



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 254 OF 2018

FORMELY HCC NO 75 OF 2008

DAYANA KHASOYA AMUTAVI

(Suing as the legal representative of the estate of the late PETER AMUTAVI...PLAINTIFF

VERSUS

DANEVA COMPANY LIMITED.....DEFENDANT

J U D G M E N T

1. The present suit was instituted by way of a plaint dated 7th May 2008 by one Jimmy Amutavi suing as the Legal Representative of the estate of the late Peter Amutavi (deceased). The plaint was filed on 7th May 2008 simultaneously with a Notice of Motion application seeking injunctive relief.

2. The plaintiff's deceased father was a tenant of the defendant on land parcel Title Number Nakuru Municipality Block 5/58 where he operated a shop business styled as "**Tip Top Clothing Shop**". The plaintiff's father died on 15th April 2008 and the plaintiff averred that the defendant unlawfully and illegally denied the plaintiff access to the business premises on or about 5th May 2008 and persisted in such refusal to grant the plaintiff access precipitating the instant suit. The plaintiff vide the amended plaint dated 22nd May 2014 prays for judgment for :

(a) A declaration that interference by the defendant with the business premises known as "Tip Top Clothing Shop" is illegal and wrongful.

(b) A perpetual injunction restraining the Defendant by itself and/or servants, agents directors or other representatives from ever interfering with the plaintiff's business premises known as Tip Top Clothing shop located on United Plaza Title No.Nakuru Municipality block 5/58.

(c) General damages for trespass and loss of business.

(d) Mandatory injunction compelling the defendant to open the business premises known as Tip top clothing Shop situated on United Plaza, Kenyatta avenue.

(e) Costs of this suit and interest.

(f) Any other or further relief as the honorable court may deem fit and just to grant.

3. Dayanah Khasoya Amutavi wife to the deceased was substituted following the relocation of Jimmy Amutavi to the United States of America after she herself had obtained letters of administration to represent the estate. That precipitated the amendment of the plaint to reflect the changes in the administration of the deceased estate.

4. The defendant filed a defence dated 6th June 2008. The defendant averred that the plaintiff lacked the capacity to institute the suit and contended that the suit was an abuse of the process of the court. The defendant denied that the plaintiff was ever their tenant and averred that the contract with the deceased was of a personal nature and hence never survived the deceased. The defendant further contended the prayers sought by the defendant could not be granted and that suit ought to be dismissed.

5. At the hearing the plaintiff, Dayana Khasoya Amutavi testified as the sole witness in support of the plaintiff's case while William Wanjohi Murithi testified as the sole witness for the defendant. The plaintiff adopted her witness statement as her evidence in chief. Her evidence was simply that they were tenants in the defendant's premises and that after the Tribunal allowed the defendant to renovate the premises and to reinstate all the tenants after the renovations had been completed, the defendant failed to comply with the tribunal's order for reinstatement.

6. In cross examination she reiterated that the Tribunal ordered that the tenants retake their shops after the renovations were completed. She affirmed that the owner of the premises informed the tenants when the premises were ready for reoccupation. She however stated that when she went to the premises she found that the space where their shop stood had been given to the bank. She said she did not find the landlord at the site and only found a lady worker on site. She confirmed that the Tribunal had ordered all the tenants to vacate to facilitate the carrying out of the renovations by the Landlord.

7. DW1 William Wanjohi Murithi in his evidence affirmed that Peter Amutavi was their tenant in their premises at Nakuru, Kenyatta Avenue. He confirmed that at the time Peter Amutavi died the defendant had a dispute pending before the Tribunal where the defendant has filed a reference being BPRT No.127 of 2007 which had been consolidated with several others. The judgment of the Tribunal was produced as "DEX1". Effectively as per the Tribunal judgment the Landlord was allowed to terminate all the tenancies on terms that after the construction was completed the tenant's were to be allowed back into the premises. The witness stated the tenants vacated the premises as ordered by the Tribunal whereupon the defendant demolished the building and carried out the reconstruction. The initial building was 2 storey and it was modified to a 4 storey building. The witness stated the renovations took longer than was anticipated. He stated at the time the reconstruction was completed, the majority of the tenants had acquired alternative premises. He stated that in Keeping with the order of the Tribunal the defendant through its advocates wrote to all the tenants the letter dated 29th March 2010 notifying them the reconstruction had been completed (DEX2) but very few of the tenants responded. He stated the plaintiff never responded and the defendant proceeded to offer the premises to other tenants.

8. The witness (DW1) explained that the renovations were not completed by 1st November 2009 the date when the Tribunal was ordered that the tenants be put back into the premises. He stated the Tribunal authorized them to do the renovations and when the same were completed they offered the premises back to the tenants, though only a few of the tenants returned to the premises. The witness stated the renovations to the premises were structural and the rented spaces were altered and additional rentable spaces were also created. DW1 stated he was a director and shareholder of the defendant company and that he had authority to represent the company.

9. Under cross examination, DW1 stated he had not filed any formal written authority from the company to represent the company in the proceedings. He reiterated that notice of the completion of the renovations was given to the tenants by the defendant's advocates M/s Ikua, Mwangi & Company Advocates. He affirmed that the defendant never had any written tenancy agreement with Tip Top Clothing though Amutavi (deceased) was operating under the name.

10. The parties following the conclusion of the trial filed their final written submissions to ventilate their respective positions as regards the suit. I have reviewed and considered the pleadings, the evidence and the submissions filed by the parties. The issues that arise for determination are as follows:

(i) Whether the plaintiff had the legal capacity to institute the suit?

(ii) Whether the tenancy if any between the deceased and defendant was lawfully terminated by the Business Premises Rent Tribunal vide BPRT case No.127 of 2007?

(iii) Whether the plaintiff is entitled to the remedies sought in the plaint?

11. On the first issue, it is apparent Lady Justice Mugo had been called upon to consider and make a determination during the interparties hearing of the interlocutory application for injunction. The defendant had submitted that the plaintiff, Jimmy Amutavi, lacked capacity to represent his late father's estate since he had not taken out grant of letters of administration. The learned judge at the time she delivered her ruling on 24th July 2008 took the position that the applicant had obtained a grant of letter of administration "ad colligenda bona" which conferred him the necessary legal capacity to represent the estate in realizing or collecting his father's estate and protecting the legal interest in the tenancy.

12. The learned judge held that the applicant was a person entitled to administration and had a beneficial interest in the subject matter of the suit.

13. At the time the suit and the interlocutory application for injunction was filed on 7th May, 2008 the plaintiff did not exhibit any copy of the grant of administration aditem and/or ad colligenda bona to clothe him with authority to institute the suit on behalf of the deceased estate. The plaintiff only attached a copy of the petition for letter of administration ad litem for the estate of the late Peter Amutavi (deceased) in Nakuru HC Succession cause No.250 of 2008. However; the application had annexed copies of proceedings taken before the learned Judge on 6th May 2008 where the orders for issue of an ad litem grant were made. Therefore even though no formal grant ad litem had been lifted, the court clearly had issued one on the 6th May 2008 and in essence by the 7th May 2008 when the suit was filed, the plaintiff had obtained an adlitem grant that allowed him to institute the suit on behalf of the deceased estate.

14. Regarding the second issue it is evident and clear from the evidence that before the death of the deceased the defendant had served all the tenants in its premises with a tenancy termination notice as the defendant desired to carry out substantial renovations in the premises which could not be carried out whilst the tenants were in occupation. In regard to Tip Top Clothing there was a pending Reference at the Tribunal namely Nakuru BPRT case No. 131 of 2007 and the same was heard together with BPRT Nos 125 of 2007; 126 of 2007; 127 of 2007; and 132 of 2007. The judgment was rendered in BPRT No.127 of 2007 which was the lead file.

15. The Tribunal after hearing the evidence from the tenants and the Landlord allowed the Landlord's Notice and ordered the tenancy

terminated and gave the tenants 30 days to vacate the premises to enable the landlord to renovate. The Tribunal however ordered the tenants to move back to the premises on 1st November 2009. The landlord explained he had not completed the renovations by then and that when he completed the same in March 2010 he gave notice to all the tenants vide the letter of 29th March 2010. The defendant indicated the majority of the tenants had by then obtained alternative premises and only very few of the tenants moved back. In the case of the plaintiff the defendant stated they never responded to the notice and the defendant proceeded to give the space to other parties.

16. On the basis of the evidence, it is my determination that the tenancy between the plaintiff and the defendant was lawfully and validly determined in accordance with the judgment of the Tribunal dated 19th June 2009. As observed earlier the instant suit was instituted when there was already subsisting proceedings before the Business Premises Rent Tribunal and the matter in dispute before the Tribunal was the LandLord's Notice seeking termination of the tenancies including that of the plaintiff herein. The references by the Tenants before the Tribunal having been determined in favour of the defendant, the orders sought by the plaintiff in this suit would not be sustainable . The Tribunal in its judgment ordered the termination and consequently prayers (a) (b) (c) and (d) in the amended plaint cannot be granted. The Tribunal found merit in the Landlord's Notice to terminate the tenancy which in essence means the plea of interference with the business premises and/or trespass by the Landlord cannot hold. Equally, the claim for loss of business is unsustainable. The suit by the plaintiff is predicated on alleged acts of intrusion and trespass by the landlord onto the plaintiff's business premises. I am not satisfied any trespass has been proved as it is apparent the defendant in seeking the termination of the deceased's tenancy had followed due process. The present suit is not founded on the determination of the Tribunal that the tenants were to be allowed back to the premises and that failure to do so constituted a cause of action. This court as it were was not called upon to implement the determination/judgment of the Tribunal. That was not part of the pleadings. Parties are bound by their pleadings and are only permitted to adduce evidence that is supported by the pleadings

17. On the careful and full evaluation of the evidence, I am not satisfied that the plaintiff has proved her case on a balance of probabilities. I dismiss the plaintiff's suit but having regard to the attendant circumstance. I order that each party will bear their own costs of the suit.

18. Orders accordingly.

JUDGMENT DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 30TH SEPTEMBER 2021.

J M MUTUNGI

JUDGE