



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 389 of 1995

(From the Original Determination or Order of the Business Premises Rent Tribunal

at Nairobi in Tribunal Case No.845 of 1991

LAVINGTON GREEN BOOKSHOP LIMITED.....APPELLANT/TENANT

VERSUS

JOHN NJOROGE KINUTHIA.....RESPONDENT/LANDLORD

JUDGMENT

This is an appeal against the determination of the business Premises Rent Tribunal at Nairobi in Tribunal case 845 of 1991 when an order was granted to the Landlord for possession on 24th November 1995.

The following grounds are submitted for our consideration.-

1. The Tribunal's determination is against the weight of the evidence before it.
2. The Tribunal's determination is wrong incorrect and erroneous having been based on the evidence of the witness in the case of the Respondent Landlord whose evidence was vague, speculative and without credibility.
3. The Respondent's evidence did not prove or establish a firm or genuine intention nor did it prove that the Respondent had the experience and or the ability and or other necessary requisites to run a business of butchery within the suit premises.
4. The Tribunal's determination was erroneous as the Respondent had failed to prove its case in that:-
 - (a) The Respondent failed to prove that they had acted bonafide with the Appellant Tenant.
 - (b) The Respondent did not prove all the ingredients necessary to be proved to come within the provisions of section 7(1) (g) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Chapter 301, Laws of Kenya

The tribunal failed to take into consideration material evidence illustrating that the Landlord's evidence and intention were not genuine.

6. The Tribunal erred in not taking into account the evidence that other shops within the same shopping complex had been vacant during the pendency of the proceedings Before the Tribunal and that these shops belonged to the Landlord who could have utilized the same for his alleged purposes without any difficulty or delay and that he did not do so. We have fully perused the Record of the Tribunal in the light of the submissions and argument And made by the Appellant and Respondent keeping in mind the Grounds of the Appeal.

Mr. Rach for the Tenant, Appellant, inter alia submits, that the tenant has been a tenant at the premises since 1970s. The tribunal's order to vacate was made on 24.11.1995 Learned Counsel inter alia submits that-

1. It is for the Landlord to establish the genuineness of his intention and the burden is upon the landlord to do so. As once the tenant is out the Tribunal can do very little to put him back on the premises. Our attention is directed to the decision made in Auto Engineering Ltd. V. M. Gonella and Co. Ltd. [1973 K.L.R. P.248]

Incidentally the counsel for the Landlord Respondent also relies upon the same decision to support and fortify his arguments.

The counsel relies upon the decision cited and urges the court to note that the test provided is of a reasonable man and that it is for the Landlord to prove the genuineness of his case.

We have taken note of these submissions and have kept it in view when determining this Appeal.

We have also noted decision cited and the principle enunciated in Haji and other v Harif Shah C.A. Mo. 34 of 1989.

The facts of this case we find are somewhat distinguishable from the present case.

It is also submitted that the Landlord must also prove that he had the ability to run the proposed business and the means to do so.

The counsel submits that the ingredients necessary to establish the case of the Landlord before the Tribunal were not established.

Mrs. Wahome for the Respondent, inter alia, contends in her submission that the Notice to Terminate the tenancy was properly issued under S.4(2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Cap 301 and the grounds were stated and the notice was duly served upon the tenant and this was so accepted.

The Landlord produced the evidence of cash amount available and his intention to start the business of Butchery. He testified in support of his case and submitted documents.

The tenant has been on the premises for 17 years and there was no harassment. The need for vacant possession was genuine one. The tenant had an offer of alternative premises at village market.

We note that in the decision cited to us made in 1973 (E.A) STANDARD BANK LTD. v KENYA CRAFTS P. 425; it was inter alia held:-

“The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301) which governs the premises in question is a simpler law. in a case like the present one. The steps to be taken by parties are as follows:-

1. S.7 (1) describes the grounds on which the landlord may seek to terminate the tenancy. His case must fall within the clauses of this section.

2. The next step for him to take is to give a notice to the tenant complying with the requirements of s.4.
3. If the tenant does not wish to vacate, he must, under s.6(1), give to the landlord a notice of his unwillingness, refer the matter to the tribunal, and give to the landlord a notice of such reference.
4. S.8(1) says that the tribunal may, after such inquiry as may be required by law "or as it deems necessary" either approve or refuse the termination of the tenancy.

"This last provision of law seems to give the tribunal a wide discretion or initiative in the matter of procedure.

The tribunal is to conduct an "inquiry" and there are no detailed rules like those prescribed in the Civil Procedure. In fact, the only requirement in this respect is that the practice and procedure shall be "conformable with justice, equity and good conscience" (Regulation should at first prove that his notice complied with s.4. if the notice is defective on the fact of it, then the tribunal will presumably dispense with inquiries and refuse the termination, if the notice is valid on the face of it, then it is for the tenant (who invoked the jurisdiction of the tribunal) to prove his case. He can challenge the validity of the notice but should state the grounds of his objection."

It is noted that in respect of this litigation the Landlord issued the other tenants with the notice of increase of monthly rental. This tenant was not asked for any increase.

In 1986 the monthly rent was Kshs. 3680/=. This has not been increased as the Landlord needed these premises for personal occupation for his own business purpose and not with a view to obtain an increase in the rental.

Mrs. Wahome further submits that the Tribunal visited the premises and to satisfy itself and recorded their observations.

The principle applicable in this litigation was fully deliberated before the Tribunal who came to a judicial decision.

The Tenant subsequently agreed to move out and asked for a six month extension. He was granted 4 months period by the Tribunal. Subsequent a stay was obtained and this lasted for 5 years or so.

Mrs. Wahome make reliance on the decision made in *Standard Bank vs Kenya Crafts 1973 (E.A)* (supra).

These then are the salient features of the submissions made before us.

We as an Appellate Court of the first instance have perused the Grounds of Appeal submitted, the arguments and submissions made by the Learned Counsel for the Appellant and the Respondent. We have also noted the principle enunciated in the wise decisions cited to us for our guidance.

It is noted that the judgement of the Tribunal was delivered on 24.11.95. It is composed of over three pages. It is noted that the said judgment considered most of the salient arguments and submissions made before it by both the parties. The evidence adduced was fully referred to in the Judgment when decision was made. We also note that the Tribunal in fact visited the shopping complex and particularly the shop in question.

After assessing the entire evidence before it the Tribunal came to a decision. Prior to this conclusion the Tribunal took note of the entire evidence adduced before it thus:-

"Looking at the evidence that has been adduced by all important issue the Tribunal has to determine is whether or not the Landlord has a genuine and settled intention to take up the suit premises for the purpose of his own business stated in his evidence."

It furthermore said:-

"Looking at the evidence and the relationship between the parties since 1977 when the tenant (Minaz) became a tenant there is nothing to suggest however remotely.

That the landlord had any reason to harm or ill will against the tenant."

There is on record of the Tribunal, evidence in our view, which is of considerable weight and was fully considered by the Tribunal.

In *Standard Bank Ltd. v Kenya Craft* (supra) on P. 429 (Chanan Singh J) relied upon *Betty's Cafes v Phillips Stores*, [1958] 1 ALL E.R 607, LORD SIMONDS quoted with approval the following passage from the judgment of ASQUITH L J in *Cunliffe v Goodman*, [1950] 1 All E.R. 720.

"an "intention", to my mind, connotes a state of affairs which the party 'intending' will call him X - does more than merely contemplate. It connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about by his own act or volition."

With respect I accept this and LORD DENNING'S judgment in the *Fisher* case as giving the correct interpretation of the word "intention".

"But how is that intention to be determined by a court of law? LORD SIMONDS says in the Betty's Cafes case at p.612 "it is a question of fact what intention a man has at a given time, difficult, it may be, to ascertain, but still a question of fact."

Question of fact are best determined by the tribunal that takes or hears evidence".

Genuineness or otherwise of the Landlord's intention is a question of fact which was established by the Landlord whom the Tribunal saw and heard. He also produced documents to support his case. This opportunity we do not have at this stage of these proceedings. We do not find any cause or reason to interfere with this finding.

The tribunal arrived at the conclusion that the Landlord's need to possess his shop was a genuine one and it ruled in his favour. We have independently on assessment afresh of all the evidence on the Tribunal record has come to the same conclusion on clear and compelling evidence. The Landlord has substantial capital to start the butchery business. The plans and the machinery would follow the acquirement of the premises for this purpose. The suggestion that the Landlord should have purchased the machinery and plant prior to an order of possession is a far fetched proposition. To be in a position to pay for the material and start work immediately is enough.

We find that the Landlord fully discharged the burden of proof and consequently the decision of the tribunal is a property striven at based on the totality of the evidence adduced before it in conformity with S.7(1)g of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Cap.301 Laws of Kenya. We consequently do not find any merit in the Grounds of Appeal No. 3, 4 and 5. We also dismiss grounds No. 6 of the Memorandum of Appeal. It is devoid of merit. Tribunal did visit all the shops and the site. The inquiry was just, equitable and in good conscience. Tribunal came to a conclusion which we find is in keeping with the facts and the evidence adduced.

We also do not find any merit in the Grounds No. 1 and 2 of the Memorandum of Appeal as the evidence adduced was clear and precise and the tribunal's decision and the order made was fully supported by the weight of the evidence.

Consequently the Appeal is dismissed with costs.

Orders accordingly.

Read and delivered at Nairobi this 26th day of *October* 2000.

SHAIKH M. AMIN

JUDGE

J.M. KHAMONI

JUDGE