REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC CIVIL APPEAL NO. 96 OF 2016

(FORMERLY HCCA NO. 100 OF 2012)

CANCER INVESTMENTS LIMITED.....APPELLANT

VERSUS

SAYANI INVESTMENTS LIMITED.....RESPONDENT

JUDGMENT

Introduction:

The appellant was at all material times a tenant of the respondent on the premises known as L.R No. 209/11413/1214, Tom Mboya Street, Nairobi (hereinafter referred to only as "the suit property"). The appellant was paying a monthly rent of kshs.780,000/=. The appellant was a protected tenant under the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301 Laws of Kenya. On 14th April, 2011, the respondent served the appellant with a notice terminating the appellant's tenancy on the suit property on the grounds that the appellant was in rent arrears for more than two months and that it had persistently delayed in paying rent as and when it fell due. The notice was served upon the appellant under section 4(2) of the Landlord and Tenant (Shops, Hotels and Catering establishments) Act, Chapter 301 Laws of Kenya. The appellant opposed the termination of its tenancy and filed a reference at the Business Premises Rent Tribunal (hereinafter referred to only as "the tribunal") on 13th April, 2011 requesting the tribunal to investigate and determine the validity of the said notice by the respondent. The reference was filed in Nairobi Tribunal Case No. 309 of 2011, Cancer Investments Ltd *v* Sayani Investments Ltd. (hereinafter referred to as "the tribunal case").

The proceedings before the tribunal:

The tribunal heard the appellant's reference and delivered a judgment on 17th February, 2012 upholding the respondent's notice to terminate the appellant's tenancy. The tribunal ordered the appellant to vacate the suit property on 1st August, 2012 and gave the respondent liberty to take over immediately the portion of the property which was not occupied by the appellant. In its judgment, the tribunal made a finding that the appellant was in rent arrears for more than two months prior to being served with a notice terminating its tenancy and had also persistently delayed in the payment of rent.

The appeal to this court:

It is against that decision that the appellant preferred the present appeal. In its Memorandum of Appeal dated 12th March, 2012, the appellant challenged the decision of the tribunal on the following grounds:

1. That the Chairperson of the tribunal erred in law and fact by failing to take into account all the evidence placed before her.

2. That the chairperson of the tribunal erred in law and fact by failing to find that the appellant had complied with all the requirements of the tenancy and was not liable to be ordered to vacate the suit property.

3. That the chairperson of the tribunal erred in law and fact in failing to consider that there was another suit namely, HCCC No. 854 of 2004 as consolidated with HCCC No. 368 of 2004 pending before the High Court between the same parties and on the same subject matter before issuing the order.

4. That the Chairperson of the tribunal erred in law by not ordering that the matter be stayed pending determination of the suit lodged in the High Court previously.

5. That the Chairperson of the tribunal exhibited bias against the appellant by preferring the evidence of the respondent to that of the

appellant.

6. That the Chairperson of the tribunal erred in law and fact by relying on the evidence of the respondent which evidence had glaring anomalies and inconsistencies especially on the account rendered.

7. That the Chairperson of the tribunal erred in law by tagging her ruling in favour of the respondents.

The appeal was heard by way of written submissions. The appellant filed its submissions on 12th August, 2016 while the respondent filed its submissions on 13th October, 2016. I have considered the record of the tribunal, the Memorandum of Appeal and the submissions by the respective advocates for the parties. The respondent's notice terminating the appellant's tenancy was given under Section 7(1)(b) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301 Laws of Kenya (hereinafter referred to as "the Act") which allows a landlord to terminate a tenancy where:

"….a tenant has defaulted in paying rent for a period of two months after such rent has become due or payable or has persistently delayed in paying rent which has become due or payable."

From my understanding of this section, a landlord can issue a notice of termination under the section where a tenant has defaulted in paying rent for a period of two months after such rent has become due or payable or where the tenant has persistently delayed in paying rent which has become due or payable. It follows therefore that what the tribunal was to decide was whether the respondent had established that the appellant had defaulted in paying rent for two months after such rent had become due or payable or that the appellant had persistently delayed in paying rent. The tribunal's findings on both issues were in the affirmative.

This being a first appeal, the court has a duty to consider and re-evaluate the evidence on record and to draw its own conclusions although it has to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified before the tribunal. See, the case of Verani t/a Kisumu Beach Resort *v* Phoenix of East Africa Assurance Co. Ltd [2004] 2 KLR 269 and Selle *v* Associated Motor Boat Co. Ltd. [1968] E.A 123 on the duty of the first appellate court.

It is also well established that an appellate court will not ordinarily interfere with the findings of fact by the trial court unless they were not based on evidence at all, or on misapprehension of the evidence or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, Peter *v* Sunday Post Ltd. [1958] E.A 424 and Makube *v* Nyamuro[1983] KLR 403. After carefully reviewing the evidence that was placed before the tribunal, I am unable to disturb the findings of the tribunal on the two issues that were before it for determination.

From the material that was before the tribunal, the tribunal cannot be faulted for finding that the appellant was occupying the ground and first floor of the suit property and paying a monthly rent of Kshs.780,000/- as at the time when the notice of termination of tenancy was served upon it. The statements of account that the appellant placed before the tribunal showed that the appellant paid rent of Kshs.780,000/= per month until December, 2010. Apart from the oral evidence by the appellant's witness that was contradicted by the payments that I have referred to above, there was no other evidence that was placed before the tribunal showing that the appellant had surrendered the first floor shops to the respondent. From the appellant's own statement of account, the last rent payment made by the appellant to the respondent was in December, 2010 before it was issued with a termination notice in March, 2011. According to the said statement, the appellant did not make any rent payment between January, 2011 and December, 2011. The appellant's contention that it stopped paying rent because it had overpaid the respondent had no basis on the evidence that was before the tribunal. The alleged overpayment according to the appellant was as a result of its surrendering the first floor shops to the respondent in October, 2008.

As I have stated above, the alleged surrender was not established. The appellant's rent therefore remained Kshs.780,000/= per month. That being the case the alleged overpayment of rent by the appellant that would have absolved it from paying rent for the suit property from January 2011 onwards was not proved. I am therefore in agreement with the tribunal's finding that the appellant had defaulted in paying rent to the respondent for two months after such rent had become due.

On the issue as to whether the appellant had persistently delayed in paying rent after the same had become due, again the findings of the tribunal cannot be faulted. The evidence that was placed before the tribunal left no doubt that the appellant was struggling to pay rent. The appellant's witness admitted that a number of the cheques that the appellant issued to the respondent for rent were dishonoured for lack of funds. The tribunal did not therefore err in its finding that appellant was inconsistent in its rent payments.

On the appellant's contention that the tribunal should have stayed the proceedings pending the hearing of the High Court cases between the parties, I find no merit on the same. As rightly submitted by the respondent, the appellant did not appeal against the interlocutory ruling by the tribunal that overruled its preliminary objection on the tribunal's jurisdiction to proceed with the hearing of the reference while the said High Court cases were pending. In any event, the appellant did not establish any nexus between the said High court cases and the issues that were before the tribunal for determination. I do not think that the fact that the appellant had sued the respondent for damages excused it from paying rent and doing so consistently.

On the issue of bias, I have not seen any evidence of bias from the record. The fact that the tribunal accepted the evidence by the respondent as against that of the appellant is not evidence of bias. It was entitled to do so after evaluating the evidence from both parties.

Due to the foregoing, I find no merit in the appellant's appeal. The appeal is dismissed with costs to the respondent.

Delivered and Dated at Nairobi this 31st day of January 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Njenga for the Appellant

Mr. Khayota h/b for Mr. Muthui for the Respondent

Mr. Okumu-Court Assistant