



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELCA 7 OF 2020

SIMON MACHARIA KAIRU.....APPELLANT

VERS US

JOHN S NJIRE MAINARESPONDENT

JUDGEMENT

1. The Appeal emanates from the judgment of Honorable Mbichi Mboroki at the Business Premises and Restriction Tribunal(BPRT) delivered on 27/5/2020 where the learned Chairman dismissed the Tenant/ Appellant's reference and allowed the Landlord/ Respondent's termination of tenancy.

2. The facts giving rise to the reference at the Tribunal were that at all material time; the Appellant was the Respondent's Tenant on premises no. PLOT NO. LOC.11/ MARAGIA/1193/82. It was during the pendency of the tenancy that the Respondent served on the Appellant a notice of termination of tenancy in compliance with Section 4(2) of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act. He contended that he wished to demolish all the structures on the plot and establish a permanent modern building which could not be done while the Appellant was in the premises.

3. The Appellant in contesting the notice filed a reference no. NAIROBI BPRT No. 50 of 2017 opposing the notice and sought the intervention of the tribunal. At the hearing of the reference the Respondent testified that he bought the property from KANU, the previous owner, during the existence of tenancy thus acquired the tenancy. He further testified that he intended to put up a five storey building and had obtained the necessary permits. That being the case, he issued a notice of termination dated 5/6/2017 to the Appellant which was to take effect in January, 2018.

4. The Appellant testified that he entered into a tenancy agreement with KANU and does not recognize the Respondent as the Tenant as he has been paying rent to his advocate as well as the tribunal. He alluded to a case in Court being Muranga ELC No.195 of 2018 and sought that the tribunal awaits the outcome in the suit. The Tribunal upon analyzing the evidence and applying the law found in favor of the Respondent and ordered the Appellant to vacate the suit property.

5. The Tribunal summarized its findings as enumerated in page 19 of the judgment and found that the Respondent had proved his case on a balance of probability and his action were within the provisions of Section 7(1)(8) of the Act.

6. The Appellant being dissatisfied with the judgment of the tribunal preferred the Appeal based on the following GROUNDS:

a. The learned judge Chairman erred in law and in fact in failing to make a finding that the Respondent did not have a right to issue a termination notice of the tenancy to the Appellant since his ownership to the premises had not been established.

b. The honorable Chairman erred in law and in fact in failing to find that since the ownership of the suit premises had been disputed in a Court of law which matter was yet to be determined; the scale of justice demanded that the notice of termination of tenancy be stayed pending the Court's decision on the ownership dispute

c. The Honorable Chairman erred in law in failing to exercise the Tribunal's key mandate of protecting the Appellant from illegal eviction

d. The learned Chairman erred in law and in fact in holding that the Appellant's reference was not merited

e. The learned Chairman erred in law in failing to consider all the issues raised by the Appellant in both in the written and oral submissions made before him

f. The learned Chairman misdirected himself in law by ruling the way he did.

7. The Appellant prayed that the Appeal be allowed with costs as follows;

a. The judgment of the Tribunal made on 27/5/2020 be set aside and be substituted with an order allowing the Appellant's reference dated 29/12/2017.

b. The Court grants any orders upon such term as this Court deems fair and just.

8. The Appeal was dispensed with by way of written submissions.

9. The Appellant in his submissions gave a summary of how he came to be a Tenant on the demised premises. He alleged that there was an ongoing case as between the Respondent and KANU as to ownership of the property and therefore the tribunal should not have allowed the termination to issue. In inviting the Court to go into the facts of the case, the Appellant relied on the case of **Selle vs. Associated Motor Boat Co. {1968} EA 123**.

10. On ground one and two of the Appeal the Appellant submitted that the tribunal ought to have in delivering its judgment been guided by the fact that ownership was in dispute and since no prejudice would have been occasioned on the Respondent, the tribunal should have stayed the proceedings. The Appellant alluded to the fact that the tribunal did not have jurisdiction and that there was no legal foundation adopted by the tribunal in allowing the termination of tenancy.

11. On the third ground the Appellant submitted that the tribunal failed to protect him as a Tenant and in the end failed to protect the unforeseen possibility that should the suit be determined in favor of KANU, the Appellant would suffer loss and damages to his business. It is the Appellant's submission that guided by the purpose of the Landlord and Tenant (Shop, Hotels and Catering Establishment Act, the Tribunal ought to have protected him from exploitation and eviction which is the Tribunal's primary mandate. It was thus according to the Appellant the mandate of the tribunal to protect the Appellant from any eviction pending the determination of ownership dispute.

12. He further submitted on the other grounds that the tribunal ignored the Appellant's key arguments and which action resulted in injustice. The Appellant contends that the learned chairman had a pre-determined outcome and which occasioned him injustice.

13. The Respondent on the other hand, submitted that there was a suit between the parties in Murang'a ELCA No. 18 of 2018 where the Appellant had appealed against the Tribunal's order directing the Appellant to pay rent to the Respondent. The Appellant did however withdraw the Appeal and has been paying rent to the Respondent thus establishing a Landlord Tenant relationship. It is his submission that the notice was legal since the agreement provided for a six months' notice.

14. On grounds one and two, the Respondent submitted that the Appellant's conduct of remitting the rent to him established a Landlord Tenant relationship. Further he submitted that the Tribunal could not delve into issues of ownership. In submitting further on establishing the existence of Landlord and Tenant relationship, the Respondent submitted that the Appellant had through his documents, SMK2, admitted to being a Tenant.

15. The Respondent on ground three submitted that he did not evict the Appellant but he only issued a notice as is required by law. According to the Respondent the fact the Appellant has enjoyed use and occupation of the demised property for more than two and half years is enough to demonstrate that the Tribunal has protected the Tenant as part of its mandate.

16. Ground Four, the Respondent submitted that he was able to prove that he was in need of vacant possession of the premises so that he could undertake developments thereon and he produced documents which remained unchallenged and thus he proved he was entitled to the judgment.

17. Ground 5, the Respondent submitted that the Appellant having failed to particularize the issues he alleges to have been left out in the Tribunal's judgment, this ground is baseless and ought to be rejected.

18. Having gone through the record of Appeal and submissions by parties, the Appeal arises from the decision of the honorable chairman to uphold the Notice of termination of tenancy and order the Appellant herein to vacate the demised premises.

19. The responsibility of this Court was emphasized in the case of **Ephantus Mwangi & Another vs. Duncan Mwangi Wambugu {1982} 1KAR 278 where Hancox J (as he then was) observed that;**

“The Court of Appeal would hesitate before reversing the decision of a trial judge on his findings of fact and would do so if (a) it appears that he failed to take account of particular circumstances of probabilities material to an estimate of the evidence or (b) that his impression based on the demeanor of material witness is inconsistent with the evidence in the case generally.”

20. The foregoing gives power to the Appeal Court to re-evaluate the facts and evidence presented before it and determine whether the conclusion arrived at by trial Court should be interfered with or not. In my view thereof, the issues for determination before this Court would be; Whether the Respondent had the right to issue a termination Notice; Whether proceedings in any Court stayed the proceedings in the Tribunal; Whether the Appeal is merited

21. The chairman when determining whether the Appellant and the Respondent had a Landlord 'Tenant relationship stated "that it is not in

dispute that the Landlord/ Respondent is the registered proprietor of the suit premises land parcel number LOC 11/ MARAGI/ 1193/82 MUKUYU MARKET MURANGA COUNTY” He further stated “that the Landlord was the registered proprietor of the suit premises as at 5/6/2017.....”

22. The foregoing statement indicates that the learned chairman found evidence that indeed the Respondent herein was the Landlord. Also there was undisputed conduct between parties as to Tenant’ Landlord relationship. If that was not the case, the Appellant had the power to raise that at the tribunal indicating the Respondent was not a Landlord. The Appellant submitted that the Tribunal should have first established ownership, the jurisdiction of the Tribunal as established in Section 12 does not involve establishing ownership. The chairman was therefore within the provisions of the Act thereof to make its ruling.

23. Having established so, Section 4(2) of the above Act requires “that A landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the Tenant, any term or condition in, or right or service enjoyed by the Tenant under, such a tenancy, shall give notice in that behalf to the Tenant in the prescribed form”.

24. Section 7 (1) the Act makes provisions on circumstances when a Landlord can terminate a tenancy, relevant to this is paragraph e which provides “that on the termination of the tenancy the Landlord intends to demolish or reconstruct the premises comprised in the tenancy, or a substantial part thereof, or to carry out substantial work of construction on such premises or part thereof, and that he could not reasonably do so without obtaining possession of such premises”

25. The Appellant did give a Notice of termination of tenancy dated 5/6/2017 which gave the Appellant a six months’ notice to vacate the premises to enable him develop the same. The notice demonstrated that the Respondent intended to develop the premises and had produced documents to buttress his claim of developing the premises, these documents were not controverted.

26. The Respondent did not evict the Appellant. It is in evidence that he issued notices as provided by law and in my considered view the trial Court did properly evaluated the purpose of the notice. The Appellant has not challenged the validity of the notice as to enforceability; he challenges the notice on the basis of issues that are beyond the jurisdiction of tribunal. To this end I find that the Respondent had the right to issue the notice thus ground one and three must fail.

27. This Court has found that the Tribunal did not have jurisdiction to make any determination on ownership. Parties have submitted that there is pending a case on issue of ownership surrounding the suit property in Murang’a ELC No. 195 of 2018, notably the Appellant is not a party. The facts in Murang’a ELC No. 195 of 2018 and the BPRT cause were very distinct and records show that the Appellant herein had attempted to be enjoined in the proceedings but the Court in exercising its discretion did not grant the prayer sought.

28. The issues for determination in the tribunal were on the Landlord and Tenant relationship and the Tribunal went ahead to determine whether the notice met the legal threshold. The tribunal had power to hear and determine the same, there being no order for stay, the tribunal was bound by the proceedings and could not *suo moto* stay the proceedings.

29. Having established that there were no stay orders, the chairman was within the precincts of the law to determine the issues placed before it and make a finding based on it. Ground two of the memorandum of Appeal must fail.

30. The learned chairman in making its finding dismissed the reference and allowed the Respondent’s notice. He was within the provision of Section 9 of the said Act to make such orders. The allegation by the Appellant that the tribunal failed in its key mandate has not been demonstrated at all. Further, the submission by the Appellant that the decision was pre-determined on the basis that no evidence to support the allegation.

31. Based on the foregoing and in light of the record of Appeal and all the material placed before me, it is my finding that the Appeal is unmerited.

32. It is dismissed with costs to the Respondent.

33. It is so ordered.

DATED, SIGNED & DELIVERED ONLINE THIS 3RD DAY OF JUNE, 2021.

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Ongeri for the Appellant

Gichuki for the Respondent

Court Assistants: Alex