondent admitted in his evidence in the lower court that rent had been paid up to and including September, 2001. Counsel therefore conceded that the landlord's notice could not hold.

Having carefully considered the proceedings before the Tribunal and the judgment of the Tribunal, we find it clear that the landlord's notice to terminate the tenancy dated 6th June, 2001 was based on the grounds: ***“that the tenant has defaulted in paying rent for a period of 17 months after such rent has become due or payable (Kshs.136,000/=).”***

In his evidence before the Tribunal, the Landlord/respondent clearly indicated that the appellant had paid rent up to September, 2001. In finding that there was evidence of non-payment of rent for more than two months, the Tribunal expressed itself thus:

“The law is very clear. A 2 months failure to pay rent may be cause for termination of tenancy. Habitual late payment of rent too calls for that. Here there is evidence of non-payment of rent for more than 2 months. There is no good reason here why this tenancy should not be terminated.”

It is evident that the Tribunal did not address itself to the landlord's notice which talked of non-payment of rent for 17 months. Nor did the Tribunal make any finding as to whether there was any rent in arrears at the time the notice was issued. Had the Tribunal properly considered the evidence it would have found that the evidence of the Landlord/respondent contradicted his notice issued in June, 2001 that the appellant had defaulted in paying rent for a period of 17 months after such rent had become due and payable. Indeed the landlord's counsel conceded that the appellant's notice was not valid as there was no rent in arrears. Under these circumstances, the judgment of the Tribunal cannot stand. Accordingly, we allow this appeal. We set aside the order of the Tribunal allowing the landlord's notice to take effect and ordering the tenant to vacate the premises. We award the costs of this appeal to the appellant.

Those shall be the orders of this court.

Dated and delivered this 18th day of September, 2008

H. M. OKWENGU

JUDGE

R. N. SITATI

JUDGE

In the presence of: -

.....for the appellant

.....for the respondent