



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 532 of 2005

JANE E. SELIM.....APPELLANT

VERSUS

KENNEDY NYAMBANE.....TENANT/RESPONDENT

J U D G M E N T

This is an appeal emanating from a reference filed in the Business Premises Rent Tribunal by Kennedy Nyambane (hereinafter referred to as the Tenant/respondent), under Section 12(4) of the Landlords & Tenants, (Shops, Hotels and Catering Establishment) Act Cap 301. The reference was in regard to a notice served on the tenant/respondent by his landlady, Jane E. Selim (hereinafter referred to as the appellant) for termination of his tenancy at premises known as Plot No.2 Makina Kibera.

During the hearing of the reference, the appellant, who claimed to be a widow, explained to the Tribunal that she served the tenant/respondent with a termination notice because she wanted to occupy the premises to carry on business so as to help her school going children. She explained that she wanted to sell foodstuffs in the premises.

On his part, the tenant/respondent testified that he started doing business in the premises in the year 2001. Since then his business which is selling wines and spirits has grown and he has acquired goodwill. In the year 2003, the appellant wrote to the tenant/respondent indicating that she wanted to stay in the business premises. The tenant/respondent and the appellant discussed and settled on an increased rent. In the year 2004, the tenant/respondent renovated the business premises and had many customers. However, the appellant started running a bar next to the premises occupied by the tenant/respondent. In December, 2004, the appellant locked the only toilet available so that the tenant/respondent's customers had no toilet to use. The appellant insisted on the tenant/respondent paying an increased rent of Kshs.4000/= to take care of the maintenance of the toilet. The tenant/respondent reported the matter to the D.O and the appellant was ordered to open the toilet. A few days later, the appellant wrote to the tenant/respondent to vacate the premises. She served the tenant/respondent with a formal notice. The tenant/respondent disputed the notice contending that he had never defaulted in the payment of rent. He explained that he had established goodwill and had many customers, and his business would suffer if he moved from the premises. The tenant/respondent maintained that the appellant had a house next to the premises and that the appellant should therefore give the tenant/respondent alternative premises.

Counsel for the appellant and counsel for the tenant/respondent each filed written submissions urging the court to find in favour of their respective clients.

In its judgment, the Tribunal relied on *Auto Engineering Ltd. Vs Gomell & Co. Ltd (1978) KLR 248*, wherein it was held that the landlord has to show a firm and settled intention to occupy the premises for more than one year. The Tribunal found that the appellant had not produced any bank statements to show that she had finances to run her own business. Nor had the appellant identified the particular business which she wanted to engage in. The Tribunal further found that the appellant's action of frustrating the tenant/respondent by breaking the door to the toilet, threatening to evict the tenant/respondent and increasing rent without notice showed a clear intention to have the tenant/respondent out of the premises so that the appellant could perhaps get a better paying tenant. The Tribunal further found that the appellant having put up a bar next to the tenant/respondent, she was merely getting rid of the tenant/respondent to avoid competition. The Tribunal held that the appellant was dishonest and malicious and refused to allow her notice.

Being dissatisfied with that judgment, the appellant has filed an appeal raising 7 grounds as follows:

- (1) *The learned Honourable Tribunal misdirected herself in making presumptions as to the intention of the appellant's issuance of the Notice of Vacation to the Respondent.*
- (2) *the Learned Honourable Tribunal did not appreciate the evidence given by the appellant that she wanted to occupy her premises to do her own business of selling foodstuff and fend for her children and therefore erred to find that the appellant did not particularize the nature of the business the appellant wanted to engage into.*
- (3) *The Learned Honourable Tribunal misdirected her mind by expecting the appellant to produce bank statements or documents to prove she is ready to set her own business in the premises herein.*
- (4) *The Learned Honourable Tribunal failed to properly consider the evidence of the appellant and further erred in dismissing it and/or not giving it due consideration.*
- (5) *The Learned Honourable Tribunal erred in giving weight to evidence of the respondent that he has no alternative premises and would not mind if the landlady provided alternative premises for him to move into.*
- (6) *The Learned Honourable Tribunal erred in Law and fact in giving weight to evidence of the respondent that he allegedly invested heavily on renovating of the premises.*
- (7) *The Learned Honourable Tribunal misinterpreted the essence of Section 7(1), (g) of the Landlord and Tenant (Shops, Hotels and Catering Establishment Act.)*

In his submissions before this court, counsel for the appellant maintained that the appellant had clearly explained in her evidence before the Tribunal that she needed the premises for her own use as she wanted to engage in her own food business. It was submitted that the appellant was not under any obligation to show the Tribunal that she had any ready finances for the business. It was further submitted that there was no evidence before the Tribunal supporting the tenant/respondent's contention that he had renovated the premises. It was maintained that the tenancy was an oral tenancy in respect of which the tenant/respondent was responsible for all internal repairs and decorations, and therefore the allegation that the tenant/respondent carried out repairs on the premises was not a sufficient reason to oust the appellant's right to repossess the premises. It was further maintained that the appellant was not under any obligation to provide the tenant/respondent with alternative premises. Finally it was submitted that the decision of the Tribunal not to uphold the notice was against the weight of evidence. The court was therefore urged to set aside the orders of the Tribunal and substitute thereof an order upholding the appellant's notice.

For the tenant/respondent, it was submitted to this court that the notice initially given by the appellant did not give any reason as to why the appellant wanted the premises nor did the appellant in her evidence in chief state what business she wanted to undertake in the premises. It was maintained that it was only in cross-examination that the appellant came up with the idea of selling foodstuffs. The court was further

referred to the formal notice served on the tenant/respondent by the appellant wherein the appellant stated that she wanted to renovate the premises and use the same for her own purpose without identifying the purpose. It was submitted that the conduct of the appellant in demanding increase of rent and threatening the tenant/respondent was a clear demonstration of malice. It was submitted that the notice of termination was not given in good faith and that the appellant was not coming to court with clean hands. It was further submitted that the tenant/respondent had renovated the premises and his business had grown and acquired goodwill. The court was urged to find that there was business rivalry as the appellant had opened a similar business as that of the tenant/respondent. The court was urged to find that Section 7(g) of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act was not complied with as the intention of the appellant was not clear.

We have carefully reconsidered and evaluated the reference and the evidence which was adduced before the Tribunal. We have also considered the submissions made before the Tribunal, the grounds of appeal and the submissions made before this court. We note that the main issue for consideration is whether the appellant gave a proper notice under Section 4(2) of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, and whether the appellant did establish a clear intention that she intended to occupy the premises for a period of not less than one year for the purpose of carrying on a business.

There are two notices which were issued by the appellant to the tenant/respondent. The 1st notice which was a letter dated 27th December, 2004, did not give any reason for the proposed termination of the tenancy. The 2nd notice which was the formal notice issued under Section 4(2) of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act Cap 301, gave the grounds upon which the termination of the tenancy was sought as follows: -

“I want to renovate the premises and use the same for my own purpose to run for a period of not less than one year.”

It is evident that both notices issued by the appellant did not give any indication that the appellant intended to occupy the premises herself, for a period of not less than one year, for the purposes of carrying on a business or as her residence. Using the premises for “her own purpose” did not necessarily mean that the appellant would occupy the premises. To that extent none of the notices issued by the appellant was a valid termination notice under Section 4(2) of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act. The notices did not satisfy the grounds for termination of a tenancy, provided under Section 7(1) f & g of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act as they did not show an intention by the appellant to occupy the premises herself to carry on any business. Although the appellant did state in her evidence in chief that she wanted to use the premises to do business she did not state what business she wanted to do and it is only under cross-examination that the appellant came up with the idea of selling foodstuffs. Moreover, the appellant did not mention anything in her evidence about renovating the premises.

We find that the appellant’s intention to occupy the premises herself to carry on a food business was neither clear nor settled. That is why that intention was not stated in the notices. Given that the relationship between the appellant and the tenant/respondent was rather acrimonious because of the tenant/respondent’s resistance to the appellant’s efforts to increase rent, it is evident that the termination notice was not issued in good faith but was a subtle attempt to remove the tenant/respondent from the premises. We note that in its judgment, the Tribunal found that the appellant did not produce any bank statements or documents to show that she had finance or that she was ready to start her own business. We find that such evidence was not crucial in determining the intention of the appellant and the Tribunal was wrong in drawing a negative inference. Notwithstanding this, for the reasons that we have given, we are satisfied that the Tribunal came to the right conclusion in refusing to allow the termination notice. Accordingly we find no merit in this appeal and do therefore dismiss it with costs.

Those shall be the orders of this court.

Dated and delivered this 25th day of September, 2008

H. M. OKWENGU

JUDGE

R.N. SITATI

JUDGE

In the presence of: -

Miss Machio H/B for Kanyangi for the appellant

Getange for the tenant/respondent