



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. APPEAL NO. 16 OF 2020

ANTHONY NDIRANGU T/A INTER

VICHICLES SALES1ST APPELLANT

BONIFACE MWANGI KAHIGA..... 2ND APPELLANT

RICHARD KIMANI.....3RD APPELLANT

ANNE NDEGWA.....4TH APPELLANT

MARY MUTHONI..... 5TH APPELLANT

JUSTUS GITUMA MUGUN.....6TH APPELLANT

WAMAE KANYIRI.....7TH APPELLANT

=VERSUS=

MUHU HOLDINGS CO LTD.....RESPONDENT

(Being an Appeal from the Judgment of the Business Premises Rent Tribunal rendered on 13/3/2020 by the Tribunal's Chairman, Hon Mbichi Mboroki, in Tribunal Case Nos 325, 326, 327, 328, 329, 330, 332, 333 of 2017 at Nairobi)

JUDGMENT

Background

1. This Appeal arises from the Judgment of the Business Premises Rent Tribunal (**the Tribunal**) rendered by the Tribunal Chairman, Hon Mbichi Mboroki, on 13/3/2020, in Eight (8) consolidated references namely, **325, 326, 327, 328, 329, 330, 332 and 333 of 2017**. The Judgment was a culmination of hearings relating to termination notices issued by the respondent, Muhu Holdings Co Ltd, in relation to various business premises, all located at **Jasho House, Land Reference Number 209/682/2, Mfangano Street, Nairobi**. Dissatisfied with the grounds set out in the respondent's statutory termination notices, the tenants challenged the termination notices in the Tribunal.

2. All the notices itemized the following as the statutory ground of termination:

“ The Landlord intends to carry out substantial works of construction and renovation and which cannot be carried out without obtaining vacant possession of such premises”

3. Upon taking evidence and inspecting the business premises, the Tribunal rendered a Judgment in which it found that the respondent had satisfied the requirements of **Section 7(1) (f) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301)** [hereinafter referred to as **“the Act”**]. The Tribunal, consequently, made the following disposal orders:

1) All the tenants' references herein are hereby dismissed.

2) The Landlord's notice dated 20th February, 2017 which is the subject matter of the above references herein is allowed.

3) The tenants shall vacate and hand over vacant possession of the suit premises on or before 1st July, 2020 in default, an eviction order shall issue without reference to the Tribunal.

4) *In the circumstances of this case, each party shall bear its own costs.*

5) *A copy of this order shall upon (sic) the advocates for the tenants and each tenant within seven (&) days from the delivery of this judgment for compliance and record.*

4. Dissatisfied with the Judgment of the Tribunal, the 1st appellant in this Appeal, **Boniface Mwangi Kahiga**, filed a Memorandum of Appeal dated 8/4/2020. The said Memorandum of Appeal was subsequently amended to incorporate other tenants as 2nd to 7th Appellants.

Grounds of Appeal

5. The appellants challenged the Tribunal's Judgment on the following verbatim grounds:

1) *That the Learned Business Tribunal Chairman erred in law in ordering execution and eviction of the Tenants during the ongoing Novel (sic) Covid 19 Coronavirus pandemic in spite of the existing rules and guidelines of the Chief Justice of Kenya.*

2) *That the Learned Business Tribunal Chairman erred in law in making a finding that the Legal Notices issued had legal basis as they were not from the known Landlord.*

3) *That the Learned Tribunal Chairman erred in law in failing to*

4) *consider the tenants' construction expert opinion that the repairs could be done without interfering with the tenancy of the appellant.*

5) *That the Learned Chairman of the Business Tribunal erred in law in failing to take into consideration that what was required to be done was minor repairs of which the Landlord had paid only Kshs 4,000 to the County Council meant for minor repairs.*

6) *That the Learned Business Rent Tribunal Chairman*

stepped (sic) his mandate in terminating the Tenancy of the Appellant in this circumstance and especially during the Novel [sic] Covid 19 Coronavirus pandemic

7) *That the Learned Business Rent Tribunal Chairman was erroneous in giving the order of eviction during this period of the Novel Covid 19 Coronavirus pandemic without considering the losses of the time and that the economy hardships (sic).*

8) *That the Learned Business Rent Tribunal erred in holding that the repairs to be done were magnitude (sic) which requires an overhaul renovation contrary to evidence on record and issuing a vacate order.*

9) *That the orders issued by the Chairman of the Business Tribunal Premises were contravening a right to life contrary to constitution of any movement which is also restricted (sic).*

10) *That the appeal is arguable and has high chances of success*

11) *That the Honourable Chairman of Business Rent Tribunal should have considered legal expert's opinion of DW2 and failed to give reasons why that experts opinion was rejected*

12) *That the Respondent be restrained from carrying out the said orders of evicting the tenant before hearing this Appeal.*

13) *That the Learned Chairman of the Business Tribunal failed to take into consideration the economic hardship with no usual income.*

14) *That the Learned Chairman of the Business Tribunal erred in issuing execution orders against the Applicant who occupies ground floor and that only minor repairs were required on that floor and renovations could be done while he is Tenancy.*

15) *That the Orders issued on 13/3/2020 be set aside.*

6. The notable errors in the wording of the grounds have been reproduced verbatim.

Appellant's Submissions

7. The Appeal was canvassed through written submissions prepared and filed by Celyne Odembo Advocate. Although the Amended Memorandum of Appeal itemized 14 grounds of appeal, counsel focused on the following three grounds: (i) *That the Learned Tribunal Chairman erred in law in making a finding that the legal Notices issued had legal basis as they were not from the known Landlord*; (ii) *That the Leaned Tribunal Chairman erred in law in failing to consider the tenants' construction expert opinion that the repairs could be done without interfering with the tenancy of the appellant [ground No 3]*; and (iii) *That the Learned Chairman of the Business Tribunal erred in law in failing to take into consideration that what was required to be done was minor repairs for which the Landlord had paid only Kshs 4,000 to the County Council, meant for Minor repairs.*

8. On the first ground, counsel submitted that the respondent was a limited liability company which by law operated through its directors and/or authorized employees or any other person appointed by the company through resolution. She added that a limited liability company could also, through resolution, donate a power of attorney to an individual to act on its behalf but the power of attorney had to be registered. Counsel contended that the notices giving rise to the references were signed by Mr Joseph Kangethe who was a real estate agent of the Landlord and in the absence of a signed and sealed resolution or a registered power of attorney, the said Mr Kangethe had no authority to issue or sign the notices, hence the notices were nullities *ab initio*. Counsel faulted the Tribunal for finding that Mr Kangethe issued the notices in his capacity as a director of the company yet there was no evidence to support that finding.

9. On the 3rd and 4th grounds of appeal, counsel submitted that the Tribunal had failed to consider the evidence of Justus Gituma Muguna who had testified that construction works on the 1st, 2nd and 3rd floors of the building were done while he was in occupation, and the evidence of John Nderi Wangombe who had similarly testified that the works could be done while the tenants were in occupation. Counsel contended that the weight of the evidence favoured the tenants yet the Tribunal found in favour of the Landlord.

Respondent's Submissions

10. The respondent filed written submissions through the firm of Anyango Opiyo & Co Advocates. Counsel for the respondent itemized the following as the issues falling for determination in the Appeal:

i. Whether the order for eviction and termination of the tenancies was issued during the Corana Virus pandemic and whether the Honourable Chairman of the Tribunal erred in delivering the Judgment on 13th March 2020.

ii. Whether the Tenants/Appellants' Construction Expert Opinion that the repairs could be done without interfering with the Tenancy of the Appellants would have influenced or changed the Tribunal's decision.

iii. Whether the repairs that were to be done on the suit premises were minor repairs or major repairs which needed complete vacant possession of the suit premises.

iv. Whether the fact that the Landlord/Respondent's appointed agent issued statutory termination Notices has any legal bearing to the validity of the statutory termination notices.

v. Whether the Tenants/Appellants Appeal is merited.

vi. Whether the Learned Chairman of the Tribunal fell into error when he exercised his discretion to deliver Judgment on 13th March 2020 dismissing the Appellants References.

11. On the first issue, counsel submitted that the references were filed in 2017 and the impugned Judgment by the Tribunal was rendered before the Chief Justice issued Practice Directions relating to COVID-19 and before the first case of COVID-19 was announced in Kenya. On the second and third issues, counsel submitted that the Tribunal considered the evidence of all witnesses and made an independent inspection which confirmed that the premises were in a deplorable state and needed extensive construction works that could not be carried out while the appellants were in occupation. On the fourth issue, counsel argued that the Tribunal properly found that Mr Joseph Kangethe was duly authorized because before the Tribunal as documentary evidence were a letter dated 15/7/2015 and signed minutes of the respondent containing a resolution which appointed his company, Variant Realtors Limited, as managing agents of the suit property and mandated them to issue all legal notices relating to the suit premises. Counsel added that the appeal herein was unmerited and that the appellants had failed to demonstrate any error on part of the Tribunal.

Analysis & Determination

12. I have considered the grounds set out in the Amended Memorandum of Appeal and the parties' rival submissions. I have also considered the relevant legal frameworks and jurisprudence. The fourteen grounds of appeal can be condensed into three key issues. The first issue is whether at the time of hearing and disposing the References the Tribunal was seized of proper notices issued by the landlord (respondent) under Section 4(2) read together with Section 7(1) (f) of the Act. The second issue is whether the Tribunal erred in finding that the respondent (landlord) had established a proper ground for termination of tenancy under Section 7(1) (f) of the Act. The third issue is whether at the time of issuing the disposal orders the Tribunal violated or disregarded the prevailing Practice Directions relating to court operations in the wake of COVID-19. I will make brief sequential pronouncements on the three issues in the above order.

13. The appellate jurisdiction of this Court is guided by clear principles. As an appellate court of first instance, this court is required to evaluate both the evidential and legal materials placed before the trial court viz-a-vis the findings of the trial court, and make its findings based on the grounds of appeal.

14. I will proceed to dispose the first issue. The appellants contended that there were no proper statutory termination notices before the Tribunal because the material notices were signed by Mr Joseph Kangethe, an agent of the respondent. It was the contention of the appellants that there was no company resolution appointing Mr Kangethe as an agent. They added that there was no power of attorney appointing him as an agent.

15. Section 4(2) of the Act contains the following legal framework on termination notices:

4. (2) A landlord who wishes to terminate a controlled tenancy or to alter, to the detriment of the tenant any term or condition in or right or service enjoyed by the tenant under such a tenancy, shall give notice in that behalf to the tenant in the prescribed form.

16. Regulation 4(1) of the Landlord and Tenant (Shops, Hotels, and Catering Establishments) (Tribunal) (Forms and Procedure) Regulations 1966 provide the following legal framework on the content and form of a notice issued under Section 4(2) of the Act:

“ 4 (1) Notice under Section 4(2) of the Act by a landlord shall be in Form A in the Schedule to these Regulations”

17. What emerges from the above legal frameworks is that, notice of termination of tenancy under Section 4(2) of the Act ought to be in the prescribed form. Secondly, the regulations and the prescribed form [Form “A”] do not contain a specific framework relating to execution of notices by landlords who are limited liability companies.

18. In the present appeal, the notices were issued by the respondent’s estate agent who was managing the premises. Trial before the Tribunal proceeded from the premise that there were valid notices issued by the Landlord. Indeed, in the absence of statutory notice from the landlord, there would be no basis for substantive hearing of a reference under the Act. A notice that does not emanate from the landlord stands to be struck out and cannot form the basis of a substantive hearing. Indeed, prior to the commencement of the hearing, the appellants filed a notice of preliminary objection dated 6/9/2017 seeking to have the notices struck out on the following grounds:

1) That the purported termination notices offend the provisions of the Companies Act Sections 37, 38 and are incurably bad in law, defective, null and void.

2) That the landlord is a limited liability company but the notices are drawn, signed, executed by an individual who is not the landlord and without legal authority.

3) That consequent to the above the purported notices dated 29th February 2017 should be struck out with costs to the tenants.

19. On 2/3/2018, counsel for the appellants applied to withdraw the preliminary objection. While allowing the application for withdrawal of the preliminary objection, the Tribunal made the following orders:

1. The tenant’s preliminary objection dated 6th September 2017 is withdrawn with no order as to costs.

2. Hearing of the reference on 25/4/2018

3. Parties to file and serve bundle of documents to be relied on at the hearing”.

20. It is apparent from the proceedings of 2/3/2018 that the objection relating to Mr Joseph Kangethe’s authority to issue the notices on behalf of the Landlord was abandoned by the appellants. Satisfied that the appellants were no longer challenging the mandate of the Mr Joseph Kangethe to sign the notices on behalf of the respondent, the court conducted a trial. Indeed, there would have been no basis for a trial in the absence of notices by the Landlord.

21. Against the above background, the appellants are raising this issue as a ground of appeal. In my view, this is not a *bona fide* ground of appeal. I say so because the appellants had the opportunity to apply to have the notices struck out; they challenged the notices through a preliminary objection; they subsequently withdrew the preliminary objection; and they allowed the hearing to proceed on the premise that they were no longer challenging the mandate of Joseph Kangethe to sign the notices on behalf of the landlord. In the circumstances, this court is not satisfied it can entertain the same issue at this appellate stage.

22. Notwithstanding the foregoing, I have looked at the Record of Appeal. At page 26 of the Supplementary Record of Appeal bearing the Court Registry Stamp of 30/7/2020, there is an extract of minutes of the respondent’s meeting held on 10/7/2015. The minutes are signed. The minutes read as follows:

“MUHU HOLDINGS LIMITED

EXTRACTS OF MINUTES OF THE DIRECTORS MEETING HELD ON 10TH DAY OF JULY 2015 AT MUHU HOLDINGS LTD OFFICES AT 11.00AM

PRESENT

1. Sarah Mweru Muhu (Chairperson)

2. Lucy Waithera Muhu (Managing Director Secretary)

3. Gachiku Muhu (Director)

4. Wanjiru Muhu (Director)

5. Tambirai Janda

NOTICE CONVENING THE MEETING

It was RESOLVED that all directors having been notified personally about the meeting the notice convening the meeting was waived.

AGENDA

1) Appointment of a management company to manage all the Company's properties

2) AOB

It was reported by the Managing Director that the Company has received an application for management of the Company's rental assets from VARIANT REALTORS LIMITED. It was explained that it was becoming difficult for the Company to collect rents timely from the tenants and in dealing with the tenants' issues arising including issues notices to the said tenants as a consequent.

After due consideration and deliberations, it was resolved that the said Variant Realtors Limited be appointed by the Company as its Agent authorized to:

i. Collect rent from all tenants with effect from 1st August 2015

ii. Deal with all other tenants' issues arising including

iii. timely settlements of bills. Notices to the tenants legal matter including instituting court proceedings in courts and tribunals as necessary.

In return

i. The said Company shall be issuing monthly statement of affairs not later than the 7th day of every month

ii. It will be paid a commission fee of 16% percent annum of net collections

The following properties will be placed under the management

1) Kangari Building 20969335

2) Cross Road 2092281

3) Kilimabogo 209910

4) Jasho House 2096812

5) Munyu Road 2092739

6) Butere Road 2095430

7) Nanyuki Road 2093915

8) Kenyatta 2099093

9) Dagoretti Karandini 61

10) Dagoretti Kandini 39

11) Dagoretti Kandini 64

12) Dagoretti Riruta 881

13) Dagoretti Kandini 74

14) Dagoretti Kandini 62

15) Dagoretti Kandini 40

16) Dagoretti Kandini 6

17) Riruta 8544

18) Riruta 8569

ANY OTHER BUSINESS

There being no other business, the meeting ended at 12.45 am with a word of prayer.

Confirmed correct record on the day's proceedings this 10th day of July 2015.

SIGNED

Sarah Mweru Muhu (Chairperson)

SIGNED

Lucy Waithera Muhu (Managing Director Secretary)"

23. It is apparent from the above minutes and from the evidence of Joseph Kangethe that there was a valid resolution appointing his company to manage the suit premises and issue necessary legal notices. Mr Kangethe testified that he was a registered and licensed estate agent and he was a director of Variant Realtors Limited. He further stated the he signed the notices in his capacity as a Director of Variant Realtors Limited and as the respondent's duly appointed estate agent managing the suit premises.

24. Consequently, my finding on the first issue is that the Tribunal was seized of proper termination notices at the time of hearing and disposing the references.

25. The second key issue in this Appeal is whether the Tribunal erred in finding that the respondent had established a proper ground for termination of tenancy under Section 7(1) (f) of the Act. I have considered the totality of the evidence on record. The respondent called Joseph Kangethe [Registered Estate Agent], Justus Kimuri [Structural Engineer], and Francis Kariuki Kiiru [Quantity Surveyor]. Their evidence was that the premises were in a dilapidated state and the works that were to be executed required hoarding. It was their evidence that it was unsafe to undertake the works while the appellants were in the premises.

26. On their part, the appellants led evidence by Joseph Gituma Muguna (Tenant) and John Nderi Wang'ombe (Building Contractor). Their evidence was that the works were minor and could be executed while the

appellants were in the suit premises.

27. The record before me shows that with this conflicting evidence before it, the Tribunal, in the company of the parties to the reference and their respective advocates, inspected the suit premises. The inspection confirmed that the suit premises were located on Mfangano Street which is a very busy street within the Central Business District of Nairobi. The 1st, 2nd and 3rd floors of the building were found to be in a deplorable and dilapidated state. Seven (7) tenants had vacated the building at the time of inspection. The respondent had obtained requisite approvals and had set aside resources for the works. Most significant, the inspection revealed that although the works on the ground floor premises were not substantial, the works on the 1st, 2nd and 3rd floors were extensive and could not be carried out without hoarding the entire building.

28. I have evaluated the Tribunal's findings based on the above evidence and I do not see any basis upon which this court can fault the Tribunal. In my view, the Tribunal properly found that, as part of solid risk management in terms of safety, the contemplated works could not be executed while the appellants were in occupation of the suit premises. It is therefore my finding that the Tribunal did not err in finding that the respondent had established a proper ground for termination of tenancy under **Section 7(1) (f) of the Act.**

29. The last issue is whether the Tribunal violated the Practice Directions issued by the Chief Justice to guide court operations in the wake of COVID-19 pandemic. The material References were filed in 2017. The impugned Judgment was rendered on 13/3/2020. There was no evidence placed before the Tribunal to suggest that the Practice Directions alluded to were in force as at 13/3/2020. Even if the Practice Directions were to be found to have been in force, that would not be a basis for setting aside the findings of the Tribunal. The Practice Directions would at best serve to guide the Tribunal when exercising discretion on an application for stay of execution for a limited period of time. I do not therefore find a basis for faulting the Tribunal on account of the eviction order granted in the Judgment.

30. The net result is that the appeal herein fails wholly. Because of the circumstances occasioned by the contemplated works and the termination granted by the Tribunal, parties shall bear their respective costs of the appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 2ND DAY OF FEBRUARY 2021.

B M EBOSO

JUDGE

In the presence of:-

Ms Celyne Odembo Advocate for the Appellants

Ms Onyango Opiyo Advocate for the Respondent

June Nafula - Court Clerk