



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC APPEAL NO. 22 OF 2019

HASHIM OMAR HASHIM.....APPLICANT

VERSUS

ALLIANCE NOMINEE LIMITED.....RESPONDENT

JUDGMENT

(Appeal from the decision of the Business Premises Rent Tribunal; appellant being tenant in premises owned by the respondent; respondent issuing notice to the appellant requiring the appellant to vacate the premises for reason that the respondent needed to use it for its own business; judgment issued against the tenant hence the appeal; from the evidence, apparent that the landlord had a genuine reason for needing the premises and adequate notice was given to the tenant; appeal dismissed)

1. This appeal arises from a decision of the Chairman of the Business Premises Rent Tribunal (BPRT or the Tribunal), where the appellant, as tenant, had sued the respondent, as landlord of the premises in Mombasa/M.S/Diani Beach/65. The respondent had issued a notice dated 27 June 2016 to the appellant, asking the appellant to vacate the suit premises for the reason that the respondent wished to use the premises. The premises is a beach property with several self contained bungalows, and the respondent, through its director, Mr. Raymond David Victor Njindo Matiba, stated that it wished to renovate the premises and use the same for short term rentals. He stated that they would need to use between Kshs. 20 and 30 million for renovations and they had these resources. He testified that they could not carry out the renovations with tenants in place. He testified that they gave the appellant six months to vacate but he failed to do so. He explained that the appellant uses the one bungalow as a store, for he operates a restaurant at the beach front, which is not in the plot of the respondent.

2. On his part, the appellant affirmed that he uses the premises to store alcohol and valuable goods and he also has a freezer for food. In essence, he uses the premises to support his restaurant business which is outside the suit premises. Electricity to the restaurant is also tapped from the suit premises. He agreed that the premises are dilapidated. He thought that the landlord has not been happy with their presence at the public beach and has been frustrating his business which led to an earlier reference. He pointed out that his restaurant business cannot do without the facilities in the bungalow. He believed that the respondent has not given good reason why he wants this bungalow.

3. In his judgment, the Honourable Chairman of the Tribunal was satisfied that the respondent had a genuine intention and resources to renovate the premises occupied by the appellant, as the appellant wished to use the same to generate more income. He believed that adequate notice had been given to the appellant. He thus entered judgment for the respondent and gave the tenant upto 1 September 2019 to vacate the premises. There were also other orders on set off or rent but they are not in issue here.

4. In this appeal, the appellant has listed 10 grounds of appeal. It is not necessary for me to list the grounds but generally the appellant contends that the Chairman of the Tribunal was wrong in finding that the respondent wished to use the premises for short term rentals and erred in accepting that the respondent had a genuine intention and sufficient funds to carry out the renovations.

5. I invited counsel for the appellant and the respondent to file submissions which they did and I have taken these into account.

6. It will be noted that the circumstances giving rise to the dispute, was the notice by the respondent, asking the appellant to vacate the premises for reason that the respondent wished to take over the premises and operate a business of short term rentals on it. Pursuant thereto, the landlord issued a notice dated 27 June 2016 and in the notice specifically stated that the landlord wishes to terminate the tenancy because *“the landlord wants to use the premises.”*

7. Section 7 of Cap 301, does provide for various instances that the landlord may be allowed to terminate a tenancy. One of them is where the landlord intends to use the premises and this is provided or under Section 7 (1) (g) which is drawn as follows :-

7. Grounds on which landlord may seek to terminate tenancy

(1) 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—

(g) 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 purposes, or partly for the purposes, of a business to be carried on by him therein, or at his residence.

8. It will thus be seen that a landlord can terminate a tenancy where the landlord intends to occupy the premises for a period of not less than one year to carry out his business.

9. Mr. Mkan, learned counsel for the appellant, in his submissions, submitted that the notice by landlord was defective, in that it did not provide that the landlord intended to use the premises for a period of more than one year. Mr. Njoroge, in opposing this line of submissions, stated that this is now a new issue which was never raised at the Tribunal.

10. In principle, I agree that a good landlord's notice ought to specify that the landlord intends to use the premises for a period of more than one year, because if the period is less than one year, then the tenant may wish to contest it. However, in the instance of this case, the issue of the notice not specifying that the business is going to extend beyond one year was never taken up at the Tribunal, and I agree with Mr. Njoroge, that this is now a new issue being raised on appeal, and which was never canvassed at the Tribunal. Indeed, the respondent's witness was never questioned on the notice itself and why it did not specify the period that the premises was intended for. That aside, I do not think that in the instance of this case there is any doubt as to what business the landlord wishes to carry out, for it is clear that it is for short term rental. I am in the circumstances of this case, ready to infer that the landlord wishes to use the premises for more than one year, based partly on the reason that the landlord disclosed the nature of the business he intended to operate and the amount of money intended to be spent, which is Kshs. 20 – 30 Million. I do not think that one would use this amount of money on this premises in order to use it for a period of less than one year. I am satisfied, just as the Chairman of the Tribunal was, that there was a genuine reason given by the landlord for needing to have the premises to operate its own business. The notice given, which was six months, was also sufficient, and I think that it was now incumbent upon the appellant to seek alternative ways of operating his restaurant business without the bungalow in question.

11. Mr. Mkan also submitted that the Chairman erred in basing his decision on the landlord's mention of the need to carry out renovations, yet renovations was not included in the landlord's notice. I agree that this was not a ground for terminating the premises as given by the landlord, but I do not think that it was a new ground being introduced at the Tribunal. What the respondent's witness stated is that they needed to renovate the premises, which was probably necessary for purposes of operating the short-term rental business, but I do not think that this was a reason for terminating the tenancy or a fundamental reason by the Chairman in allowing the landlord's notice. What the Chairman stated in his judgment is that he saw a genuine intention by the landlord and that the landlord had sufficient resources to execute the intention. This was not in any way a departure from the reason given in the notice that the landlord needed to use the premises for its own business. The display of building plans for renovations, and the mention of adequate resources, was only aimed at demonstrating that the landlord was acting in good faith, in issuing the notice to tenant.

12. From the foregoing, I do not think that the Chairman erred in his decision, and I am not persuaded to disturb it. I am aware that the Chairman directed the appellant to vacate the suit premises on or before 1 September 2019. This date has now passed. In my discretion, I will give the appellant 3 more months for him to organise himself to vacate the suit premises. He will thus need to vacate the premises on or before 4 June 2020, subject to him faithfully paying rent as it falls due during this period.

13. This appeal is otherwise dismissed with costs.

14. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 4th day of March, 2020.

MUNYAO SILA,

JUDGE.

IN THE PRESENCE OF:

Mr. Mkan for the appellant.

Mr Odhiambo S. E. holding brief for M/s Igeria & Ngugi for the respondent.

Court Assistant; David Koitamet.