



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CIVIL APPEAL NO. 657 OF 2011

BENEDICT KILONZO MWENGA.....APPELLANT

VERSUS

1. PETER MUNUVE MWANGANGI

2. PAULINE NGOMI MWANGANGI.....RESPONDENTS

(Appeal from the original judgment and decree of Hon. Mr. D. Mochache, Chairperson Business Premises Rent Tribunal, Nairobi BPRT Case No. 881 of 2012 delivered on 25st November, 2011)

JUDGMENT

1. This appeal has been filed on the following grounds:-

- i. The learned chairperson erred in fact in saying that the Respondent incurred costs of KShs. 1.3 Million after construction when it was the tenant who had incurred the costs.***
- ii. The learned chairperson erred in law in failing to consider the sum of KShs. 330,740/= owed by the Respondent to the Appellant.***
- iii. The learned chairperson erred in law in holding that the agreement between the Respondents and the Appellant was meant to subvert the Tribunal from the path of justice when the said agreement was neither disputed nor challenged by the Respondents.***
- iv. The learned chairperson erred in law in saying that this is a tenant who does not deserve protection under the Act when the said Act clearly protects tenants.***
- v. The learned chairperson's judgment was against the weight of the evidence adduced by the Appellant and conceded by the Respondent.***

2. The Appellant and the Respondents entered into a tenancy agreement for premises on L.R. No. 209/8313 Nairobi (***suit premises***) sometime in August, 2001. The Respondents issued the Appellant with a notice of termination of tenancy on 25th August, 2010. The Appellant subsequently filed a reference before the Business Premises Rent Tribunal seeking to restrain the Respondents from evicting him from the suit premises. The Appellant's case was that he entered into the tenancy agreement with John Mwangangi who passed on in the year 2007. Upon his demise, the Respondents indicated that they were the legal administrators of the deceased's estate and they coerced him to remit rent to them and he was to do so retrospectively. He then filed a reference BPRTC No. 291 of 2008 Benedict K. Mwenga v. Peter

Munuve & 3 Others which reference was disposed of and was advised by his advocates to pay outstanding rent. On 25th August, 2010 he was served with a notice to terminate tenancy dated 17th August, 2010 allegedly drawn by the Respondents. He was advised that his tenancy relationship with John Mwangangi needed to be determined since Mwangangi was not the owner of the suit property and that the owner of the suit property was demanding rent. He stated that he currently paid KShs. 30,000/= per month to the Respondent through their advocates M/s. Nzamba Kitonga & Co. Advocates and the demand by the landlord to evict him left him confused on who exactly he should be remitting rent to and for that reason he failed to respond to the notice.

3. The Respondents in their reply to the reference stated the Appellant has always paid rent to the same advocate even before their father John Mwangangi's demise. That the Appellant fell in arrears and when his property were to be attached, he filed BPRTC No. 295 of 2008 which was dismissed and he was ordered to pay rent. He continued to pay rent irregularly and was in arrears of rent from August, 2010. That the Appellant issued the Respondents' advocates with a cheque which bounced and he promised to settle the said rent in cash. That it is due to his failure to pay rent that he was issued with a notice of termination of tenancy. That since he failed to file a reference objecting to the notice, he ceased being a tenant with effect from 1st November, 2010 and is in fact a trespasser and the tribunal had no jurisdiction to entertain his complaint or enlarge time. The Respondents contended that the return to sender slip was manufactured to mislead the court and the Respondents prayed for vacant possession.

4. The chairperson of the tribunal heard the matter and found in favour of the Respondent and ordered that the Appellant to vacate the premises on 1st January, 2012.

5. The 1st Respondent testified that the Appellant entered into an agreement with the deceased. The Appellant constructed structures worth 1.3 Million on the premises and he was to deduct the cost incurred from rent until completion. The construction begun in 2001 and ended in 2003. He stated that the Appellant was meant to pay rent of KShs. 30,000/= per month. Having been in arrears of KShs. 595,000/= being rent until 30th June, 2009 plus an extra eleven (11) months it totalled to KShs. 925,000/=. The Appellant paid KShs. 650,000/= leaving a balance of KShs. 275,000/=. He stated that the Appellant issued post dated cheques of KShs. 137,500/= and KShs. 137,000/= which bounced. He thereafter continued to pay rent erratically.

6. The Appellant testified that the delay in rent payment was occasioned by the Respondents' lawyers sicne he would sometimes refuse to take the rent. He stated that he not only incurred a cost of KShs. 1.3 Million but that the landlord refused to consider KShs. 221,540/=. He stated that he gave the 1st Respondent KShs. 50,000/= between 2003 and 2009 and a further KShs. 10,000/= for electricity on 4th March, 2004. On 30th August, 2005, he paid KShs. 80,000/=. That the letter dated 11th November, 2004 shows that the Respondents requested for money for memorial service for which he gave them KShs. 18,000/=. He stated that he paid KShs. 23,200/= on behalf of the 2nd Respondent. He stated that the Respondents owed him a total of KShs. 312,740/= and stated that he had been depositing rent with the Tribunal and was not in arrears. He stated that the Respondents wanted to terminate his tenancy because they got a new tenant who is willing to pay more rent. He requested for his tenancy not to be terminated since he was still furnishing the loan he took with the bank for purposes of construction and that he was still in arrears of the loan at KShs. 1.7 Million. He stated that he did not deposit rent with the Tribunal because his advocates did not direct him to do so. He stated that he acknowledged being in arrears of rent of KShs. 330,300/= from July, 2009 to 31st May, 2010. He stated that he issued post-dated cheques No.s 2545, 2546, 2570, 2571, 2574 and 2573 for KShs. 75,000/=, 75,000/=, 200,000/=, 100,000/=, 100,000/= and 100,000/= respectively for the rent that he owed to settle the amount that had accrued from March, 2008 to June, 2009. He stated that one of the cheques was returned to the drawer because the Respondents banked it late and denied that the cheques bounced.

7. The parties submissions essentially reiterated their case. The Appellant however, referred the court to the preamble of the Landlord and Tenant (Shops, hotels and catering establishments) Act Cap 301 Laws of Kenya and submitted that it had a right as a tenant to be protected. He also referred to Section 6 of the said Act which provides for extension of the time within which to file a reference.

8. This being a first appeal, it is my duty to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of hearing the witnesses testify. (See: **Peter v. Sunday Post (1958) at pg. 429**).

9. The Appellant argued that he had the right as a tenant to be protected from eviction. It is my considered view that with every right comes a responsibility. It is worth noting that the existence of landlord-tenant relationship between the parties herein which relationship has not been contended gave rise to duties and obligations such as the obligation to pay rent promptly on the part of the Appellant and a guarantee to enjoy quiet possession on the part of the Respondents. The Appellant did not establish that he was not in arrears of rent at the time notice to terminate the tenancy was served on him. His evidence is in fact an admission that he never used to pay rent promptly. In my view, other claims by the Appellant against the Respondents are an afterthought. Default in rent payment is one of the reasons for which tenancy can be terminated under Section 7 of the Landlord and Tenant (Shops, hotels and catering establishments) Act Cap 301 therefore, the Respondents demonstrated a strong and firm reason for termination of the tenancy hence I see no reason to interfere with the Tribunal's decision. In the circumstances, this appeal has no merit it is dismissed with costs to the Respondents.

Dated, Signed and Delivered in open court this 9th day of March, 2015.

J. K. SERGON

JUDGE

In the presence of:

Mrs. Wangui Koech holding brief Kamau for the Appellant.

No appearance for the Respondents