Pharmacy and Poisons Board v Power General Contractors Ltd (Environment and Land Appeal E097 of 2021) [2023] KEELC 15922 (KLR) (2 March 2023) (Judgment)

Neutral citation: [2023] KEELC 15922 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL E097 OF 2021

J OMANGE, J

MARCH 2, 2023

BETWEEN

THE PHARMACY AND POISONS BOARD ..... APPELLANT

AND

POWER GENERAL CONTRACTORS LTD ..... RESPONDENT

JUDGMENT

1. This appeal arises from a decision of the Business Premises Rent Tribunal delivered on December 2, 2021 and the resultant decree. In this decision the Chair of the Tribunal upheld the Reference filed by the Respondent in this appeal (hereinafter referred to as Respondent) against the appellant herein.

2. The background to the appeal is that the Respondent is registered as proprietor lessee of the premises in the building known as Fourth Season Centre which was subject of a lease agreement between the appellant and the respondent.

3. The appellant expressed interest to lease 1772 square feet of the premises. An offer letter was prepared outlining the terms of the lease. Upon receipt of the letter offer, the appellant reverted with a counter offer highlighting various areas of concern including on valuation of the rent and service charge, escalation clause, rent interest, legal costs and delays. There were further negotiations which culminated in an acceptance of the counter offer by the appellant in a letter dated May 10, 2019

4. Following this agreement, a handing over/ taking over of the premises took place and a hand over/ take over certificate was prepared to mark the start of a 3 months fit out period which was slated for June, July and August 2019. The first quarter of the term of the tenancy was to run from September 1, 2019 to November 30, 2019.

5. The Ministry of Transport thereafter prepared a lease based on the terms that had been agreed upon by the appellant and the Respondent. The Respondent executed its part and forwarded the lease to the

appellant who did not return it duly executed. Nonetheless, the appellant paid rent of Kes 1,233,312. The appellant did not pay any further rent.

6. This prompted the Respondent to file an application at the Business Premises Tribunal seeking an order for payment of rent and service charge arrears. In a Ruling delivered on December 2, 2021 the Tribunal upheld the reference ordering the appellant to pay rent and service charge for the quarter beginning September 2019 to August 2020 within 60 days and further ordering immediate vacant possession of the premises.

7. The appellant being aggrieved by this decision filed a memorandum of appeal on the following grounds:-

    1. The learned chair of the tribunal erred in fact and in law in misapprehending the evidence on record and finding the Appellant owing in rent arrears.

    2. The learned chair of the tribunal erred in fact and in law in finding that the Appellant was in actual physical occupation of the subject premises despite evidence to the contrary.

    3. The learned chair of the tribunal misapprehended the evidence on record to find that signing of the handing over certificate during the fit out period amounted to actual physical occupation of the subject premises.

    4. The learned chair of the tribunal erred in fact and in law in failing to appreciate the terms of letter of offer dated January 30, 2019 which stipulated that the contractual obligations of the parties could only arise after execution of the lease and finding that the appellant was in breach of its contractual obligations when it was apparent that such obligations had not arisen.

    5. The learned chair of the tribunal erred in fact and in law in disregarding clause 6 of the letter of offer as well as the letters of May 2019 and May 10, 2019 on the commencement date of the lease which was stipulated to be after a three months period during which the obligation to pay rent could not arise.

    6. The learned chair of the tribunal erred in fact and in law in disregarding the appellant's submissions on the doctrine of mitigating damages and failing to find the respondent in breach of the doctrine.

    7. The learned chair of the tribunal erred in fact and in law in disregarding clause 14 of the letter of offer which provided for the respondent's right to reenter the premises within 14 days after the rent becoming due. In this regard, the learned chair failed to consider, the respondent's failure to invoke this clause and its deliberate delay to take any measures to prevent further loss was aimed at temporizing its loss for as long as possible in order to reap maximum benefit, in breach of the doctrine of mitigating damages.

    8. The learned chair of the tribunal erred in fact and in law in finding that there was no communication about the termination of the tenancy from the appellant despite evidence to the contrary.

    9. The learned chair of the tribunal erred in fact and in law in failing to find that the respondent was entitled to refund the appellant the sum of Kshs

1,233,312/- which as rent paid during the period the appellant was not in occupation of the premises and before the obligation to pay the rent had arisen.

10. The learned chair of the tribunal erred in fact and in law in ordering the appellant to pay rent in arrears from the quarter beginning December 1, 2019 while the respondent had claimed damages from the quarter beginning December 1, 2019.

11. The learned chair of the tribunal erred in fact and in law in totally disregarding the appellants submissions thereby arriving at an erroneous conclusion.

8. Both counsel filed written submissions and authorities which I have duly considered. Counsel for the appellant referred the court to clause 6 of the letter of offer which initially granted the appellant one month fit out period but was later changed to three months. The appellants argue that during the fit out period, they did not have possession of the premises.

9. Appellants counsel further referred the court to clause 15 of the letter of offer which was to the effect that possession was only to be given on delivery of an executed lease and compliance of the terms of the letter hereof. It is the appellants contention that given these clear terms of the letter of offer, the learned chair of the Tribunal erred in finding that Handing/ Taking over certificate amounted to possession.

10. In the same vein, counsel for the appellant argued that given that the lease was never executed, the letter of offer was to guide the contractual relationship between the two parties. This letter, counsel submitted was clear that the tenancy relationship could only arise after the fit out period notwithstanding that rent was paid during the fit out period.

11. Counsel argued that the appellant was not indebted to the Respondent who had taken no action to mitigate its damages and should be ordered to refund the rent already paid.

12. Counsel for the Respondent recounted the main findings of the Tribunal namely that the tenancy was a controlled tenancy, that there were arrears of rent and that there was no evidence of communication to the Respondent of the issuance of the circular dated June 4, 2019 hence the Respondent had no way of knowing that the Appellant would not be retaining the premises. The Respondents contend that it has not been established that the decision of the Tribunal was based on error of law or fact. As such there is no basis for the court to interfere with the decision.

13. I have considered the pleadings herein, the relevant laws, submissions and accompanying authorities. This court as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that.

14. In *Gitobu Imanyara & 2 others v Attorney General* [2016] e KLR, the Court of Appeal stated that;

> "[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect"

15. In *Peters v Sunday Post Ltd* [1958] EA 424, the Court held that;

> "Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if

there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide"

16. Similarly, in *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] e KLR, the same stated with regard to the duty of the first appellate court;

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way".

15. The undisputed facts in the lower court are that the Appellant and the Respondent commenced discussions on a tenancy agreement in respect of the suit premises. These discussions are encapsulated in the letter of offer dated January 30, 2019, the Response by the Appellant dated May 8, 2019 and subsequent acceptance by the Respondent of the Revised terms proposed by the Appellant. It is common ground that the lease was never executed by the Appellant herein. On the May 29, 2019 the Respondent (the Landlord) handed over the premises to the Appellant (the Tenant) for purposes of fitting out. Both parties are in agreement that no rent was payable during the period of fitting out. On the 28th of June, 2019 the Appellant paid an amount of Kshs 1,233,312/- which the Appellant claims was deposit and rent.

16. The issues that are in contention and that form the crux of this appeal are;In view of the fact that the lease was not executed, did the parties herein have a tenancy agreement?Did the Appellant ever take possession of the premise?Are there any rent arrears due and if so how much?

17. On the question of the lease that was not executed, the Learned Tribunal Chair found that failure of the Tenant to execute the lease rendered it non-binding on the parties thus bringing the relationship within the ambit of Section 2 (a) of the *Landlord and Tenant (Shops, Hotels and Catering Establishment)* cap 301 of the Law of Kenya. Given that the letter of offer was emphatic that only the executed lease would be binding, I find that this finding by the Tribunal was sound.

18. The tenancy relationship between the parties was cemented by the payment of rent which was to take effect from the month of September. The Appellant did try to argue that the amount of Kes 1,233,312 included deposit but this is against the position of the Appellant espoused in the letter dated May 8, 2019 wherein they indicated that it is against Government policy to pay deposit. Having found that the amount paid was rent the Appellants cannot rely on the statement in the letter of offer that had indicated that no contractual obligations were to arise if the lease was not executed.

19. The Handing Over Certificate makes it clear that the Appellants had taken possession of the premises although they had not physically moved into the premises. The certificate is a very detailed document that confirms that the Appellants were taking possession of the premises as the incoming occupants. There is no indication whatsoever that it was only for fit out as alleged by the Appellants.

20. On the question of rent I find that the Appellant did pay rent for the period September to November, 2019. The Appellant argue that given that they had received communication barring them from continuing with the lease rent should not have accrued. It was the finding of the Tribunal that although the Appellants received the letter on June 4, 2019 they did not inform the Respondent. As such rent continued to accrue. I have looked at the evidence that was adduced in the Tribunal and note that the letter notifying the Respondents of the impediment was dated June 12, 2020. For almost a year

knowing very well they had signed a document taking over the Respondents premises and paid rent, the Appellants did not notify the Respondents of the directive.

21. On their part the Appellants make a compelling case that the Respondents should have mitigated their damages by taking action to repossess the premises. The Respondents could only do so after being informed of the directive. This was proved to have been done on the June 12, 2020. At this point armed with this information, the Respondent should have taken action to mitigate their loss. The Ruling of the Tribunal does not address the issue of mitigation of damages. However I note that in the final orders the court ordered the Tenant to pay the rent arrears accruing from the quarter beginning September, 2019 (which is outside the fit out period) and ending November, 2019 to the quarter beginning June 2020 (which is when the Respondents were notified of the directive) and ending August 2020. Given that both parties were in agreement in pleadings filed in the Tribunal that rent was not payable during the fit out period, the amount that was paid by the Appellants should have offset rent for the quarter beginning September, 2019 and ending in November, 2019. As such arrears only accrued from quarter beginning December 2019 and ending February 2020 to the quarter beginning June 2020 and ending August 2020. The Respondents were not and should not be awarded the full amounts they claimed in the statement of accounts.

22. The upshot of the foregoing is that the appeal partially succeeds in the following terms

    a) The Appellants shall pay the arrears owed to the Respondents for rent for the quarter beginning December 2019 and ending February, 2020, upto the quarter beginning June, 2020 and ending August, 2020 within 90 days.

    b) The Landlord shall recover vacant possession of the premises immediately.

    c) Each party to bear their own costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 2ND DAY OF MARCH 2023.

JUDY OMANGE

JUDGE

In the presence of: -

Mrs. Yala holding brief for Mr. Kivuva for the Appellant

Ms Waiganjo for the Respondent

Steve - Court Assistant