



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 25 OF 2019

ASHA GROVER W/O SATENDRA GROVER T/A ELECTRO

WINDERS SERVICESAPPELLANT

VERSUS

YUHUA TRADING COMPANY LIMITED.....RESPONDENT

J U D G M E N T

(Being an Appeal from the Judgment /Decree of Hon. Mbichi Mboroki, Chairman delivered on 21st September 2018 in Nakuru BPRT No.37 Of 2017).

1. This appeal arises from the judgment/Decree of Hon Mbichi Mboroki, Chairman of the Business Premises Rent Tribunal (BPRT) delivered on 21st September 2018 in Nakuru BPRT No.37 of 2017. The Hon. Chairman after hearing both the Tenant and the landlord on the reference filed by the Tenant made a decision dismissing the reference by the Tenant dated 25th July 2017. He upheld the Landlord's Notice dated 19th July 2017 to terminated the tenancy and ordered the Tenant to vacate the premises on or before 31st December, 2018 and in default an eviction order to issue without any further reference to the Tribunal.

2. The Tenant/Appellant was aggrieved by the decision and has appealed to this court against the judgment of the Hon. Mbichi Mboroki, Chairman of the BPRT and has set out the following grounds of appeal in the memorandum dated 22nd October 2018:-

1. That the learned Chairman erred in granting an order of termination of tenancy on the grounds given by the Landlord whereas there was insufficient evidence to support the grounds.

2. That given the multiplicity of notices issued over the years and the multiplicity of reasons for termination and given that the law is for the protection of the tenant, the chairman erred in law and in fact in not finding that the current notice was tainted with malice and a desire to victimize the tenant at whatever cost.

3. That the learned Chairman erred in failing to consider the nature, validity and veracity of the evidence adduced for the Respondent in granting the orders of termination.

4. That the learned Chairman erred in granting an inordinately short period for the effective date of termination considering the Appellant's long period in the suit premises.

5. That the chairman decided the reference against the weight of evidence on record.

6. That the chairman erred in law and in fact in directing the appellant to vacate and deliver vacant possession of the suit premises on or before 31st December 2018 and in default thereof eviction order do issue without reference to the tribunal .

3. It is evident from the grounds of appeal that the appellant is primarily faulting the chairman's evaluation of the evidence and his findings thereof contending that the chairman fell in error in his evaluation and appreciation of the evidence. Simply put the appellant's contention is that the chairman's findings and the decision thereof was against the weight of the evidence. The appellant's position was that the decision of the chairman was unjustified having regard to the evidence placed on record and on that account the Appellant wants this court sitting as an appellate court to interfere with the Chairman's findings and decision in the manner proposed in the memorandum of appeal by setting aside the judgment and in place thereof to make an order allowing the appellant's reference before the Tribunal.

4. This being a first appeal the court is obliged and indeed under a duty to re-evaluate the evidence adduced before the Tribunal to satisfy itself whether or not the Tribunal reached a just decision having regard to the evidence. The rule of a court on a first appeal was well enunciated in the Court of appeal case of **Selle & Another -vs- Associated Motor Boat Co Ltd & others (1968) EA 123** where the court stated the guiding principle as follows:-

“—this court is not bound necessarily to accept the findings of facts by the Court below. An appeal to this court is by way of retrial and the principles upon which this court acts upon which this court acts in such an appeal are well settled. Briefly put they are this court must reconsider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

5. The appellant's counsel in his submissions has cited to the court the case of **Makube -vs- Nyamuro (1983) KLR 403** where the court of Appeal *inter alia* held :-

“ A court on appeal will not normally interfere with the findings of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted in wrong principles in reaching a conclusion”.

6. The above referenced cases do succinctly capture the role of an appellate court in the hearing and determination of an appeal. The court has an obligation to re-evaluate and re analyse the evidence and can reach its own conclusion respecting the evidence. The court however should exercise caution before interfering with the lower court's findings of fact and should only do so if it is evident that the trial court's findings were not based on any evidence and/or were based on a misapprehension of the evidence and /or that the Court is shown to have acted on wrong principles in reaching the conclusion it did.

7. It is thus essential to re-evaluate the evidence the parties presented before the Tribunal in order to determine whether the Hon. Chairman's decision was justified. The basic facts in regard to the reference before the Tribunal were briefly as follows:-

8. The Landlord the present respondent served a Notice to Terminate the tenancy of the appellant vide the Landlord's Notice to Terminate Tenancy dated 19th July 2017. The Notice was issued pursuant to the provisions of section 4 (2) of the Landlord and Tenant (shops Hotels and catering Establishments) Act, Cap 301 Laws of Kenya. The ground for the Notice to Terminate was: -

“That on termination of the tenancy the landlord himself intends to occupy the premises comprised in the tenancy for the purposes of a business carried on by him therein. The landlord intends to expand his business and as at the moment his business goods are kept outside hence being exposed to the bad weather as rain and hot sun was causing depletion of the stock.

9. The Notice was to take effect from 1st November 2017 and the Tenant was required within one month to notify the landlord whether or not he would comply with the notice. The Tenant /Appellant did not accept the Notice and on 28th July 2017 filed a reference at the Tribunal being Nakuru BPRT No.37 of 2017 signifying his opposition to the Notice of Termination of Tenancy by the Respondent. The reference was heard by the Tribunal and briefly the parties adduced evidence as follows:-

10. The Landlord Respondent testified that he was the owner of **LR No.Nakuru Municipality Block 4/3** and that he served the appellant with the Notice to terminate tenancy dated 19th July 2017. He explained that he required to occupy the premises occupied by the appellant as he needed to expand the business he was carrying of motor cycle sales. He stated he had had no problem with the appellant for the period of 20 years he had occupied the premises as a tenant. He stated he only had 2 tenants in his premises.

11. The Respondent admitted he had previously issued the appellant notices in 2014, 2015 and 2016 which were withdrawn. He stated the other tenant in the premises was Anzu Agro Chemists and that there was no other tenant. He denied he intended and/or had intended to increase rent and affirmed there was no dispute relating to rent.

12. The appellant who testified through her son confirmed she was a tenant in the respondent's premises and acknowledged having received the Notice to terminate the Tenancy. The Appellant was of the view the Notice had not been given in good faith. The Appellant stated the Respondent had served previous notices which however had been withdrawn. The Appellant asserted the Respondent had a lot of space within the premises which he could utilize in expansion of his business.

13. In cross examination the Appellant stated her shop was at the rear of the Respondent's shop. The Appellant further stated they had occupied the premises for over 20 years while the other tenant in the premises had only been in the premises for three (3) years. The appellant reiterated the respondent had no genuine reason to seek termination of the appellant's tenancy. The Tribunal inspected the premises on 15th March 2018 after which the parties filed their closing submissions before the Tribunal rendered its judgment.

14. The chairman after evaluating the evidence and following inspection of the premises made the following findings:-

1. That there is no evidence on record to show that the Landlord has malice or a grudge against the Tenant. The Tenant's witness merely asserted that the Landlord was not genuine. There is no material before the Tribunal to show that from the time the Landlord acquired the property, that is, 9th May 2008 that it has treated the Tenant maliciously. The Landlord has not even increased rent from 9th May 2008.

2. The Tribunal upon inspection of the suit premises confirmed that the Landlord was using the adjacent room to the Tenant's premises as a store.

3. The Landlord has satisfied the Tribunal that it has a genuine intention to use the suit premises as part of the expansion of its business.

4. That Tenant has been aware of the Landlord's intention from the year 2014. The Tribunal is satisfied on the evidence on record that the Landlord has proved the ground of termination of tenancy as per the notice dated 19th July, 2017 on a balance of probabilities.

15. The Court having reviewed the evidence presented before the Tribunal is satisfied that the Respondent's Notice to terminate the appellant's Tenancy was a valid notice and that it was based upon one of the grounds provided under section 7 (1) of the Landlord and Tenant (shops, Hotels and catering Establishments) Act Cap 301 Laws of Kenya pursuant to which a landlord could lawfully terminate a tenancy.

16. The primary objection that the Appellant had against the notice to terminate her tenancy was that the Respondent was not acting in good faith and that the intention to terminate the tenancy was not genuine. To back up her objection the appellant contended that the landlord had a lot of space within the premises which they could use to expand their business. The Tribunal visited the premises, and although there was no record of the proceedings during the site visit, the chairman in the judgment dispelled the appellant's contention of availability of ample space.

The Chairman in the judgment interalia stated as follows:-

“ The Tribunal inspected the premises, on 15th March, 2018 and confirmed that the shop the Tenant stated was vacant was being used by the Landlord for storage purposes and it was full of the Landlords properties”.

17. Clearly there was no credible evidence adduced by the Appellant to demonstrate that the Respondent was acting in bad faith and/or maliciously. Indeed the evidence appeared to show that the Respondent and the Appellant had a good landlord and tenant relationship. The Respondent acquired the premises in 2008 and upto to the time the reference was being heard, had not revised the appellant's rent. The Respondent and appellant had no rent dispute. Although evidence was led that the Respondent had served notices on the appellant in 2014 and 2015 which were subsequently withdrawn, these notices were not exhibited and there is no evidence to suggest the same were served and/or given maliciously. The evidence presented established there was a need by the Respondent for additional space. I see no evidence to suggest the Respondent was actuated by malice when he served the Notice on the Appellant. On the evidence I cannot fault the Hon. Chairman of the Tribunal finding that the Respondent had a genuine intention to use the premises occupied by the appellant to expand its business.

18. In the premises and after careful evaluation of the evidence presented before the Tribunal I am satisfied that the Chairman of the Tribunal reached the correct determination on the facts and the law. There is no basis to interfere with his findings and the decision he reached. There is no merit in the appeal and the same is ordered dismissed with costs to the respondent.

Judgment dated signed and delivered electronically at Nakuru this 7th day of 2020.

J M MUTUNGI

JUDGE