



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELCA NO.7 OF 2019

JOHN S NJIRE MAINAAPPELLANT

VS

SIMON MACHARIA KAIRU.....1ST RESPONDENT

STEPHEN K WARUINGI & NATHANIEL KIRAGU (sued as

Trustees of KANU -Kiharu sub branch)..... 2ND RESPONDENT

JUDGMENT

1. Being aggrieved by the decision of the Business Premises Rent Tribunal (BPRT) the Appellant proffered this Appeal on 7 grounds which have been summarized into one key ground which is that the Tribunal erred in reviewing its earlier orders issued on the 22/3/19 in Tribunal case No 22 of 2017 which ordered the 1st Respondent to pay rent to the Appellant from the 1/12/16.

2. The grounds of Appeal are reproduced for ease of reference as follows;

- a. The learned Chairman erred in law in ordering that the tenant pays rent to the Appellants as from 1st November, 2017 and not from 1st December, 2016 when it was patently clear that the Appellant acquired the suit property before November 2016.
- b. The Chairman erred in relying on its own order made on 6th October, 2017 directing the 1st Respondent's Advocate to collect and preserve rent for November and December 2017 to mean that the rent was only falling due to the Appellant in November 2017 and not earlier.
- c. Since the 1st Respondent was already a tenant on the premises by the time the Appellant acquired title to the suit premises the Tribunal had no justification for ordering the rent to accrue from 1st November 2017 considering that the Appellant is deemed to have acquired the premises subject to the 1st Respondent's lease.
- d. The Tribunal ought to have found that since the Appellant acquired title to the suit property before November 2016 he took ownership subject to the 1st Respondent's tenancy and all future rents were therefore lawfully payable to the Appellant and not to any other person or body.
- e. In deciding that the Appellant was not entitled to rent for the period between 1st December, 2016 and 1st November, 2017 the Tribunal was in effect stating that the Appellant was not the owner of the property during that period, and this clearly was illogical and also was beyond the jurisdiction of the Tribunal.
- f. The decision of the Tribunal lacks sound legal or logical basis and is an affront to justice.
- g. The reasoning of the Tribunal is clearly erroneous both in law and in logic.

3. The background of this Appeal is that the subject of this suit LOC 11/MARAGI/1193 /82 situate in Mukuyu estate in Muranga Town. The premises are alleged to have been owned by Kenya African National Union (KANU) and let to the 1st Respondent for a period of 10 years from 17/8/2008. Rent has risen over the years from the initial Kshs 12,000/- to Kshs 30,000/-. It is alleged that the premises owner sold it to the Appellant in September 2016.

4. That on the 16/10/16 the 1st Respondent who is a tenant in the premises was notified of the changes in property ownership and advised to remit rent to the new owner, the Appellant herein. In default to remitting the rent the Appellant sought to levy distress against him but was restrained by the Tribunal hence the levying of distress was stopped.

5. The Tribunal in its ruling of the 6/7/18 observed that the premises were a subject of the ownership claim in ELC 242/2017 in Nyeri and rightly steered away from it on ground of want of jurisdiction. It dwelt on the issue which was to whom rent was payable pending the determination of the ownership claim and made the following orders;

a. The tenant shall pay rent from the 1/12/16 and shall continue to pay future rents to Mr. John S Njire Maina unless directed otherwise by the judge in ELC cause No 259/2016 at Nyeri.

b. The Tenant shall pay all the arrears of rent within 30 days from the date of this ruling in default the Landlord shall levy distress.

6. Dissatisfied with the above ruling the tenant filed a Notice of Motion dated the 4/2/19 seeking interalia orders that the Tribunal review its orders of the 6/7/18 issued on the 19/7/18 to read that rent is payable from the 1/11/17 instead of 1/12/16 on the grounds that he had paid rent to the previous owners for the period in review and attached the rents showing that rent was paid.

7. The Appellant opposed the application for review arguing that the tenant had been informed of the ownership changes of the suit land and advised to pay rent to the Appellant on the 16/11/16 wef from the 1/12/16. That upon notification of the new mode of rent payment he ought to have paid the rent to the Appellant and not the previous owners. That varying the rental period to 1/11/17 will prejudice the Appellant and occasion loss of rent.

8. In its ruling of the 22/3/19 the Tribunal explained that the orders of the 6/7/18 had indicated that rent was payable from 1/11/17 to accord with the orders which had been recorded on the 6/10/17 by the parties. The orders were to the effect that the Advocate for the tenant shall collect and keep rent for the months of November and December 2017 and not to release until further orders of the Tribunal.

9. Further the Tribunal explained that the dates of 1/12/16 was changed to 1/11/17 at the instance of Mr. Gichuki, Advocate for the Landlord who stated that there was an error on the dates. That upon perusal of the record and the affidavit of the Tenant in support of the application dated the 4/2/19 the Tribunal was persuaded and made the following orders;

a. The ruling delivered on the 6/7/18 and the order issued on the 19/7/18 are hereby rectified to read that the tenant do pay rent from 1/11/17 and not 1/12/16 pending further orders of the Tribunal.

b. Each party to pay the costs.

10. It is this ruling of the 22/3/19 that is subject to the Appeal.

11. Parties elected to canvass the Appeal by way of written submissions. The Appellant submitted that the Tribunal changed the dates without any reason despite affidavit evidence on record that showed that the Appellant had acquired the property and on the 15/9/16 which evidence was supported by an official search from Murang'a County Government as well as letters confirming the position from the previous owner. The tenant had also been notified on the 23/11/16 to pay rent to the Appellant by the previous owner. The tribunal directed the tenant to deposit rent for the month of November and December 2017 with his Advocates leaving the rent for the period of December 2016 – October 2017 unpaid.

12. The Appeal is opposed by both the 1st and the 2nd Respondents through the submissions on record.

13. According to the 1st Respondent tenant, it would appear that the rent has been paid as follows

a. December 2016 – October 2017- KANU Kiharu sub branch.

b. Nov and Dec 2017 – paid to the tenant's Advocates with authority of the BPRT.

c. Jan 2019 to date – either KANU Kiharu sub branch or some other person unknown to the Appellant.

14. The Appellant further argued that if the tenant has paid rent to unauthorized person(s) then it is his duty to retrieve that rent and pay to the Appellant. The Appellant urged the Court to allow the Appeal and order that the orders given on the 6/7/18 to the effect that the rent is payable to the Appellant from 1/12/16 be reinstated.

15. The 1st Respondent, the tenant submitted in opposition to the Appeal that he has paid all the rents to the 2nd Respondent. That the error was rectified by the Tribunal on realizing that the 1st Respondent had already paid rent to the 2nd Respondent for the period 1/12/16 to 1/11/17. The tribunal attributed the error to the insistence of Mr. Gichuki for the Appellant who apparently pointed out to the Court that the date should read 1/12/16. That the rent was paid to the 2nd Respondent who did not dispute receipt of the said rent.

16. The 2nd Respondent stated that the finding by the Chairman of the Business Tribunal that the rent is payable from the 1/11/2017 and not the 1/12/16 was arrived at through oral and documentary evidence and ground 1 should fail in that regard.

17. Further that since the ownership of the premises is under an ongoing dispute the Tribunal was right in determining the rent to be payable

from 1/11/17 and not any earlier date.

18. In conclusion that there was no error apparent on the record and the Appellant's advocate's insistence on the commencement date of 1/12/17 was merely to mislead the Court.

19. I have two rulings by the Tribunal and the key issue is whether the rent was payable from the 1/12/16 or from the 1/11/17. I have perused the affidavit of the 1st Respondent dated the 14/8/19 where he deponed that the rent from December 2016 to October 2017 had been remitted to the 2nd Respondent. It is highly probable that the Tribunal took this into consideration and to avoid putting the tenant into double jeopardy of paying rent twice, the Tribunal ordered the rent to be paid from the 1/11/17. It is therefore not true to state that the Tribunal gave no reason for its decision. Indeed the Chairman indicated in his ruling that he had given the date of 1/11/17 but upon insistence of the Appellant's counsel that there was an error, he changed it to 1/12/17. I therefore find no reason to fault the tribunal on this ground.

20. In respect to ground No 2 it is clear from the record that the orders of the tribunal of the 6/10/17 were recorded by consent and wherein the advocate for the 1st Respondent was to collect and keep the rent for the months of November and December 2017. I do not find any ground to fault the Tribunal on this issue.

21. Further and as alluded earlier on, the suit property is subject to a legal dispute as to its ownership between the Appellant and the 2nd Defendant in the Environment and Land Court and the Tribunal was right not to encroach on an area that it had no jurisdiction.

22. Having evaluated the evidence on record it is the finding of the Court that the Tribunal arrived at the correct decision in its ruling dated the 22/3/19. The Tribunal took into consideration the evidence of payment of rent by the 1st Respondent to the 2nd Respondent for the period 1/12/17 to October 2017. This fact has not been disputed by the 2nd Respondents who are parties to this Appeal and the reference in the Tribunal. The Tribunal accepted the evidence of the 1st Respondent in respect to the payment of rent, receipts of which were annexed to the application for review.

23. It is commonly acceptable that the ownership dispute between the Appellant and the 2nd Respondent remains undisputed and on that account is subjudice. I do not intent to delve into it. It is not therefore correct to state that the Tribunal did not give reasons for its decision. It is the finding of the Court that the Tribunal exercised its discretion correctly and I find no grounds to fault it.

24. In the upshot the Appeal is unmerited and it is dismissed with costs to the Respondents.

25. It is so ordered

DELIVERED, DATED AND SIGNED AT MURANGA THIS DAY OF 30TH DAY OF JANUARY 2020.

J. G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Waiganjo Gichuki for the Appellant

Ms Waweru HB for Mose Nyambega for the 1st Respondent

Bwonwonga for the 2nd Respondent

Irene and Njeri, Court Assistants