



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NUMBER 137 OF 2012

AERO ELECTRONICS. APPELLANT

VERSUS

DIMIT INVESTMENTS LTD. RESPONDENT

(An appeal from a ruling and orders of the Chairperson Business Premises Rent Tribunal made on 5th November, 2012 in BPRT Case no. 70 of 2012 by D. Mochache).

J U D G M E N T

The Appellant Aero Electronics was a tenant of the Respondent, Dimit Investments Ltd in their premises, **Kisumu Municipality Block 7/211**. The agreed monthly rent payable by the Appellant was Kshs.30,000/-. By notice to alter terms of tenancy dated 18th May, 2012, the Respondent gave notice to the Appellant of its intention to increase rent for the premises from Ksh.30,000/- to Ksh.100,000/- per month for the reason that the rent the Respondent was currently paying was uneconomical in view of the prevailing market rate.

On 4th September, 2012, Mr. Onsongo Advocate for the Appellant wrote to the Respondent's Advocate referring to an earlier letter dated 28th May, 2012 in which the Respondent gave notice of disagreement to comply with the notice. A copy of this letter was however, not annexed. The Respondent filed a notice of motion dated 30th October, 2012 seeking the following orders: -

- 1. That the reference dated 12th September, 2012 and filed herein on 17th September, 2012 be struck off the record.***
- 2. That the Landlord be permitted to levy distress against the property of the tenant to recover arrears of rent in the sum of Ksh.210,000/-.***
- 3. That the costs of the reference and of this application be paid by the Tenant in any event.***

The application as supported by the affidavit of Mitech Fulchand Shah, the Managing Director of the Landlord Company who reiterated the grounds of the application and adding that the reference filed by the tenant was filed outside the statutory period and is therefore without effect.

Mr. Tariq Gani the proprietor of the Aero Electronic filed a replying affidavit opposing the application. He in particular depones that: -

- “1. That I know of my own knowledge that upon receipt of the Notice by the Respondent/Landlord, I wrote to them and clearly indicated in writing my unwillingness to***

comply with the notice. A copy of the letter is attached herewith and marked TG -2.

2. That I know of my own knowledge that the application seeks to ride on technicalities which do not go to the heart/substance of the dispute and the same seeks to breach the provisions of: -

a) Article 159 (2) (d) that in exercising judicial authority, the courts and tribunals shall be guided by the following principles “Justice shall be administered without undue regard to procedural technicalities”.

b) Sections 1A and 1B of the Civil Procedure Act (Cap 21) in so far as and to the extent they are applicable.”

The parties argued the application before D. Mochache (Mrs.), the Chairperson of BPRT on 5th November, 2012 and the Chairperson rendered her ruling dated 6th November, 2012 allowing the application and ordered the Appellant/Tenant to pay the outstanding arrears immediately and in default the landlord to levy distress.

Aggrieved by the ruling the Appellant appealed to this court on the following main grounds of appeal: -

“1. The Tribunal erred both in fact and law in failing to appreciate that the Proviso to Section 6(1) of Cap 301 gives the Tribunal wide and unfettered powers to allow or “... permit the filing of a reference notwithstanding that the receiving party has not complied with any of the requirements of this section.

2. The decision of the Tribunal is an affront to the provisions of Article 159(2) (d) of the Constitution as well as the provisions of Section 1A and 1B of the Civil Procedure Act (Cap 21) in so far as it denied the Appellant a hearing on the basis of a technicality; that the reference was filed out of time.

3. The Tribunal erred both in law and fact in disregarding the fact the Appellant had duly served the Landlord with a notice of his (Tenant’s) unwillingness to comply with such notice and hence the Notice served by the Landlord was of no effect by dint of the Provisions of Section 10 of Cap 301.”

Mr. Onsongo, learned counsel for the Appellant who argued that appeal before me submitted that at the time of the application, there was a reference on record which had been filed out of time. He submitted that the provision of Section 6(1) of the landlord and tenants (Shops, Hotels and Restaurant Act) gives the Tribunal the latitude to admit reference filed out of time. He submitted that the issue of time within which to do an act is a technical issue and under Article 159 (2) (a) which should not be used to deny the pursuit of substantive justice. In support of his contention, he invited the court to be guided by the Supreme Court decision in Supreme Court of Kenya, Civil Application no. 35 of 2015, **Fahim Yasin Twah Vs Timany Issa Abdalla & 2 Others.**

Mr. Qui learned counsel for the Respondent submitted that the landlord gave notice to vary the terms of the tenancy. It is not in dispute that the tenant filed a reference but was done out of time, but the Appellant did not apply for extension of time; and that the Respondent will suffer prejudice if this appeal is allowed as the Appellant has been paying the original rent and therefore, the Respondent has suffered loss. He urged this court to dismiss this appeal.

The main issue from the submissions of the parties which lends itself for determination in this appeal is whether the allowing of the application which was premised on filing of the reference out of time was proper. The learned chairperson of the Tribunal in her ruling: -

“At the time of filing the reference the notice had already taken effect under Section 10. Under Section 10, the notice takes effect by operation of the law. It’s not therefore true that I have a wide latitude (discretion) to allow the reference out of time.”

Section 6(1) of the Act provides: -

“6(1) A receiving party who wishes to oppose the tenancy notice and who has notified the requesting party under Section 4(5) of this Act that he does not agree to comply with the tenancy notice, may before the date upon which such notice is to take effect refer the matter to a tribunal whereupon such notice shall be of no effect until and subject to the determination of the reference by the tribunal.

Provided that a tribunal may for sufficient reason and on such conditions as it may think fit permit such a reference notwithstanding that the receiving party has not complied with one of the requirements of this Section.”

The tribunal from the above provisions had discretion to permit a reference which has not complied with the conditions on being shown sufficient reason. Sufficient reason in this case will be the reasons why the reference was filed late; a prayer for extension or enlargement of time, has been made and a declaration that no prejudice will be suffered by the Respondent. In this case, No application was lodged to seek extension of time; no reason had been tendered for the delay either in the application or in this appeal. In the absence of such sufficient reason, it will be difficult for this court to exercise discretion in favour of the Appellant. This court being the first appeal court will not interfere with the discretion of the trial Chairperson unless it is demonstrated that she acted on wrong principles or took into account factors which she ought not to have been into account. In this appeal, I agree with the Chairperson, that there were never placed sufficient material before her to exercise her discretion to reject the Application before her.

I, therefore, find no merit in this appeal and dismiss the same with costs.

Dated, signed and delivered at Kisumu this 5th day of April, 2017.

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S N RIECHI

JUDGE