



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO 281 OF 2001**

**RUMWE FARMERS CO-OP. SOCIETY LTD..... APPELLANT**

**VERSUS**

**BINGWA ENTERPRISES LTD..... RESPONDENT**

**JUDGMENT**

This is an appeal from a decision of the Business Premises Rent Tribunal (Mr. G. K. Mwaura, Chairman, dated 7th May, 2001). The matters leading to the appeal are fairly straight forward. They are, briefly, as follows.

The Appellant is the owner of the property known as L R No 209 of 4985 situate along Mfangano Street in the City of Nairobi. On that property stands a storey building which the Appellant rents to others. The Respondent is one of the tenants of the property. On 13th May, 1997, the Appellant through its Advocates issued a notice to terminate the Respondent's tenancy on the ground that the Respondent had defaulted in paying rent for more than 6 years. The Respondent was aggrieved by that notice and filed a Reference in the Tribunal. In the hearing before the Tribunal, the main issue which emerged was whether the Tenancy was a protected one or not.

The position taken by the Respondent's Counsel before the Tribunal and in this court was that the tenancy between the parties was not a protected one since the premises in issue were for residential purposes.

The Chairman of the Tribunal, after hearing the testimony of the witnesses of the contending parties and the submissions of Counsel decided in favour of the Respondent and declared that the Notice issued by the Appellant was of no effect. The Appellant was aggrieved by the decision of the Tribunal and appealed to this court hence this appeal. The Appellant's appeal was based on 7 grounds set out in the Memorandum of Appeal as follows:

***“1. THAT the Chairman erred in law and in fact in finding that the suit premises were meant for residential user though the document evidence produced by the Appellant was clear that the premises could either be used as flats or offices and required no change of user.***

***2. THAT the Chairman erred in law and in fact in finding that a change of user was requisite for premises to be used for business purposes.***

***3. THAT the Chairman erred in law and in fact in finding against the weight of evidence produced by the Appellant, that the premises were not governed by the provisions of the Landlord and Tenant (Shop, Hotels and Catering establishments) Act (Cap 301) (hereinafter***

*referred to as the Act).*

**4. THAT further in the alternative, the Chairman erred in law and in fact in failing to find that even if the change of user had not been applied for and obtained, the same did not vitiate the contract for business use between the Appellant and the Respondent.**

**5. THAT the Chairman erred in law and in fact in failing to find, against the weight of submissions and case law provided to him, that what determines whether a premises is governed under ... (the Act) or not is the purpose for which the premises were let by (sic) not the value of the construction or the authority on the user by the local authority.**

**6. THAT the Chairman erred in law and in fact in failing to find that the Respondent had breached the tenancy agreement by not paying rent when the same had become due and payable.**

**7. THAT the Chairman erred in law and in fact in allowing the reference and dismissing the notice.”**

I have carefully gone through the record of the Tribunal and considered the submissions of Counsel who argued the appeal before me and I take the following view of the matter.

Although it is evidence that the premises in issue were approved for use for both commercial and residential purposes, there was clear evidence before the Tribunal that the portion which had been let to the Respondent was approved for use for residential purposes only. The Respondent's General Manager in his testimony before the Tribunal said that that was the reason the Respondent was denied business licenses when it applied for the same and the Respondent was unable to do business from the premises. It is no wonder, therefore, that the Appellant at some point applied for change of user of the premises from the dual user to full commercial user.

So even though the Respondent sought to be let business premises, the premises which were in fact let to it were premises whose use was residential and the result was that he could not then carry on business therefrom.

The Appellant's Counsel argued that approved use of the premises did not affect the letting of the same to the Respondent to be used for a different purpose. The Counsel referred me to a number of authorities but I do not think that the same can aid the Appellant's case in any way. This is because the Appellant let to the Respondent the premises in dispute for a purpose which was not approved by the relevant authorities. The fact that the Respondent took possession did not change the user of the property. In fact, the evidence suggests that due to that matter, the Respondent was unable to carry on its business and could only have done so in breach of the law which would have exposed it to risk of criminal liability for breach of the by-laws of the relevant Municipality. In other words, the tenancy could not have been followed through without involving the parties in some illegality. This case is, therefore, distinguishable from the case of **Mody's (E. A.) Ltd vs Jani (1964) E. A. 610** since in the earlier case, it was clear that the circumstances which were likely to result in illegality could be remedied before the tenancy commenced yet in the present case the Respondent had taken possession before the circumstances which could lead to illegality were cleared.

In summary, I am of the view that though the parties negotiated for lease for business premises, the premises let remained residential premises as the approved use of the same had not been changed and as the premises were residential, the same were not protected and were not subject to the Act. So the notice issued by the Appellant in respect of the premises is invalid.

In the result, I do not see any reason to interfere with the decision of the Tribunal as it was based on sound principles. I, therefore, dismiss this appeal and affirm the decision of the Tribunal. The Respondent will have the costs of the appeal.

Dated and delivered at Nairobi this 8th day of December, 2004.

**ALNASHIR VISRAM**

**JUDGE**