REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC APPEAL NO. 18 OF 2019

KASSIM YUSSUF ABDALLA.....APPELLANT/TENANT

VERSUS

ABDALLA BATHAWAB.....RESPONDENT/LANDLORD

JUDGMENT

(Being an Appeal from the Judgment and Decree of the Business Premises and Rent Tribunal by Hon Mbichi Mboroki (Chairman) on the 9 May 2018 in Mombasa BPRT No. 114 of 2017)

1. The appellant in this appeal has been a tenant of the respondent in the Plot No. 793/1 Lamu Island Sea Front. The appellant filed the suit BPRT No. 114 of 2017 seeking orders inter alia to have inspectors sent to the site so as to establish its suitability for use, and further wished to have orders to have the respondent put the demised premises in a tenantable condition, or in default, the appellant (as tenant) to be allowed to repair the demised premises and recover the costs thereof from rent. Through a notice dated 21 March 2018, the respondent (as landlord), notified the appellant that he wished to terminate the tenancy with effect from 1 June 2018 on the grounds that he wished to carry out major renovations which could not be carried out without obtaining vacant possession. The appellant did not wish to comply with this notice and filed the reference BPRT No. 30 of 2018. The dispute was heard before the Business Premises Rent Tribunal (BPRT), and in his judgment delivered on 12 May 2019, the Chairman found that the landlord had reasonable grounds to seek vacant possession for purposes of carrying out repairs. The Chairman referred to the inspection report that had been prepared and found that the same showed that the repairs could not be carried out while the tenant was in occupation. The Chairman thus dismissed both BPRT No. 114 of 2017 and BPRT No. 30 of 2018. He ordered the appellant to vacate the premises on or before 1 July 2019 and in default he be evicted. He further ordered the appellant to pay rent up to June 2019 and ordered each party to bear his own costs. Aggrieved, the tenant, filed this appeal. His Memorandum of Appeal, filed on 30 May 2019, contains the following grounds :-

i. The learned trial Chairman erred in law and in fact in failing to take into consideration the appellant's pleadings and evidence and thereby arriving at a decision that is at variance with evidence and pleadings contrary to the law.

ii. The learned Chairman erred in law by failing to accord the parties a hearing as required by law and thereby occasioning serious miscarriage of justice to the appellants.

iii. The learned Chairman erred in failing to set out issues raised in the pleadings and analyse each of them in relation to the documentary evidence tendered.

iv. The learned Chairman erred in failing to give a reasoned judgment based on pleadings and evidence and by failing to hear the parties and consider the appellant's pleadings and evidence the decision of the Chairman is coloured with gross irregularities.

v. The learned Chairman erred in failing to allow the appellants argue their case as required by law.

2. The appellant seeks orders that the judgment be set aside and the court be pleased to make such further orders as deemed fit.

3. Parties agreed to argue the appeal through written submissions, and I have gone through the submissions of Mr. Omwenga, learned counsel for the appellant, and those of the respondent who is acting in person. I have considered these before arriving at my decision.

4. I have gone through the record. I have noted that within the suit BPRT No. 114 of 2017, there was an order issued on 25 January 2018, inter alia requiring the respondent (as landlord) to put the premises in tenantable condition. Subsequently, the appellant (as tenant) filed an application dated 26 April 2018, seeking orders for the landlord to be ordered to put the premises in a tenantable condition immediately. The tenant cited the order issued on 25 January 2018 and complained that despite being ordered to put the premises in a good state, the landlord had failed to do so. In reply to that application, the respondent stated that he had asked the appellant to move out so that he could repair the

premises but he failed to do so. Later, the appellant filed another application dated 14 May 2018, seeking orders to have inspectors sent to the suit premises to inspect it and establish its suitability. The court obliged and sent an inspector to the premises. A report was done, and in the report, the inspector found the premises to be in a dilapidated state needing extensive repairs to the roof, floor, toilet and store. Thereafter, the landlord issued notice asking the tenant to vacate so that he can undertake the repairs.

5. In his submissions, Mr. Omwenga, for the appellant, inter alia submitted that the notice served on 6 April 2018 was defective as it did not comply with the provisions of Section 4 (4) of Cap 301, which inter alia requires a notice of not less than 2 months. Counsel submitted that the notice was served on 6 April 2018 and was to take effect on 1 June 2018, which was less than 2 months. He referred me to various authorities on this point. He submitted further that the respondent failed to produce crucial evidence such as the person who was to do the work, and the bill of quantities, minutes of the local authority approving the plans, and NEMA approval. He submitted that there was no genuine intention by the respondent. He referred me to the record and submitted that the tenant's case was never closed and he was thus not accorded a chance to call other witnesses. He further submitted that the decision was coloured with irregularities and that crucial issues were not taken into account, though with respect, no specifics were provided.

6. I have assessed the grounds of appeal. All of them are actually very general grounds that complain about the manner in which the Chairman conducted the proceedings; failure to assess the pleadings and evidence and failure to allow parties argue their case. I have gone through the proceedings and I see no fault in the manner in which the Chairman conducted the proceedings. I can see that the parties were allowed to testify, and did testify. They were also allowed to avail their documentary evidence. Although Mr. Omwenga submitted that the tenant's case was not closed, the tenant did testify and thereafter the matter was adjourned to allow him produce the tenancy agreement as an exhibit, on which day, both parties agreed to produce some documents as exhibits. A date for judgment was then given. Although the Chairman did not formally record the tenant's case as closed, the appellant did not signal that he intended to avail any additional evidence, and to me the failure to formally record the hearing of the matter as closed, in the circumstances, is a mere technicality, that the appellant cannot now hinge on to set aside the whole of the proceedings. Nowhere did the appellant say that he intends to call evidence and the Chairman shut him out.

7. I note further that in his submissions, Mr. Omwenga faulted the termination notice and submitted that it is less than the two months required by Section 4 (4) of Cap 301. The notice in issue was dated 31 March 2018 and gave the tenant one month of receipt of the notice to notify the landlord whether or not he wished to comply with the notice. There is evidence that the notice was served on 6 April 2018. The tenant then filed the reference BPRT No. 30 of 2018 on 24 April 2018 to oppose this notice. Nothing arises on this notice. I have gone through the Act and what it requires under Section 4(4) which is drawn as follows:-

> *(4) No tenancy notice shall take effect until such date, not being less than two months after the receipt thereof by the receiving party, as shall be specified therein:*
>
> *Provided that—*
>
> *(i) where notice is given of the termination of a controlled tenancy, the date of termination shall not be earlier than the earliest date on which, but for the provisions of this Act, the tenancy would have, or could have been, terminated;*
>
> *(ii) where the terms and conditions of a controlled tenancy provide for a period of notice exceeding two months, that period shall be substituted for the said period of two months after the receipt of the tenancy notice;*
>
> *(iii) the parties to the tenancy may agree in writing to any lesser period of notice.*

8. Although Mr. Omwenga argued that the tenancy notice gave a period of less than two months and was thus defective, I see no substance in this argument. There is a proviso to Section 4 which allows for a greater than, or lesser than, 2 months, notice. If the tenancy provides for a period of notice of more than 2 months, then this applies. If the tenancy agreement provides for a lesser than 2 months notice period, then this is what applies. The parties herein availed their tenancy agreement and it provides for a notice period of one calendar month, at Clause 6 thereof. The notice herein was served on 6 April 2018. The tenant was required to vacate by 1 June 2018. There was a clear month of May in between and I see no fault with the notice period given in the landlord's notice. The authorities supplied by Mr. Omwenga on the issue of notice cannot therefore be applicable to the circumstances of this case for the notice period given was in line with the agreement of the parties.

9. The notice by the landlord stated that the landlord required the premises so as to renovate it. Although it is argued in this appeal that this is not the position, I do not agree. The respondent did produce an approved plan for the redevelopment of the suit premises. Within the hearing of the matter, the appellant did not question the respondent on any other licences required, and I find it improper that issues of other licences are now being raised on appeal. In fact, the Memorandum of Appeal does not raise any issue that there was no proof of intention to repair the premises. It is a new point introduced at the submissions stage and I feel that this is unfair to the appellant. But whatever the case, the Chairman of the Tribunal did not doubt the genuine intention of the landlord to repair the premises. There was indeed an inspection report which pointed out what was to be repaired. There was also the approved plans that were produced and the respondent also produced a bank account showing that he had close to Kshs. 3 million dedicated to undertake the developments. The Chairman was persuaded that the repairs noted in the report could not be carried out without vacant possession. It does therefore appear that there was a genuine need to repair the premises. I will thus distinguish this case with the cases of **Tekimano Company Limited vs James Wanjohi Gitahi & 4 Others (2017)eKLR and Auto Engineering Ltd vs M. Gonella & Co Limited (1978)eKLR** cited by Mr. Omwenga. In the latter case, the intention was to put up an upper floor to the premises, and also subdivide the shops into smaller units to have more tenants. The court doubted if this can be done without an accompanying and approved structural plan. The court thus questioned the intention of the landlord. In our case, there was an approved plan. The Chairman did not doubt the intention of the landlord and I also do not doubt his intention. There is no law that bars a landlord from seeking to improve his premises, and indeed it would be absurd to have such law, for it would mean that a person can never rehabilitate existing premises to make it better, or make better use of the land where his premises is located.

10. From the foregoing, it will be seen that I see no substance in this appeal. I hereby dismiss it with costs. The notice issued by the

respondent has now long lapsed. In my discretion, I give the appellant 60 (sixty) days to vacate the suit premises.

11. Judgment accordingly.

DATED AND DELIVERED THIS 11TH DAY OF MAY 2021.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA