



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT NAIROBI**

**ELC APPEAL NO. 45 OF 2015**

**MUNYAKA KUNA & CO. LTD.....APPELLANT**

**VERSUS**

**EAST AFRICA PRODUCE CO. LTD.....RESPONDENT**

**JUDGMENT**

At all material times, the Appellant was the owner of all that parcel of land known as L.R No. 209/2750 (hereinafter referred to as “the property”) and the Respondent was one of the Appellant’s tenants on the property. The Respondent’s tenancy was a controlled one under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301 Laws of Kenya (“the Act”).

On or about 30<sup>th</sup> October, 2012 the Appellant served the Respondent with a notice under Section 4(2) of the Act seeking to terminate the Respondent’s tenancy with effect from 1<sup>st</sup> January, 2013 on the ground that the Appellant wanted the premises that were occupied by the Respondent (“the suit property”) for its own use. The Respondent opposed the notice and filed a reference at the Business Premises Rent Tribunal (“hereinafter referred to as the tribunal”) on 16<sup>th</sup> November, 2012 requesting the tribunal to investigate the matter and determine the same.

The tribunal heard the Respondent’s reference on 3<sup>rd</sup> June, 2013. At the hearing, each party called one witness. The Appellant’s witness Karanja Macharia told the tribunal that he was a director of the Appellant and that the Appellant wanted the Respondent to vacate the suit property so that the Appellant could convert it into a bar and restaurant that it wished to operate in the premises. He told the tribunal that the Appellant was operating a similar business in other locations in Nairobi. Mr. Karanja produced in evidence a copy of an approved building plan which the Appellant wanted to use to convert the suit property into a bar and restaurant. He also produced bank statements showing that the Appellant had the requisite funds to undertake the project.

The Respondent’s witness was Silesh Hanchard Shabi. Mr. Shabi told the tribunal that he was a director of the Respondent and that the Respondent had occupied the suit property since 1930’s. He told the tribunal that the Respondent was not prepared to vacate the suit property because it had no alternative premises to move to and that if he was to move out of the suit property, he would require 2 years to do so. He also stated that the Respondent had improved the property and had also established a good will.

In its judgment dated 7<sup>th</sup> June, 2013, the tribunal made a finding that the Appellant’s notice to the Respondent was not issued in bad faith. The tribunal also made a finding that the Appellant was running the business that it wished to operate on the suit property in other areas in Nairobi. With these findings, the tribunal still went ahead and allowed the Appellant’s reference. Out of the blue, the tribunal contended that the Appellant’s case had a technical hitch. The tribunal claimed that the Appellant had failed to produce a resolution by the Appellant’s board of directors authorizing the termination of the Respondent’s tenancy. The tribunal held that in the absence of such a resolution the notice by the Appellant could not be upheld.

It is against that decision that this appeal was preferred by the Appellant. The Appellant challenged the decision of the tribunal on five (5) grounds that are set out in its memorandum of appeal dated 4<sup>th</sup> July, 2013. On 20<sup>th</sup> July, 2016 the court directed that the appeal be heard by way of written submissions. The Appellant filed its submissions on 29<sup>th</sup> June, 2017 while the Respondent filed its submissions on 24<sup>th</sup> August, 2017.

I have considered the proceedings and the judgment of the tribunal, the grounds of appeal and the submissions by the parties. My view on the appeal is as follows. On the material that was placed before the tribunal, the tribunal erred in allowing the reference by the Respondent. The Appellant sought to terminate the Respondent’s tenancy on the ground that it wanted the suit property for its own use. What the Appellant was required to establish was that it genuinely required the premises for its own use. The notice which the Appellant served upon the Respondent was signed by two (2) of its directors under the seal of the Appellant. The notice was issued by and in the name of the Appellant. It was not issued by the Appellant’s director, Karanja Macharia who gave evidence before the tribunal. The Appellant produced evidence showing that it wanted to convert the suit property into a bar and restaurant which was the business it wished to run on the premises. The Appellant produced an approved plan which they intended to use to make alterations to the suit property so as to convert it into a bar and restaurant. The Appellant also produced evidence that it had financial ability to undertake the project. With this evidence and the court’s finding that the Appellant had given the Respondent’s notice to vacate the suit property in good faith, the Appellant was entitled to have its notice upheld. The issue of a board of directors resolution which the tribunal held to have stood between the Appellant and the relief it sought was of the tribunal’s own creation. It was neither anchored on the law nor raised by the parties at the trial. There is no requirement in law that a notice to terminate a tenancy issued by a limited liability company under Section 4(2) of the Act must be accompanied by a board resolution. There was no dispute before the tribunal that the notice to terminate the tenancy of the Respondent was authorized and issued by the Appellant. I find merit in all the grounds of appeal put forward by the Appellant against the decision of the tribunal.

The upshot of the foregoing is that the Appellant’s Appeal has merit. The appeal is hereby allowed. The judgment of the tribunal made on 7<sup>th</sup> June, 2013 is set aside and substituted with an order dismissing the Respondent’s reference dated 9<sup>th</sup> November, 2012 and allowing the

Appellant's notice dated 30<sup>th</sup> October, 2012. The Respondent shall vacate and handover possession of the suit property to the Appellant on or before 30<sup>th</sup> November, 2018 in default of which the Appellant shall be at liberty to apply for a warrant for its forceful eviction from the suit property. The Appellant shall have the costs of the Appeal and the proceedings before the tribunal.

**Delivered and Dated at Nairobi this 4<sup>th</sup> day of October, 2018**

**S. OKONG'O**

**JUDGE**

**Judgment read in open court in the presence of:**

.....for the Appellant

.....for the Respondent

.....Court Assistant