Akama & another v Nyabuto (Environment and Land Appeal 19 of 2019) [2023] KEELC 18747 (KLR) (11 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18747 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT AND LAND APPEAL 19 OF 2019

M SILA, J

JULY 11, 2023

BETWEEN

PROF JOHN AKAMA ..... 1ST APPELLANT

ADAMS NYABUTO MATURI ..... 2ND APPELLANT

AND

PAMELA MORAA NYABUTO ..... RESPONDENT

JUDGMENT

1. On 12 August 2016, the respondent filed suit against the 1st appellant, claiming that the 1st appellant is her tenant in residential premises at an agreed monthly rent of Kshs 23,000/-. She averred that the premises is residential premises leased by the 1st appellant for his workers. She claimed that the 1st appellant was in rent arrears of Kshs 258,500/= being rent for 11 months though the period of default was not specified in the plaint. Her prayers in the plaint were for the alleged rent arrears of Kshs 258,500/=, mesne profits of Kshs 23,500/=, vacant possession and costs of the suit.

2. On 1 September 2016, the 1st appellant filed defence vide which he inter alia admitted entering into a tenancy agreement with the respondent. He however denied being in rent arrears of Kshs 258,500/= and pleaded that what was due to the landlord is fully paid and acknowledged. He pleaded that he would raise a preliminary objection that the tribunal was devoid of jurisdiction.

3. On 6 September 2016, a preliminary objection was filed. I haven't seen the preliminary objection in the record of appeal, but from the proceedings, it would appear that the objection was to the effect that the monthly rent of Kshs 23,500/= supercedes the amount provided under Section 2 (1) (c) of the *Rent Restriction Act*. This was opposed. In her ruling, the Chairman of the tribunal did not find merit in the objection and she dismissed it on 8 September 2016. Upon delivery of the ruling, counsel for the respondent complained that the 1st appellant was not making regular payments towards rent. The plaintiff was allowed to speak and she stated that the rent for the entire premises is Kshs 38,000/= and

that she is supposed to be paid Kshs 23,500/= whereas her husband, is paid Kshs 15,000/=. Counsel for the 1st respondent made a rejoinder stating that the whole rent is Kshs 23,500/= which is to be shared between the respondent and her husband and that the respondent is meant to receive Kshs 14,000/=.

4. On hearing these submissions, the Chairman of the tribunal made the order that from the documents produced, the rent is Kshs 38,000/= and the 1st appellant has been paying the respondent Kshs 23,500/=. She added that pending hearing of the suit "and taking into account that it is the plaintiff's husband who signed the lease agreement and not the plaintiff and the plaintiff and her husband are engaged in a tussle over this property, the defendant/tenant to pay to the plaintiff a sum of Kshs 23,500/= per month with effect from September 2016. The defendant/tenant to make payment from September 2016 within the next seven (7) days. Thereafter to pay rent on or before 5th day of each month in advance." No appeal was preferred against these interlocutory orders and the matter was given a date for hearing on 12 January 2017. It did not proceed on that day as counsel for the respondent made no appearance and the respondent stated that she was willing to negotiate the matter. The case was adjourned to 20 April 2017. On 20 April 2017, it was mentioned by counsel for the respondent that the 1st appellant has not paid rent which was countered by counsel for the 1st appellant insisting that rent has been paid.

5. The tribunal made orders for the 1st appellant to provide evidence of payment of rent to counsel for the respondent, from September 216 to April 2017, and for the documents to be supplied within 7 days. Subsequently, two applications were filed. The first was dated 16 June 2017, vide which the 2nd appellant applied to be joined to the suit as interested party. His reasons for being joined were that he is the registered proprietor of the land where the disputed premises is located and that he was the one who leased the property. He averred that he never leased the property to the 1st appellant, but to Embonga Restaurant. The application for joinder was allowed on 19 April 2018. The second application was one dated 14 October 2017 filed by the respondent. In it, she sought to have the 1st appellant found guilty of contempt and imprisoned for disobeying the orders made on 20 April 2017, i.e to provide evidence of payment of rent from September 2016 to April 2017. The application was opposed. The tribunal made an order that no payments were made for April, May, June August September and October 2017, and February and March 2018, in total 9 months. The 1st appellant was ordered to pay the money within 30 days, and continue paying Kshs 23,000/= per month. What followed was the application dated 2 May 2018 by the 1st appellant seeking to have the suit struck out. It is the ruling of the tribunal on this application which has triggered this appeal.

6. The said application sought orders to have the respondent's suit struck on the grounds inter alia that the respondent was not the landlord of the premises, that the suit also touches on and/or concerns a tenancy agreement between Embonga Oasis Hotel and Restaurant, and the interested party (2nd appellant herein); that the suit property belongs to the interested party; that the respondent has no proprietary rights; that the premises is commercial in nature where a hotel and bar business is being carried out and not a dwelling house. To support the application, the 1st appellant attached what he contended was the tenancy agreement in dispute and the search of the property indicating that it is owned by the 2nd appellant. The respondent opposed the motion through a replying affidavit where she inter alia averred that the subject matter in the case is in respect of three residential dwellings which is not part of the business premises known as Embonga Oasis Hotel and Restaurant. The application was heard and ruling delivered on 6 December 2018. The Chairman of the tribunal dismissed the application. In her ruling, she held that the 1st appellant had in his pleadings admitted entering into a tenancy agreement with the respondent though he denied being in rent arrears. She held that the 1st appellant had admitted to the premises being residential. On the annexed lease agreement, she found that it did not specify the property being demised, and it was unclear whether the premises let to

Embonga Oasis Hotel and Restaurant are the same as that let to the 1st appellant. She held that this was an issue that could only be determined during trial. On locus standi, she held that the 1st appellant could not argue that the respondent has no locus as he admitted the tenancy in his pleadings. She dismissed the application with costs.

7. Aggrieved, the appellants have preferred this appeal inter alia on the following grounds which I copy verbatim :-

1. The learned Chairperson erred in law in finding and holding that the appellants herein do pay the respondent a certain sum of money when the respondent herein is a stranger to the said appellants. No evidence was ever tendered before the learned Chairperson for her to make such decision which was/is biased.

2. The learned Chairperson erred in law and in fact by holding that the appellants had any valid tenancy agreement between the appellants herein and the respondent which culminated into making an order of payment of rent arrears without any substantive evidence being placed before the Honourable Rent Tribunal.

3. The learned Chairperson erred in law in finding and holding that same was seized with jurisdiction to entertain the suit herein contrary to the provisions of the *Rent Restriction Act* Chapter 296 Laws of Kenya.

4. The learned Chairperson misconceived, misunderstood and misinterpreted the provisions of the *Rent Restriction Act* Chapter 296 Laws of Kenya vis a vis the provisions of the *Landlord and Tenant (shops, hotels and catering establishments) Act* Chapter 301 Laws of Kenya.

5. The learned trial Chairperson failed to properly evaluate and/or analyze the evidence and submissions rendered by the appellant's counsel and thereby arrived at an erroneous conclusion, contrary to the obtaining position in law.

6. The Ruling and/or Decision of the learned trial Chairperson is invalid, illegal and devoid of legal foundation because she did not deliver a Ruling based on the Notice of Motion dated 2nd day of May 2018.

7. The Ruling of the learned trial Chairperson is not understudy (sic) that there was no Tenancy relationship between the appellants and the respondent herein at all.

8. The learned Chairperson erred in law and in fact by making a decision which is not based on any facts and the law consequently she engaged in a fishing expedition on issues that were not presented before her.

9. The learned Chairperson erred in law and in fact in failing to properly or at all, analyze, evaluate and consider, the totality of evidence (both oral and documentary), adduced by the appellants. Consequently, the trial Chairperson arrived at a biased conclusion contrary to the evidence on record.

10. The learned Chairperson failed to properly evaluate and/or analyze the tenor of the submissions tendered by the appellants. Consequently, the learned Chairperson misapprehended the crux of the legal issues attendant to the

matter before the Honourable Tribunal and thereby arrived at an erroneous conclusion and/or findings.

11. The Ruling by the learned Chairperson is unbalanced, perfunctory, passionate and substantially at variance with the evidence rendered by the appellants. Consequently, the ruling is wrought and/or fraught with errors of facts and law.

8. I can summarise the above grounds into three, that is, firstly, that the Chairperson erred in making orders for the appellants to pay monies to the respondent while she is a stranger to them; secondly, that she misunderstood the provisions of the *Rent Restriction Act*, vis-à-vis the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Cap 301, Laws of Kenya and was wrong in construing the premises as residential when it was commercial; and thirdly, that the Chairperson failed to deliver ruling based on the application dated 2 May 2018 and wrongly evaluated the said application.

9. The appeal was argued through written submissions which I have taken account of before arriving at my decision.

10. . At the outset, it is erroneous for the appellants to contend that the Chairperson failed to make a ruling on the application dated 2 May 2018, or that she failed to properly analyse and evaluate the application. The ruling of 6 December 2018 was one squarely addressing this application. I have also gone through the ruling and I find that the Chairperson analysed and evaluated the issues as presented. I also see no substance on the second main ground of appeal, that the Chairperson erred in making orders that the appellants pay certain monies to the respondent as rent pending hearing of the suit. There is nowhere in the impugned ruling where she ordered the appellants to make payments to the respondent in form of rent. The orders requiring the 1st appellant to be paying rent to the respondent were made much earlier, not in the subject ruling, and no appeal was preferred against them. If either of the appellants were aggrieved by the interim orders made, they had the option of appealing the same but no appeal was filed.

11. On the ground that the Chairperson erred in not concluding that the premises were commercial, I see no substance. The Chairperson carefully went through the pleadings and the material presented in support of the application. She found, correctly, that the 1st appellant had in his defence admitted being a tenant of the respondent his only point of departure being that he was up to date with rent payments. She observed that there has been no amendment to this pleading. On the lease agreement that the 1st appellant attached, she observed, again correctly, that it did not specify the actual land parcel being leased. She was also alive to the contention of the respondent that what was in dispute was not the business premises leased to Embonga Oasis Hotel and Restaurant but some residential dwellings leased directly to the 1st appellant by the respondent. She was correct in finding that in those circumstances, the question of whether the demised property was business premises or some residential dwellings, could only be determined with finality upon hearing the suit. She was also correct in her finding that it could not be argued that the respondent has no locus, given the fact that the 1st appellant had admitted in his pleadings that he was a tenant of the respondent.

12. I think that the Chairperson evaluated the application carefully and meticulously. I am persuaded that she found correctly, that she could not, on the basis of the application alone, without first hearing the suit, come to a conclusive finding that the suit was a non-starter.

13. From the above, it will be seen that I am not persuaded to disturb the ruling of the Chairperson. I find no substance in this appeal and it is hereby dismissed with costs to the respondent.

14. Judgment accordingly.

DATED AND DELIVERD AT KISII THIS 11 DAY OF JULY 2023

JUSTICE MUNYAO SILA

JUDGE,

ENVIRONMENT AND LAND COURT AT KISII