REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC APPEAL NO .55 OF 2018

EMBU GATURI HOUSING CO-OP SOCIETY.....APPELLANT

=VERSUS=

GEORGE THUO TIA PARAMOUNT CAFÉ.....1ST RESPONDENT

SONICA FASHIONS LIMITED.....2ND RESPONDENT

CENTRAL WATCH LIMITED.....3RD RESPONDENT

(Being an Appeal from the Judgement and decree/orders of the Honourable Mbichi Mboroki, Chairman, Business Premises Rent Tribunal delivered on 28th September 2018 in consolidated Tribunal case Nos 579 of 2016, 580 of 2016 and 581 of 2016)

JUDGEMENT

Background

1. This Appeal arises out of a judgement which was delivered by the chairman of the Business Premises Rent Tribunal Honourable Mbichi Mboroki on 28th September 2018. Three references had been filed before the Tribunal. The three references are Tribunal Case No. 579 of 2016, 580 of 2016 and 581 of 2016 which were filed by the 1st 2nd and 3rd Respondents respectively. The three references were consolidated on 5th August 2016.

2. The Appellants together with a company called Roopman Limited are tenants in the Appellant's premises erected on LR No.209/744 along Tubman Road in Nairobi Central Business District. On 22nd December 2015, the Appellant gave the Respondents notice to terminate their tenancy with effect from 30th June 2016 on the ground that the Appellant intended to demolish and reconstruct the premises.

3. The Respondents did not comply with the notice of termination and this is why they filed separate references which were later consolidated. After hearing the references, the Chairman of the Tribunal dismissed the Appellant's notices for termination and allowed the Respondents' references. The Appellant was granted leave to serve the Respondents' with fresh notices for termination of tenancy within 3 months from the date of Judgement.

The Appeal.

4. It is the Judgement of the Tribunal which triggered the Appellant to file this Appeal which has raised the following grounds:-

> ***1) The learned Chairman of the Business Premises Rent Tribunal (hereinafter referred to as "the Chairman) misdirected himself on several matters of law and fact and consequently arrived at a decision that was not just and fair in the circumstances of the case.***
>
> ***2) The learned Chairman erred in law of evidence and practice in deciding the case against the weight of evidence in that;***
>
> > ***a) He failed to consider the relevant law relating to grounds on which a landlord may seek to terminate tenancy under section 7(1) (e) of Cap 301 Laws of Kenya and therefore arriving at a wrong determination of the matter.***

b) He failed to consider evidence that the landlord intends to demolish and reconstruct the premises by the notice to terminate tenancy dated 30th June 2016.

c) He failed to consider evidence presented demonstrating the Appellant's financial capability to undertake construction of the proposed commercial buildings on the suit premises.

d) He failed to consider that the continued occupation of the Appellant's premises by the Respondents constitutes a gross affront to the Appellant's property rights as recognized under Article 40 of the Constitution.

e) He failed to consider that the purpose of the Act is to give tenants notice which notice was properly issued by the Appellants two years ago on 30th June 2016.

f) He failed to consider the submissions by the appellant's Counsel

3. That the learned Chairman of the Tribunal erred in law and in fact in failing to conclude that the reference by the appellant herein was meant to frustrate the landlord in its quest to develop the suit property

4. That the Learned Chairman erred in law and in fact in allowing the Respondents reference despite the Appellant having rendered sufficient evidence to warrant the termination of the tenancy.

5. That the Tribunal failed to exercise its discretion judiciously and failed to consider all relevant facts.

5. The parties to this Appeal were directed to dispose of the Appeal by way of written submissions. The Appellant filed its submissions dated 10th May 2021. The 2nd and 3rd Respondents filed their submissions dated 20th May 2021. Though the parties had been given an opportunity to highlight their submissions, the Appellant's Advocate who appeared on the date when highlighting had been scheduled indicated to court that he did not wish to highlight.

6. I have through the Record of Appeal vis-a vis the memorandum of Appeal. I have also considered the submissions filed by the Appellant and the 2nd and 3rd Respondents. There are two issues which arise for determination. The first is whether the Tribunal Chairman properly analyzed the evidence and the second is whether the Tribunal Chairman applied the law correctly. This being a first Appeal, I am under obligation to re-evaluate the evidence and reach my own conclusions but of course giving allowance to the fact that I did not see the witnesses who testified.

7. On the first issue, I have carefully gone through the proceedings before the Tribunal and submissions before the Tribunal. The Tribunal Chairman identified the major areas where the Appellant was expected to prove if the termination notice was to be upheld. This included whether the Appellant had a genuine firm and settled intention to demolish and reconstruct the suit premises. The other issue was whether the Appellant had the necessary resources to carry out the reconstruction.

8. On whether the Appellant had a genuine, firm and settled intention to demolish and reconstruct the suit premises, the chairman found that there was no evidence tabled before the Tribunal to show that there was a resolution of the members to demolish and reconstruct the suit premises. This finding was correct and sound. The evidence on record shows that the Chairman of the Appellant testified that the Appellants members had passed a resolution in 2014 to have the suit premises demolished and reconstructed. When this witness was cross-examined, he conceded that he did not have the alleged resolution before the Court.

9. Other than the Respondents, there was a fourth tenant in the suit premises called Roopman Limited. This tenant was not served with notice of termination of tenancy. During the hearing, the Chairman of the Appellant stated that the Appellant had not given notice to this tenant because it had accepted their terms. There is a document in the Appellant's bundle where the Appellant's officials had instructed their Advocates to ask the tenants to increase their monthly rent from Kshs.70,000/- to kshs.77,000/= . The additional amount was to cater for Lawyers' Commission for collection of rent on behalf of the Appellant. All except Roopman Limited resisted the increase. It is around this time that the termination notices were given by the Appellant.

10. There is evidence from the director of the 3rd Respondent who testified that while the Respondents had been served with termination notices, Roopman Limited was busy renovating the space it was occupying. It had put up a new store in the common area and had installed CCTV Camera. The director of Roopman Limited had approached the director of the 3rd Respondent and offered him goodwill if he was willing to vacate the suit premises. This shows that the Appellant had no genuine intention or demolish the suit premises. Otherwise what would be the need for one Tenant out of four be renovating his space and offering others goodwill if the building was going to be demolished.

11. Courts have been particularly keen to ensure that landlords do not kick out tenants on the pretext that they are going to carry out major repairs or demolish the premises only for them to put in new tenants at higher rents. In the case of **Fisher Vs Taylors furnishings Store Limited (1956) 2 ALL ER 78,** Lord Denning while examining the provisions of Section 30(1) of the Landlord and tenant Act of 1956 which is equivalent to Section 7(1) of Cap 301 stated as follows; -

For this purpose , the court must be satisfied that the intention to re-construct is genuine and not colorable ; that it is a firm and settled intention , not likely to be changed; that the reconstruction is of a substantial part of the premises, indeed so substantial that it cannot be thought to be a device to get possession ; that the work is so extensive that it is necessary to get possession of the holding in order to do it; and that it is intended to do the work at once and not after a time. Unless the court were to insist strictly on these requirements, tenants might be deprived of the protection which parliament intended them to have. It must be remembered that, if the landlord, having got possession honestly changes his mind and does not do any work of reconstruction,

the tenant has no remedy. Hence the necessity for a firm and settled intention. It must also be remembered that the Act is intended for the protection of shopkeepers, and that this protection would be nullified if a big concern could buy the property and get possession by putting in say a new shop-front, hence the necessity for the work being substantial".

12. From the evidence on record, it is clear that the Appellant had no genuine, firm and settled intention to demolish the premises and reconstruct it. If there was to be immediate demolition and reconstruction, one tenant would not have been allowed to renovate its portion and urge others to get out in return for payment of good goodwill. The intention was to hand over the Respondents' spaces to Roopman Limited. There was no evidence that Roopman Limited had agreed with the Appellant that it was going to move out. The Tribunal chair did not err in his findings that the Appellant had not demonstrated that it had a genuine, firm and settled intention to have the premises demolished and reconstructed.

13. On the issue of whether the Appellant had the resources to undertake the reconstruction upon demolition, what the Appellant tabled before the Tribunal is a document titled "indicative term sheet for a loan of Kshs.80 Million". This was not a letter of offer. This fact was confirmed during cross-examination of the Appellant's Chairman who stated that the document was not an offer letter. The evidence on record is that the Appellant wanted to put up an eleven (11) storey building. Other than the document mentioned hereinabove, there is no evidence which was tabled before the Tribunal to show that the Appellant had the resources to undertake the demolition and reconstruction.

14. The Appellant's Architect testified that the re-constructed building was to take about Kshs.110 million and that the figure may have gone up. There was no evidence tabled to show that the contractor of the proposed 11 storey building was to finance the project. The Tribunal Chairman was therefore correct in making a finding that there was no evidence that the Appellant had the Kshs.110 million or so which was required to put up the massive building. The contractor was not called to confirm that he was ready to finance the project. There was also no offer letter from any bank willing to give the Appellant a loan.

15. In the case of **Kobil Petroleum Limited Vs Alumasi magic Merchants Limited (2010)eKLR**, the Judges had this to say as regards the need to have resources:-

"Of greater concern, was whether the Respondent had the financial ability to carry out the intended purpose? Although the Respondent director testified that he had bought some equipment worth over kshs.3.6 million for the intended project, he did not produce evidence to confirm that the equipment which he bought in Dubai were actually brought to Kenya. There were no importation documents which were produced, nor were any documents for payment of any duty availed to the Tribunal".

16. On the second issue as to whether the Tribunal Chairman applied the law correctly, I have no doubt that he Tribunal Chairperson applied the law as it should be. He analyzed the evidence in accordance to the statute and case law as provided, more particularly the two cases cited hereinabove. The Tribunal Chairperson even exercised his discretion under Section 9 of Cap 301 Laws of Kenya by reducing the period for issuance of fresh notices to terminate by (9) nine months. He gave the Appellant 3 months within which to issue fresh notices. The Appellant did not issue fresh notices because the Appellant was aware that it had no genuine intention to demolish.

Disposition.

18. From the analysis herein-above, it is clear that this appeal lacks merit. The same is dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 30TH DAY OF SEPTEMBER 2021

E.O.OBAGA

JUDGE

In the Virtual Presence of :-

Ms Ngei for Ms Kashindi for 2nd and 3rd Respondent

Mr Anyona for the Applicants

Court Assistant: Mercy

E.O. OBAGA

JUDGE