REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELCA NO. 34 OF 2019

YUSUF ABDULSWAMAD.....APPELLANT

-VERSUS-

HAITHAR HAJI ABDI.....RESPONDENT

JUDGMENT

1. The Appeal herein arises from the decision of the Honourable Chairman of the Business Premises Rent Tribunal, Mr. Mbichi Mboroki delivered on 5th July 2019 in BPRT No.122 of 2018 Mombasa. In the Memorandum of Appeal dated 2nd August 2019, the Appellant raised the following as his grounds of appeal:

> **1. The Honourable Tribunal grossly erred in law in law in ignoring and failing to implement the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments)Act (Cap 301) Laws of Kenya as follows:**
>
> **a. Failing to accord the proper meaning, import and purport to Section 7(1)(b) in line with general objective of the statute which is stated at long title of the said statute and instead interpreting the same liberally and disregarding the object of the statute.**
>
> **b. Failing to appreciate the discretion vested on the Tribunal under Sections 9(1)(a) and 9(2)(b) for purposes of actualizing the purpose of the statute hence wrongfully making finding that it had no discretion to implement justice in the circumstances of the case.**
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> **2. The Honourable Tribunal erred in law and fact in that despite making a finding that the pattern of payment of rent between the Appellant and the Respondent had been mutually agreed and existed for a long time, the Honourable Tribunal still made a finding that the Appellant was in the wrong to the extent that his tenancy deserved to be terminated.**
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> **3. The Honorable Tribunal erred in law in failing to consider and to appreciate Section 120 of the Evidence Act (Cap 80) Laws of Kenya and the equitable principle of waiver, estoppel and acquiescence which are applicable to the circumstance of the case.**
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> **4. The Honourable Tribunal erred in law in failing to consider and to appreciate that the evidence tendered by the Appellant in respect of the relationship between the Appellant and the respondent in terms of the pattern of payment of rent stood uncontroverted as the same was not a fact within the knowledge of the respondent's sole witness.**
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> **5. The Honourable Tribunal erred in law and fact in failing to appreciate that the testimony of respondent's sole witness was hearsay evidence and therefore inadmissible and of not cogent value to the case.**
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> **6. The Honourable Tribunal erred in law and fact by totally failing and refusing to consider the Appellant's written submissions dated 17th May 2019.**

2. For those reasons, the Appellant prayed that this appeal be allowed in terms that the Appellant's reference be allowed and the Respondent's notice be dismissed and for the respondent to pay the costs of this appeal and of the case in the BPRT.

3. The appeal proceeded by way of written submission. Messrs. N. A. Ali and Co. Advocates for the Appellant submitted that the respondent's witness who testified at the Tribunal was not competent to do so on the disputed facts of payment of rent arrears, and that his evidence amounted to hearsay. It was submitted that the pattern of payment of rent was not consistent. That at times the Appellant remitted rent to the respondent yearly in advance, or six months in advance and at times in arrears. That having established that the pattern of rent was

inconsistent, the tribunal erred by finding that the Appellant committed a wrong doing that he deserved his tenancy terminated. The Appellant submitted that the respondent could not be allowed to change course and say that the Appellant paid rent irregularly, and that the Tribunal erred in failing to apply the principles of equity and Section 120 of the Evidence Act. The Appellant's counsel cited Article 10 (2) (a) of the Constitution and relied on the case of **Willy Kimutai Kitilit –v- Michael Kibet (2018)eKLR and Serah Njeri Mwobi –v- John Kimani Njoroge (2013)eKLR**. The Appellant's counsel further submitted that the Tribunal failed to correctly apply, appreciate and interpret Sections 7(1) (b), 9(1) (a) and 9(2) (b) of Cap 301. That from the evidence on record, the Appellant always paid rent regularly and has never failed to pay rent and was not a defaulter of rent. They relied on the case of **Shabbir Motors Spares Ltd-v- Mohamed Salim Mohamed & 2 Others (2002)eKLR**. The appellant's counsel submitted that the tribunal should have exercised its discretion under Section 9(1)(a) and 9(2)(b) of the Cap 301 and Order that henceforth rent be paid by the Appellant in advance failure to which the tenancy would automatically terminate. The Appellant urged the court to allow the appeal and the order of the tribunal terminating the subject tenancy by recalled and overturned.

4. The firm of Mogaka Omwenga & Mabeya Advocates for the respondent submitted that the appeal is unwarranted. With regard to the argument that the respondent's witness was not competent to testify, it was submitted that the witness is the project Manager of the landlord's property responsible for the said property, including communicating with the tenant on issues of rent payment and therefore was a competent witness. The respondent's advocate cited **Bowstead and Raynolds on Agency, Seventeen Edition, Sweet and Maxwell**, at page 1-001 which defines an agent-principal relationship, and relied on the case of **Provincial Construction Company Ltd & Another-v- The Attorney General (1991)KLR**. It was further submitted that the Appellant in his own evidence admitted non-payment and varied payment of rent and therefore the Appellant has no right to allege hearsay evidence. It was the Respondents submissions that the fact that the Landlord condoned the behavior of the Appellant in irregularity of rent payment does not amount to waiver of his statutory rights. That the learned Honourable Chairman did not err in holding that the Appellant was in the wrong to the extent that the tenancy deserved to be terminated. That the appellant admitted that he would pay the rent yearly, in six months, monthly and sometimes in arrears and in light of this, the tribunal was right in terminating the tenancy due to the Appellant having been persistently in arrears. Counsel for the respondent relied on the case of **Charles Okoth –v- Abdulrahman Hamumy(2018)eKLR; Shabbir Motor Spares Ltd (supra)** and **Mohamed Bwana Bakari –v- Salha Abdulatif (2018)eKLR**.

5. Regarding the issue whether the Honourable Chairman failed to appreciate the doctrine of estoppel as per Section 120 of the Evidence Act, and the equitable principles of waiver, estoppels and acquiescence, the respondent's submission is that the doctrine of estoppel is inapplicable. The respondent submitted that the Honourable Chairman was guided by statute and his interpretation was based on the same and therefore did not err in interpreting and implementing Section 7 (1) (b), 9(1) (a) and 9 (2) (b) of Cap 301. Relying on the case of **Shabbir Motor Spares Ltd (supra)** and **Charles Okoth (supra**), the respondent's counsel submitted that the above provisions of law gave the tribunal discretion to terminate a tenancy. That the Honourable Chairman took cognizance of this discretion and terminated the tenancy after taking into account the testimony adduced by both parties. The respondent urged the court to dismiss the appeal herein with costs.

6. I have considered the Record of Appeal, the grounds of appeal and the submissions. This being a first (and final) appeal, I am conscious of the court's duty and obligation to evaluate, re-assess and re-analyze the evidence on record to determine whether the conclusions reached by the learned Chairman of the Tribunal were justified on the basis of the evidence presented and the law. The issues for determination in this appeal as I can deduce from the grounds of appeal are:

> **a. Whether the evidence tendered by the respondent's witness amounted to hearsay.**
>
> **b. Whether the learned Chairman of the Tribunal misinterpreted the provisions of Section 120 of the Evidence Act and Sections 7 (1) (b), 9(1) (a) and 9 (2) (b), of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301.**

7. The brief summary of the facts of this case from the Record of Appeal filed is that the respondent served the appellant with a notice dated 31st July, 2018 seeking to terminate the tenancy to the Appellant with effect from 1st October, 2018 for the reason that the appellant was highly irregular in rent payment. The appellant did not wish to comply with the Notice and filed a reference in the tribunal. Jayib Haithar testified on behalf of the respondent. The witness stated that he was the son of the Landlord (the respondent herein) and testified that he managed his father's properties in Nairobi and Mombasa. That the appellant is the only tenant in PLOT NUMBER BLOCK BI/1161 AND 1162 MN (THE SUIT PROPERTIES). The appellant has submitted that the said witness was not competent to testify since he was not the Landlord and that his evidence amounts to hearsay. Since the said witness was the property manager of the respondent's property, including the suit property, it cannot be said that the said witness was not a competent witness. Section 125(1) of the Evidence Act is clear that "all persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause." The respondent's witness did not fall within the said exceptions. As the property manager of the suit property where the appellant was a tenant, no doubt the witness was a competent witness as he was responsible for managing the said property, including communicating with the appellant as tenant on the issues of rent payment. In any case, the issue of non-payment and varied payment was well documented and also admitted by the appellant in his evidence and submissions. The said respondent's witness in my view testified on facts within his knowledge and property manager of the respondent and his evidence could not therefore be said to be hearsay. The mere fact that the witness did not have written authority nor a power of attorney from the respondent to represent the respondent did not in itself make his evidence to be hearsay.

8. The appellant in his submissions stated that the learned Chairman of the tribunal erred in law for failing to correctly interpret and apply Sections 120 of the Evidence Act and Sections 7 (1) (b), 9(1) (a) and 9(2) (b) of Cap 301. The pattern of payment of rent between the parties was asserted by the parties and considered by the tribunal as follows:

> **"……it is true that there is overwhelming evidence that the tenant had been sometimes paying rent in advance at the request of the landlord. There is also no evidence that the landlord has been complaining about the Tenant's mode of payment of rent."**

9. The appellant submitted that he believed the respondent was fine with the manner in which rent was paid. That at times, he paid it in

advance and at other times in arrears. The appellant's submission was that on account of the long standing relationship between the parties during which time the rent could be paid annually or biannually, or monthly or sometimes in arrears, the tribunal was enjoined by the constitution to apply the equitable principles of waiver, estoppel and acquiescence in the circumstances of this case. The appellant specifically cited Section 120 of the Evidence Act which provides as follows:

> **"when a person has, by his declaration, act or omissions, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."**

10. The appellant submitted that the tribunal failed to correctly apply, appreciate and interpret Section 7(1) (b), 9(1)(a) and 9(2)(b) of the Cap 301. Section 7 (1) (b) provides the grounds of termination of tenancy which was the ground which the respondent sought to terminate the tenancy and provides as follows:

> **"That the tenant has defaulted in paying rent for a period of two months after such rent has become due or payable or has persistently delayed in paying rent which has become due or payable."**

11. In his evidence, the appellant stated that he did not agree with the respondent when the rent was payable. He stated that sometimes he pays rent monthly, yearly, six (6) months and sometimes in arrears. That the landlord had not complained about the mode of rent payment and was at the time paying rent in arrears. He confirmed that the rent for June and July 2018 was paid on 2nd August 2018.

12. After evaluating the evidence, the learned Chairman of the Tribunal stated as follows:

> **"The tenant has admitted before the tribunal that he paid rent for June, July 2018 on 2nd February, 2018. The tenant was in arrears of rent for 2 months as that 31st July 2018 when (sic) is a breach of clause 7(1)(b) of Cap 301. That it is true that there is overwhelming evidence that the tenant had been sometimes paying rent in advance at the request of the landlord. There is also no evidence that the landlord has been complaining about the tenant's mode of payment of rent. However, this cannot take away or compromise the landlord's right under Section 4(2) of Cap 301 and Section 7(1)(b) of Cap 301….."**

13. The appellant has faulted the tribunal for terminating the tenancy despite having made a finding on the pattern of payment of rent which was irregular. That the respondent never complained nor protested over the pattern and manner of payment of rent.

14. From the evidence on record, and in his own admission, the appellant admitted that he would pay rent in arrears. It is also true that the appellant would pay rent in advance, but the evidence on record indicates that that was only done at the request of the respondent. The appellant, in my view, cannot hang on the instances when the respondent was paid rent in arrears and invoke the equitable doctrine of estoppel. It is therefore clear that the appellant was in arrears for 2 months which is a breach of Section 7(1)(b) of Cap 301. In light of this, it is my opinion and I so find, that the learned Chairman of the Tribunal was right in terminating the tenancy on account of the appellant's being persistently in arrears of rent.

15. Given that Section 7 (1) (b) allowed for termination of tenancy on account of default of payment of rent, I am satisfied that proof was made of such default on the part of the appellant and aided by his own admission of paying rent in arrears. It is my finding that the learned Chairman arrived at the right conclusion in dismissing the reference and upholding the notice of termination.

16. The upshot is that I find this appeal as lacking in merit and is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 25TH DAY OF MAY, 2021

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C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE