



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT NAIROBI

ELC APPEAL NO. 9 OF 2016

ELDOMART HOLDINGS LIMITED.....APPELLANT

VERSUS

THE TICKET COMPANY LIMITED.....RESPONDENT

JUDGMENT

On or about 7th May, 2014, the appellant served the respondent with a notice under Section 4(2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301 Laws of Kenya of its intention to terminate the respondent's tenancy in respect of the premises situated on the 1st Floor of a building known as Woodvale Place owned by the appellant (hereinafter referred to as "the suit premises"). The ground upon which the appellant sought to terminate the respondent's tenancy was that the appellant intended to occupy the suit premises for the purposes of a business to be carried out by the appellant therein.

The respondent objected to the said notice and filed a reference at the Business Premises Rent Tribunal in Nairobi (hereinafter referred to only as "the tribunal") on 28th May, 2014 requesting the tribunal to investigate the notice and determine its validity. The reference by the respondent was filed in Tribunal Case No. 289 of 2014 (hereinafter referred to only as "the tribunal case").

The respondent's reference was heard by the tribunal between 27th November, 2014 and 7th July, 2015. The appellant and the respondent called one witness each. The appellant's Managing Director, Farrah Nurani told the tribunal that the appellant wanted the suit premises for its own use. He stated that the appellant wanted to establish a Yoga Studio in the space that was occupied by the suit premises and that the appellant intended to demolish the suit premises for the purposes of putting up the said studio. He stated that the Yoga Studio was supposed to complement the other facilities and activities that were being undertaken by the appellant on the 1st Floor of the building where the suit premises was situated. He stated that the appellant was already operating a business on the 1st Floor of the said building under the name Mind Body and Spirit Library. He stated that the appellant had no problem with the respondent and that the notice of termination was not actuated by malice. He stated that an architect had prepared for the appellant a floor plan for the project and that the appellant had already spent Kshs.15 million in the project. He told the tribunal that the appellant would implement the project as soon as vacant possession of the suit premises was obtained.

In cross-examination by the advocate for the respondent, Mr. Farrah Nurani reiterated that the appellant was operating a business on the same floor (1st Floor) where the suit premises was situated under the name Mind Body and Spirit and that it had operated the business since 2008. He stated that although the business was not registered, it was a legal business. He stated that the business was being carried out under a company known as AAA Pharmaceuticals Limited. He stated that the appellant issued the respondent with a termination notice on 7th May, 2014 but the floor plan by the architect was drawn on 16th June, 2014. He reiterated that once set up the Yoga Studio would be operated by the appellant. He denied that the appellant wanted to evict the respondent from the suit premises because the respondent had refused to sign a lease. He stated that although the appellant had an empty space on the 1st floor of the building on which the suit premises was situated, the same could not accommodate a Yoga Studio. In re-examination he stated that the suit premises was occupying the most ideal space for the said studio.

The respondent's witness before the tribunal was its director, Lalji V. Hirani. He told the court that the respondent was running a travel agency business on the suit premises which was dealing with tourism and air travel. He told the court that the respondent had 8 employees and that it was registered with KATA. He told the court that if the respondent was evicted from the suit premises abruptly, the respondent risked losing its KATA licence. He contended that the notice of termination that was served upon the respondent was malicious. He claimed that there was a time when the appellant denied the respondent access to the toilets serving the suit premises and that it took the intervention of the tribunal for them to be given access. He contended further that the appellant had also increased the respondent's rent to Kshs.117,880/- per quarter. He claimed that the business known as Mind Body and Spirit had no relationship with the appellant and that the appellant's real intention was to create room for another tenant. He stated that the respondent had occupied the suit premises since 1996 and that it would require at least 2 years to vacate the premises. In cross-examination by the appellant's advocate, he reiterated that the respondent would require at least 2 years to vacate the suit property. He stated that the respondent would need time to find alternative premises which are ideal

for its business.

After the close of evidence at the tribunal, the parties made closing submissions in writing. In a judgment that was delivered on 22nd January, 2016, the tribunal allowed the respondent's reference and dismissed the appellant's notice with costs to the respondent. In its judgment, the tribunal found that the appellant had established a genuine intention to use the suit premises. The tribunal held however that the appellant had not obtained the requisite approvals for the alterations it wished to carry out on the suit premises and had also failed to demonstrate that it had the financial resources to undertake the project.

It is against that decision that the appellant preferred this appeal. The appellant challenged the decision of the tribunal on 5 grounds set out in its memorandum of appeal dated 8th February, 2016 as follows:

1. That the Chairman of the tribunal erred in law in focusing on the financial ability of the appellant and thereby upholding the reference filed by the respondent
2. That the Chairman of the tribunal erred in fact in holding that the evidence adduced by the appellant was speculative.
3. That the Chairman of the tribunal erred in law in holding that the structural plans produced by the appellant required statutory approvals before the appellant could terminate the respondent's tenancy.
4. That the Chairman of the tribunal erred in law in failing to pronounce himself on all the issues framed for determination.
5. That the Chairman of the tribunal erred in law and fact in upholding the respondent's reference notwithstanding its finding that the appellant had a genuine intention for serving the notice of termination.

The appeal was heard by way of written submissions. The appellant filed its submissions on 9th November, 2017 while the respondent filed its submissions on 31st January, 2018. I have perused the proceedings and the judgment of the tribunal. I have also perused the grounds of appeal and the submissions of counsel. I will consider all the grounds of appeal together. The appellant's notice of termination of the respondent's tenancy was issued under section 7(1) (g) of the Landlord and Tenant (shops, Hotels and Catering Establishments) Act, Chapter 301 Laws of Kenya (" hereinafter referred to only as "the Act") which allows the landlord to terminate a tenancy on the grounds that;

"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."

What the tribunal was supposed to determine was whether the appellant had established an intention to occupy the suit premises for a period of not less than one year for the purposes of its own business.

The objective of the Act is set out as follows:

"An Act of Parliament to make provision with respect to certain premises for the protection of tenants of such premises from eviction or from exploitation and for matters connected therewith and incidental thereto (emphasis added)."

The legislature left no doubt that the Act was enacted for the purposes of protecting tenants. This court must have the said objective in mind while interpreting the Act. The burden was upon the appellant to establish that it had an intention of occupying the suit premises for a period of not less than one year for the purposes of its own business. In the case of *Auto Engineering v Gonella (1978) KLR 248*, it was held that the onus is on the landlord to establish a firm and settled intention to occupy the premises held by a tenant. I have carefully reviewed the evidence that was placed before the tribunal. I am not satisfied that the appellant had established a firm and settled intention to occupy the suit premises for its own business. The tribunal had found that the appellant had established an intention to occupy the suit premises. There was however no evidence that the intention was to occupy the suit premises for the appellant's own business. From the evidence that was placed before the tribunal, the appellant had contended that it was running a business by the name "Mind Body and Spirit" on the 1st Floor of the building on which the suit premises was situated and that due to increased demand by the customers at its "Mind Body and Spirit" Shop, it had become necessary to take over the space on the same floor that was occupied by the respondent and convert it into a Yoga Studio so as to give the "Mind Body and Spirit" clients a place to among others, exercise breath control and meditation. The appellant contended that its "Mind Body and Spirit" business was directly intertwined and correlated with the intended Yoga Studio. When the appellant's witness was asked to shed more light on this "Mind Body and Spirit" business and the proposed Yoga Studio, he told the tribunal that the "Mind, Body and Spirit" business was not registered and that it was being run by another company known as AAA Pharmaceutical Limited. What this meant was that the appellant required the suit premises for the expansion of a business that was not registered and whose existence could not be established and worse still that the business was not being run by the appellant but by another limited liability company.

No evidence was placed before the tribunal regarding the relationship if any that existed between the appellant and AAA Pharmaceutical Limited. Under Section 7(1) (g) of the Act, the appellant could not terminate the respondent's tenancy on the ground that it required the suit premises for a business that was to be run therein by a third party. The appellant did not therefore establish the ground on which it sought the termination of the respondents' tenancy. I am unable to fault the tribunal in its holding that the appellant's failure to produce in evidence approved plans for the renovations it intended to undertake on the suit premises and to demonstrate financial ability to undertake the project undermined and created a doubt over its intention to occupy the suit premises. I am in agreement with the appellant that these issues considered in isolation could not determine the appellant's intention. However, considered together with the other evidence that was before the tribunal which I have alluded to above, they added weight to the respondent's contention that the appellant had no firm and settled intention to occupy the suit premises for its own business. In the final analysis, I am of the view that the tribunal arrived at the correct decision but gave wrong reasons for it.

The upshot of the foregoing is that I find no merit in the appeal before the court. The same is dismissed with costs to the respondent.

Delivered and Dated at Nairobi this 14th day of February 2019

S. OKONG'O

JUDGE

Judgment read in open court in the presence of:

Mr. Mapesa h/b for Mr. Njenga for the Appellant

Mr. Manyara h/b for Mr. Okemwa for the Respondent

Mr. Waweru-Court Assistant