



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC APPEAL CASE NO. 9 OF 2019

IBRAHIM OMAR HUSSEIN t/a ZAMZAM HOTEL.....APPELLANT

versus

SHIVLING SUPERMARKET LIMITED.....RESPONDENT

JUDGMENT

A. Introduction

1. This is an appeal from the Judgment and decree of Honourable Mr. Mbichi Mboroki; the Chairman of the Business Premises Rent Tribunal in Kisii BPRT No. 28 of 2018 (The Tribunal herein) rendered on 12th April, 2019 where the learned chairman held that :-

1)The Tenant's reference dated 23rd July 2018 is dismissed.

2)The Landlord's notice dated 21st June, 2018 is allowed.

3)The Tenant shall vacate and hand over vacant possession of the premises on or before 1st October 2019 in default an eviction order shall issue without further reference to the Tribunal and shall be enforced by the O. C. S. Migori Police Station.

4)The Tenant is at liberty to remove and/or demolish its strictures and / or improvements from the suit premises and leave the same vacant.

5) Each party shall bear its own costs of the reference.

2. By the said decision, the appellant was aggrieved. Thus, the instant appeal was generated by way of a memorandum of appeal dated 8th May 2019 and duly filed in court on 10th May 2019.

3. The appellant, Ibrahim Omar Hussein t/a Zamzam Hotel is represented by the firm of Bruce Odeny and Company Advocates.

4. The respondent, Shivling Super Markets Ltd is represented by the firm of Nyamurongi and Company Advocates.

B. The Respondent's Case before the Tribunal

5. By a notice dated 21st June 2018, issued under section 4 (2) of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act (Cap 301), the respondent who was the Landlord before the tribunal, sought termination of tenancy of the appellant, the applicant/tenant before the tribunal in aspect of the suit premises, plot number 9 B in Migori Town. The termination was based on twin grounds;

a)After termination I intend to demolish the existing building and to build a storey building.

b)Occupation will be impossible as it will be incompatible with the intended demolition and construction thereafter.

6. On 4th October 2018, one Rajesh Bhai Ashokbhai Patel, a director of the respondent testified that the tenancy termination notice be allowed with costs. He relied on his affidavit sworn on 2nd October 2018 and all annexures thereto, in support of his claim as well as, the proceedings in BPRT case number 43 of 2016 which was dismissed and the NEMA impact assessment licence marked as Exhibits 4. That the appellant did not wish to comply with the notice and filed the reference dated 23rd July, 2018 in the tribunal.

7. Learned counsel for the respondent submitted in part that the respondent's firm and settled intention is to demolish the existing premises and construct a storey building as stated in the notice of termination of tenancy. That the said notice be allowed with costs by the tribunal.

C. The gist of the appellant's case before the tribunal

8. The appellant opposed the notice of termination of tenancy by the reference as stated in paragraph 6 hereinabove. The respondent therefore, requested the tribunal to investigate the matter and determine it.

9. The appellant through Ahmed Noor Omar a businessman in the construction industry and a son of the tenant told the court that they have occupied and carried on business from the front part of the suit premises for the last forty (40) years. That the reasons given by the respondent in the notice are not genuine precipitating the objection to the notice.

10. This witness further stated that they have been paying rent through the appellant's counsel and that there has been no complaint for non-payment. That also the respondent had not produced documents including structural drawings and in the name of the respondent.

11. Learned counsel for the appellant submitted inter alia, that notice of termination of tenancy is brought in bad faith. That the respondent only desire is to evict the respondent and not to demolish and reconstruct the suit premises. He urged the tribunal to allow the respondent's reference and dismiss the appellant's notice.

D. The Tribunal's findings:-

12. The tribunal considered the evidence on record and written submissions, proceedings and all exhibits in BPRT 43/2016 availed and being part of record of the proceedings before the tribunal pursuant to the consent of the parties made on 19/11/2018 therein. It took into account the judgment in BPRT number 43 of 2016, where it was held inter alia, the respondent is the bonafide owner of the suit premises and there was landlord /tenant relationship between the respondent and appellant respectively.

13. The tribunal further held in part:-

a)That the Landlord has demonstrated on evidence that it has a genuine and firm intention to demolish the existing building on the suit premises and put up a modern 6 storey building.

b)The landlord has demonstrated to the Tribunal that it has sufficient resources and is capable of obtaining additional resources from the Bank to carry out the project.

14. So, the respondent proved the notice on a balance of probabilities. The findings of the tribunal as stated in paragraph 1 hereinabove.

E. The Instant Appeal

15. The appellant commenced this appeal by a memorandum of appeal dated 9th May 2019 on the grounds that:-

1)The learned Chairman erred in both law and fact by dismissing the tenant's reference, yet enough grounds had been proved by the Appellant that the Respondent's notice of termination of the tenancy was not based in good faith.

2)The learned Chairman erred in both law and fact in failing to appreciate that the Respondent had not demonstrated its case on a balance of probabilities.

3)The Learned Chairman erred in both law and fact in failing to find that the Landlord had failed to show that it had the financial means to carry out the reconstruction of the property upon its termination.

4)The Learned Chairman erred in both law and fact in failing to find that the suit property is not owned by the Respondent thus the respondent lacked the locus to terminate the Appellant's tenancy.

5)The learned Chairman erred in law and in fact in failing to consider the Appellant's submissions before arising at his decision.

6)The Judgment was against the weight of evidence.

16. On that score, the appellant has sought orders thus:

a) For this Appeal to be allowed with costs

b) The Judgment of the Honourable Mr. Mbichi Mboroki, the Chairman of the Business Premises Rent Tribunal in Kisii BPRT No. 28 of 2018 delivered on 12th April, 2019 be set aside in its entirety and substituted with an order allowing the Appellant/ tenant's reference dated 23rd July, 2018 by declining the Respondent / Landlord's notice of termination of tenancy dated 21st June, 2018.

17. The appeal being the first one from the tribunal, this court is bound to reconsider the evidence on record afresh in order to determine whether the conclusion originally reached upon that evidence should stand. However, this is a jurisdiction which should be exercised with caution as per observation of Sir Kenneth O' Connor P in **Peters =vs= Sunday Post (1958) EA 424 at 429**; see also **Peter Njau case (supra)**.

18. It must be appreciated that an appellate court will not ordinarily interfere with the findings of fact by the trial court or tribunal unless they are based on no evidence at all, or a misapprehension of evidence or the trial court or tribunal is shown demonstrably to have acted on wrong principles in arriving at the decision; see **Mwanasokoni =vs= Kenya Bus Services Ltd (1982-88) 1 KAR 278 and Mwangi and another Wambugu (1982) 2 KCA 100**.

19. The parties herein argued the appeal by way of written submissions pursuant to this court's order and directions given on 25th February 2020.

20. In his submission dated 19th September 2020 and filed in court on 22nd September 2020, learned counsel for the appellant referred to the background of the appeal including the grounds of termination of the tenancy, evidence of the parties, cited Sections 4(1), and 9(3)(b) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301 Laws of Kenya), Regulation 16 of the attendant Regulations and Order 17 Rule 2(1) of the Civil Procedure Rules, 2010. That the respondent has no good faith in the intention to terminate the tenancy. Counsel submitted that the appeal has merit and should be allowed with costs.

21. By the submissions dated 8th January 2021 and duly filed in court on 19th January, 2021, learned counsel for the respondent gave background facts of the dispute between the appellant and the respondent including Kisii BPRT No. 43 of 2016, the respondent's notice of termination of tenancy and relied on the case of **Peter Kamau Njau =vs= Emmanuel Charo Tinga (2016)eKLR** which applied the decision in **Selle =vs= associated Motor Boat Co (1968)EA 123**. Counsel submitted that the appellant filed a first reference namely Kisii BPRT No. 28 of 2018 opposing the respondent's notice and succeeded. That again, the appellant filed a second reference and failed hence, prompting this appeal. Counsel further submitted that the appeal is without foundation, an abuse of the due process and ought to be dismissed with costs to the respondent. Reliance was made on the case of **Douglas Odhiambo Apol & Another =vs= Telkom Kenya Ltd Court of Appeal Civil Appeal No. 115 of 2006 (2014) eKLR**, Article 40 of the Constitution of Kenya, 2010 and Sections 24 and 25 of the Land Registration Act, 2016 (2012).

22. I have anxiously considered the appeal in its entirety and the rival submissions herein. Therefore, is the appeal merited based on the grounds thereon as set out in paragraph 15 hereinabove?

ANALYSIS AND DETERMINATION

23. In respect of ground one, the appellant laments that the respondent's notice of termination of the tenancy, was not based in good faith. That the respondent was not genuine and sincere with the alleged intended reconstruction on the suit premises.

24. According to the **Concise Oxford English Dictionary 12th Edition** by Angus Stevenson and Maurice Waite at page 612, the term "good faith" means:

"honesty or sincerity of intention."

25. Proof of good faith is contained in Section 117 of the Evidence Act Chapter 80 Laws of Kenya which reads:

"Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence."

26. The respondent asserted that since the issue of the first notice in the year 2016, the appellant has continued to enjoy occupation of the suit premises. That the respondent has been oppressively deprived of the opportunity to develop the premises for maximum benefit.

27. The learned trial chairman did refer to the grounds of the termination of tenancy as set out in the notice and shown at page 1 of the judgment. Clearly, the respondent honestly did express the intention of termination of the tenancy as per the notice. On that strength, ground one fails.

28. Regarding ground two, this court is aware of the burden of proof as stipulated under Sections 107, 108, 109 and 110 of the Evidence Act Chapter 80 Laws of Kenya. Doubtlessly, the burden of proof with regard to the notice of termination of tenancy rests with the respondent.

29. It is trite law that the burden was always on the plaintiff (or the respondent in his case) to prove his case on the balance of probabilities. That such burden is not lessened even if the case was heard by way of formal proof, see the Court of Appeal decision in **Kirugi and another =vs= Kabiya and 3 others (1987) KLR 347**.

30. The respondent's witness, Patel relied on the record in Kisii BPRT 43 of 2016 and wanted the Appellant to vacate the suit premises. In cross examination, he did maintain that:

"I cannot develop the plot without taking possession of the premises occupied by the tenant..."

31. It is noted from pages 5 of the judgment that the tribunal was satisfied on the evidence of Kisii BPRT 43 of 2016 and the evidence on record that the respondent was entitled to take possession of the suit premises. That the appellant had not offered credible reasons for not vacating the premises.

32. Plainly, the tribunal rendered its determination after satisfaction that the respondent had proved its notice dated 21st June 2018 on the balance of probabilities. So, ground two fails, too.

33. In regard to ground three, the respondent stated that it has bank accounts with Diamond Trust Bank (DTB), Co-operative Bank Ltd and Equity Bank. Whereas the appellant alleged that the respondent has not demonstrated that they have resources to carry out construction on the suit premise, there was an acknowledgement in evidence by the appellant that the letter from the Co-operative Bank showed that the respondent qualifies for a loan facility of more than Kshs. 30,000/= among other things.

34. The tribunal was satisfied that the respondent can easily raise Kshs. 59,624,960 for the project on the suit premises. It was further held that the respondent had obtained National Environment Management Authority (NEMA) licence thereof.

35. On ground number four, the **Concise Oxford English Dictionary (supra)** at page 837, the term “locus standi” refers to

“the right or capacity to bring an action or to appear in court.”

36. Similarly, the Black’s Law Dictionary 10th Edition by Bryan A. Garner at 1084, fashioned a definition for “locus standi” as follows:

“The right to bring an action or to be heard in a given forum.”

37. It was the assertion of the respondent that it bought the suit premises from the previous land lord. The appellant did confirm that the respondent is its Landlord in respect of the premises. During cross examination by learned counsel for the respondent as shown in page 10 of the record of appeal, the appellant’s witness, Ahmed Noor Omar, testified in part:

“The Landlord has the right to terminated the tenancy. I know the owner in plot number 9B Shivling Supermarket. I operate an hotel business with suit premises (Emphasis added).

38. The witness further stated at pages 10 and 11 as per said record in detail thus:

“...Landlord became the owner of the plot. I have no knowledge of Civil Engineering. Witness shown exhibit 5(3)(a). The certificate is issued when a person is ready to commence construction works. The proposed construction has been approved by NCA and NEMA. It is true that the Landlord has paid to NCA a sum of Kshs. 245,805/=. The approved plans are in respect of plot number 9A & 9B. I have no ownership right in respect of plot number B. It is not my business to know from which side the Landlord develops his plot.

I do not have evidence to corroborate when I have said that the Landlord has no genuine intention. I do not have evidence that he wants to have his brother operate a pharmacy in the suit premises. I do not have evidence to show how much goodwill is being asked for the premises at Migori. I became aware of the Landlords intention in 2016. The Landlord has not changed its position. I am aware of Tribunal case number 43/2016. The Tribunal dismissed Tribunal case number 43/2016 because of the NEMA license. There is no impediment which would prevent the Directors of the Landlord RAJESHBAI ASHOKBHAJ PATEL and ASHWIN BHAJ PATEL from carrying on business as Shivling Supermarket Ltd.”

(Emphasis laid)

39. Sections 56, 57 and 58 of the Land Registration Act, 2016 (2012) provide for power to lease land, periodic leases and short term leases respectively. In **Kimani =vs= Gikanga (1965) EA 735**, Duffus JA (as he then was) equated an occupier of land (**“Muhoi” in Kikuyu**) with a tenant at Will.

40. Evidently, the appellant did accept a consent to the tenancy relationship with the respondent (the Landlord) without protest; see the definition of “acquiesce” in the **Concise English Dictionary (supra)** at page 11.

41. Moreover, the principles of Equity (in particular, that equity treats that ought to be done, as done,) under **Article 10(2)(b) of the Constitution (supra)**, come into play. This follows the undisputed conduct of the respondent as the Landlord and the appellant as the Tenant over the suit premises. Thus, the respondent has the locus standi to terminate the appellant’s tenancy over the suit premises.

42. As regards grounds five and six, the learned Chairman of the tribunal noted the written submissions on record and considered the same in details as revealed at pages 1 and 4 of the judgment. The same informed the said judgment which I find to be within the weight of evidence on record. Grounds 5 and 6 fail in the circumstances.

43. To that end, it is the finding of this court that the respondent’s notice to terminate the appellant’s tenancy dated 21st June 2018 is sound at law. The appellants’ reference dated 23rd July 2018 declining the notice sits on sinking sand. The judgment of the learned Chairman of the tribunal rendered on 12th April, 2019 is faultless. The instant appeal lacks merit.

44. A fortiori, the present appeal generated by way of a memorandum of appeal dated 8th May 2019 is hereby dismissed with costs to the respondent.

It is so ordered.

DATED, SIGNED DELIVERED in open Court at Migori this 24th day of February 2021.

G.M.A. ONGONDO

JUDGE

In the presence of:-

Mr. B. S. Mulisa holding brief for Mr. B. Odeny learned Counsel for the Appellant.

Tom Maurice – Court Assistant