



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 39 OF 2015

JAMES KARIUKI KITHINJIAPPELLANT

VERSUS

DOMINIC NTONGAL.....RESPONDENT

(Appeal arising out of the judgment/order of the chairman of the business premises rent tribunal Hon. Mbichi Mboroki delivered on 7th August 2015 in Meru BPRT No. 3 of 2015 between James Kariuki Githinji (Tenant) vs. Dominic Ntongai (Land lord).

JUDGMENT

1. This appeal arises from a reference filed by the appellant before the Business Premises Tribunal (hereinafter, “the BPRT/Tribunal”) at Meru relating to the appellant’s tenancy on the land parcel No. Block 11/53 Meru municipality owned by the respondent.
2. The respondent had served the appellant with a notice to terminate or alter terms of the tenancy dated 18.12.2014, and the same was issued under the provisions of section 4(2) of **The Land Lord and Tenant (shops, hotels and catering establishments) Act Cap 301 laws of Kenya** whereby the tenancy was to be terminated with effect from 1.3.2015.
3. What emerges from the proceedings before the tribunal is that the appellant had complained that the notice to terminate the tenancy was defective as it was issued in contravention of section 7 (1) (g) of the Land Lord and Tenant (shops, hotels and catering establishments) Act as the respondent did not state the purposes of occupying the premises and that the appellant had paid rent up to January 2020.
4. In the Judgment delivered on 7.8.2015, the tribunal ruled as follows:
 - i. “The relationship between the land lord and the tenant herein is not cordial because of the landlords/inability to receive arrears and rent from the tenant hence the dispute is pending before the Chief Magistrate’s court No. 173/2011.
 - ii. The tribunal can’t understand why the tenant is still objecting to the release of the money deposited in CMCC 173/2011 to the landlord.
 - iii. No credible explanation as to why the tenant ignored the business rent tribunal where even the primary judgment to hear and determine all disputes in respect of controlled tenancy and filed matter in court.
 - iv. The land lord appeared frustrated and that he hence resolved to have the premises for his own use. The landlord had satisfied the tribunal that he had a genuine intention to have the premises for his own business and he even put in place the necessary infrastructure and he resolved to start his own business in the said premises of land lord who has been receiving a fair return on all investments his entitled to have the same for his own use. The grounds of termination relied on by the land lord is provided for in section 7 of cap 301.
 - v. The land lord does not have to use the exact language of the statute. Justice is to be dispensed without undue reference to termination as per the constitution of Kenya 2010 Article 159 (2). The tribunal is satisfied that the landlord has proved his case herein on a balance of probabilities and makes the following orders in respect of the tenant’s reference.
 - a. That the tenant’s reference is dismissed with costs.
 - b. The tenant shall vacate and deliver vacant possession of the suit premises on or before 31st December, 2015 in default an eviction order shall issue without further reference to the tribunal.

c. The tenant shall pay all the arrears of rent due to the landlord as at August 2015 on or before 31st August 2015 in default the landlord shall levy distress and take possession of the suit premises under section 12 (1) (e) of cap 301.

d. The tenant shall remain in the same premises up to 31.12.2015 on condition that all the outstanding areas of rent are paid on or before 31.8.2015.

e. The tenant shall pay the landlord the cost of the reference.”

5. Aggrieved by the aforementioned judgment, the tenant filed this appeal vide his memorandum of appeal dated 14.8.2015 containing the following grounds:

i. “The learned chairman erred in law and in fact for dismissing the appellant’s reference whereas the respondent did not prove on balance of probability that he intended to occupy the suit premises for the purposes of a business to be carried on by him therein.

ii. The learned chairman erred in law and in fact for dismissing the appellant’s reference whereas the notice to terminate tenancy which was issued to the appellant by the respondent did not indicate for what purpose the respondent intended to occupy the suit premises for.

iii. The learned Chairman erred in law and in fact for dismissing the appellant’s reference whereas the notice to terminate tenancy which was issued to the appellant by the respondent was incurably defective for contravening provisions of section 7 (1) (g) of the Land Lord and Tenant (Shops, hotels and catering establishment) Act, cap 301 laws of Kenya.

iv. The learned Chairman erred in law and in fact for dismissing the appellant’s reference whereas the respondent owns other empty premises from which he can carry on his alleged business.

v. The learned chairman erred in law and in fact for failing to find and for reasons that he failed to find that the respondent was not terminating the tenancy between himself and the appellant in good faith.

vi. The learned chairman erred in law and in fact for failing to find and for reasons that he failed to find that the respondent was not terminating the tenancy between himself and the appellant so that he can use the suit premises for carrying on his business therein.

vii. The learned chairman erred in law and in fact for making a decision on issues that were not raised by the respondent in the notice to terminate tenancy.

viii. The learned chairman erred in law and in fact for making a decision on the issue of rent whereas the same had not been raised by the respondent in his notice to terminate tenancy.

ix. The learned chairman erred in law and in fact for holding and for reasons that he held that the appellant had outstanding rent owed to the respondent.

x. The learned chairman erred in law and in fact for holding and for reasons he held that the appellant had defaulted in payment whereas the tenant had deposited in court rent for upon January 2020 in MERU CMCC NO. 173 OF 2001.

xi. The learned chairman’s judgment was against the weight of evidence.

xii. The appellant hence prays for the following orders:

I. That the learned chairman aforesaid judgment/order be set aside.

II. The appellant’s reference be allowed with costs to the appellant.

III. The appeal be allowed with costs to the appellant”.

6. The appeal was argued by way of written submissions. In summary the appellant argued that the respondent was not terminating the tenancy between himself and the appellant so that he can use the suit premises for carrying on business therein since the respondent owns other empty premises/rooms for which he could have carried on his alleged business therein if any. He further averred that the notice was issued in violation of section 7 (1) (g) of the landlord and tenant (shops, hotels and catering establishments Act cap 301 Laws of Kenya).

7. It was further argued that the notice was not made in good faith since the respondent had purported to increase rent which had prompted the appellant to file the case Meru BPRT No. 50 of 2012 which case was withdrawn on 7.5.2015. Appellant contends that the respondent had issued the notice to terminate the tenancy because the appellant had opposed the notice to increase rent.

8. It was further argued that the tribunal erred in making a decision on the issue of rent whereas the same had not been raised by the respondent in the notice to terminate the tenancy, and that it was erroneous for the tribunal to hold that the appellant had defaulted in payment of rent yet the appellant had deposited in court rent up to January 2020 as directed in Meru CMCC No. 173 of 2001.

9. The respondent submissions were filed on 13.6.2019 outside the given timelines (by 30.4.2019) and no leave was sought from this court to

admit the said submissions which now stand as expunged as per the court's directions given on 18.3.2019.

10. I summarize the issues arising for determination herein are as follows:

- **Whether the tribunal was right in dismissing the appellant's reference yet the tenancy notice did not indicate the purpose for which the respondent intended to use the premises for.**
- **Whether the tribunal erred in making a decision on the issue of rent whereas the same was not raised in the notice to terminate the tenancy.**

11. As regards the first issue, I find that the respondent gave evidence before the tribunal stating that he had registered a company and was intending to carry out a business. He was to use the suit premises as an office and a show room for the products he was to be selling. He provided details of his registered company.

12. Section 7 (1) (g) of the Land Lord and Tenant (Shops, Hotels and Catering Establishments) Act provides that:

“Where under section 4 of this Act served a notice of termination of a controlled tenancy on the tenant, the grounds on which the landlord seeks to terminate such tenancy may be such of the following grounds as are stated in the aforesaid notice —.....

Subject as hereinafter provided, that on the termination of the tenancy the landlord himself intends to occupy for a period of not less than one year the premises comprised in the tenancy for the purpose or partly for the purposes, of a business to be carried on by him therein, or at his residence”.

13. The act does not state that a detailed account should be given regarding the nature of the intended use of the premises by the landlord. It was therefore sufficient for the respondent to demonstrate that he intended to put up a business and use the suit premises. The tribunal was therefore correct in holding that the respondent had met the criteria set out under section 7 of the Act and it was not necessary for him to use the exact language set out in the statute.

14. On the issue of rent, I find that this was not captured in the notice issued on 18.12.2014.

15. However, it is quite clear that one of the complaints lodged by the appellant in the tribunal in opposing the notice of 18.12.2014 was that he had paid rent in advance, up to January 2020. In support of that reference, the appellant gave evidence indicating that he had filed case no. Meru CMCC 173/2001 and through orders issued in that case, he has deposited a total sum of Shs.573,200 which is rent up to January 2020. In his submissions filed before the tribunal, the appellant again raised this issue contending that it was via a court order of 18.1.2001 which directed him to pay the rent. If this was not an issue, why did he raise the same throughout the trial. How was the tribunal to ignore the rent issue when it appears to have been the core point for the appellant to oppose the notice for termination of the tenancy.

16. In the case of **Phirajlal J. Shah & Another vs Vijay Amritlal Shethia (2018) eKLR (COA)**, the court stated that:

“Our construction of the title of this Act together with the content of the preamble is that this act (in reference to landlord and tenant (shops, hotels and catering establishments Act Cap 301 laws of Kenya) deals specifically with the landlord and tenant relationships in relation to structures on the land. The mandate to resolve disputes arising from dealings in relation to such structures is exclusively vested in the BPRT in terms of section 12 of the act...”

17. In the judgment of the tribunal, the chairman did state that the tribunal is the one which had the mandate to hear all disputes in respect of controlled tenancy; rightly so in view of the mandate given to the tribunal by the statute.

18. Way back on 4.6.2001, the court in Meru CMCC No. 173/2001 where appellant is the plaintiff, had stated that **“If there is any dispute over the rent, the matter should be referred to the Business Premises Tribunal”**. It has also emerged that even whatever monies the appellant has deposited in court as rent he has opposed the release of the same to the respondent. The appellant cannot have his cake and eat it at the same time. He already has sour relationship with the respondent, and there is not the slightest explanation as to why he continued with the CMCC case no. 173/01 even after the court had pronounced itself on matters of jurisdiction.

19. I find that the tribunal was right in determining the issue of rent.

20. In the final analysis I find that this appeal is not merited. The same is hereby dismissed with costs to the respondent. **DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 22ND JANUARY, 2020 IN THE PRESENCE OF:-**

C/A: Kananu

Gikonyo holding brief for J.G Gitonga for appellant

HON. LUCY. N. MBUGUA

ELC JUDGE