



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELCIVIL APPEAL NO 33 OF 2017

DR CYPRIANUS OKOTH OKERE.....APPELLANT

=VERSUS=

NACICO SACCO SOCIETY LIMITED.....RESPONDENT

(Being an appeal from the judgment of Mr. Mbichi Mboroki, Chairman of the Business Premises Rent Tribunal delivered on 18th August 2017 in BPRT Case No. 41 of 2013 Nairobi, Dr. Cyprianus Okoth Okere vs Nacico Sacco Society Ltd)

JUDGEMENT

1. This matter arises out of the judgment of Mr. Mbichi Mboroki Chairman Business Premises Rent Tribunal delivered on 18th August 2017 in respect of the tenant/appellant reference. The Hon. Chairman made the following orders:-

“1. That the tenant’s reference dated 20th January 2013 is dismissed with costs to the landlord.

2. That the landlord’s notice dated 21st January 2012 is allowed.

3. The tenant shall vacate and handover vacant possession of the suit premises on or before 1st September 2017 in default eviction order shall issue without further reference to the tribunal.

4. The landlord is granted leave to levy distress and recover all outstanding arrears of rent unless the tenant pays the same on or before 31st August 2017.

5. Costs of the reference to be agreed or taxed by the tribunal”.

2. The tenant/appellant being dissatisfied with the decision filed an appeal to this court on the following grounds:-

1. That the learned chairman erred in law and fact by dismissing the appellant’s reference when no sufficient evidence was adduced by the respondent in the form of a rent book to prove any rent arrears owed by the appellant which decision was unfair and manifestly unjust.

2. That the learned chairman erred in law and fact in upholding the respondent’s notice to terminate tenancy despite the overwhelming evidence that the appellant had in fact overpaid the rent which decision is highly erroneous, unfair and manifestly unjust.

3. That the learned chairman erred in law and fact in disregarding and/or failing to judiciously analyse the evidence of rent payment adduced by the appellant thereby arriving at a finding that the appellant owed the respondent Kshs.157,873 in rent arrears which finding was unfair and manifestly unjust.

4. That the learned chairman erred in law and fact in disregarding and/or failing to judiciously analyse the appellant’s written submissions thereby issuing an eviction order against the appellant which decision is highly unfair and manifestly unjust.

5. That the learned chairman erred in law and fact in granting the respondent leave to levy distress against the appellant

despite overwhelming evidence that the appellant is not in rent arrears which decision is manifestly unjust.

6. The appellant shall upon receipt of the typed proceedings and judgment file a supplementary memorandum of appeal to include other grounds and reasons that may become apparent therein.

3. The appellant prays that:-

1. That the judgment delivered by Mr. Mbichi Mboroki, Chairman of the Business Premises Rent Tribunal on the 18th August 2017 be set aside on its entirety.

2. That the Appellant's reference dated 20th January 2013 be allowed.

3. That the Respondent's notice to terminate tenancy dated 21st January 2012 be dismissed.

4. That the appellant be awarded the costs both in the tribunal and for this appeal.

4. Together with the memorandum of appeal, the appellant also filed a notice of motion seeking stay of execution of the judgment in Nairobi BPRT Case No. 41 of 2013 Hon. Lady Justice Gitumbi granted stay of execution of the judgment on condition that the appellant pays the respondent Kshs.150,000 on or before 31st August 2017, being part of the rent arrears. This order was complied with on 29th August 2017 and the parties filed a consent dated 18th April 2018 which was adopted by the court.

5. On the 27th June 2018, the court directed the parties to file written submissions.

The Appellant's Submissions

6. The appellant's submissions are dated 30th August 2018. The tribunal disregarded and/or failed to judiciously analyse the evidence adduced by the appellant. The appellant had made an overpayment of rent between the year 2001-2012 showing that there was an overpayment of Kshs.21,809. The respondent never rebutted this evidence. The appellant produced copies of cheque stubs of all the rent payments to the respondent, which was not rebutted by the respondent and which evidence was not considered by the tribunal. The tribunal only relied on the respondent's statements of accounts, the demand letter dated 19th January 2010 and the appellants letter dated 19th January 2010.

7. Section 3(3) of Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301, Laws of Kenya provides that in a controlled tenancy it is the responsibility of the landlord to maintain a rent book in the prescribed manner which shall contain among other details all payments of rent. The former manager never kept records and that the Respondent's witness admitted that on cross examination that it is due to the respondent's failure to comply with the law that the appellant mistakenly agreed to pay non existing rent arrears. He has put forward the case of **Kenya Pipeline Company Limited vs Glencore Energy (UK) Ltd Nairobi Civil Appeal No. 67 of 2014.**

8. The tribunal disregarded and or failed to judiciously analyse the appellant's written submissions on record. The appellant provided several tables showing the amounts of rent that he paid to the respondent. The tribunal did not make a reference to them in its judgment. That had it considered the submissions, it would have arrived at a finding that the appellant owned no arrears. He urges the court to allow the appeal.

The Respondent's submissions

9. The Respondent's submissions are dated 3rd October 2018. The basis of its notice to terminate tenancy of the appellant was that as at 31st June 2012 the appellant was in arrears of rent in the sum of Kshs.157,873/- which had been outstanding for more than two months and that he had delayed paying rent. The Appellant's appeal ought to be dismissed and he was in breach of the terms of the tenancy. According to third schedule of the landlord and tenant (shops, hotels and catering establishment) Act, it is an implied term in a controlled tenancy that the tenant will pay rent for the premises in advance thus it would be a breach of the agreement if the tenant does not pay the agreed rent in advance. Section 7(1) (b) of the Act, entitles the landlord to terminate a tenancy if the tenant has defaulted in payment of rent for a period of two months after such rent has become payable or has persistently delayed in paying the rent which has become due or payable.

10. The respondents analysis of the rent as at 23/5/2015 produced before the tribunal as landlords exhibit 6 on page 157 of the record of appeal which shows that rent arrears due from the appellant had been carried forward from the year 2006 and as at 2012, he was in arrears of Kshs.157,873/-. There was no evidence tendered to the tribunal to show that the appellant requested for a rent book in order to check how much was due and that the respondent refused to furnish it. The cheque stubs produced by the appellant are not evidence of payment of rent as it is not clear what the cheques were for. He could have be repaying a loan as he is a member of the respondent SACCO. The only proof of payment is by way of receipts.

11. The notice to terminate the tenancy was justified and the appellant has not shown how it is erroneous as the respondent complied with the provisions of section 4(4) of the Act. The respondent has put forward the case of **Dorca Ondieki Gisege vs Nyakarangania Farmers Co-operative Society (2010) eKLR; Amos Wenyere & another vs Ashford Murithi Muregi & 2 Others [2017] eKLR.**

The respondent contends that the tribunal was proper in upholding the respondent's notice to terminate tenancy and urges the court to dismiss this appeal and uphold the judgment of the tribunal dated 18th August 2017 with costs to the respondent.

12. I have considered the grounds of appeal, the response, the written submissions of counsel and the authorities cited.

13. Jane Mukindia a property manager with the respondent (landlord) on the tribunal told the court that the appellant is a tenant of the landlord and a member of the landlord Sacco. She told the tribunal;

“He had been a tenant since 2002. He had a lease agreement with the landlord. I wish to produce a copy of the letter of offer dated 1st September 2002. The lettable area was 393 square feet. The lease was for a period of 6 years. It expired in December 2008. I wish to produce the letter of offer as an exhibit. Landlord exhibit 1. There was a letter of offer of renewal of the lease dated 14th January 2009. The tenant was given a copy of the draft lease. Landlord exhibit 2a and 2b. (The letter and the draft lease). The tenant did not sign the lease. Before the expiry of the lease the tenant was paying Kshs.10,218/- exclusive of VAT and electricity. The rent was increased to Kshs.13,755/- exclusive of VAT and electricity. The tenant was not paying the rent in time. We demanded for rent many times. There was a letter dated 19th January 2010 demanding for rent arrears of Kshs.172,484/- letter produced as exhibit no. 3. The tenant replied to the letter dated 19th January 2010. The letter of reply dated 4th February 2010. The tenant admitted the arrears of rent. Letter produced as exhibit no. 4. The tenant proposed to pay the arrears at the monthly instalment of Kshs.500/- plus the monthly rent of Kshs.13,755/- making a monthly payment of Kshs.18,755/-The tenant did not honour his proposal. As at June 2012 the tenant owed the landlord Kshs.157,873/-”.

She further told the court:-

“I have the current analysis of what the tenant has paid from 2006 upto date. The tenant still owes the landlord Kshs.157,873/- as at 2015. Letter produced as exhibit no. 6”. When cross examined by Mr. Morara for the tenant (now appellant, she told the court

“I maintain that the landlord’s statements which I have produced in court are correct”.

14. The appellant testified in person. He told the court that he was not issued with receipt for the period between January 2001 to 5th January 2005. When cross examined by Mr. Ochieng for the landlord, he told the court:-

“I entered the premises in January 2001. I have a lease. I did not sign a new lease. The rent as per exhibit LL and 2(b) was Kshs.13,755. This is the rent payable upto now. Between 2006 and 2012 there were arrears of rent. The arrears of rent were taken care of by the overpayment. There was no reconciliation to show that I was in arrears of rent. (Witness shown landlord exhibit 4). I proposed to settle the arrears of rent at Kshs.5,000/-”.

15. It is clear from the above, that the appellant was in arrears of rent as at the time the notice to terminate was issued. He also failed to prove at the tribunal that he had made any overpayments. His letter dated 4th February 2010 exhibited on page 155 of the record of appeal confirms that he was in rent arrears and he proposed to pay Kshs.5000/- monthly towards the clearing of the arrears. In addition he was to pay the monthly rent of Kshs.13,750. The appellant has not denied that he wrote this letter. At the end of the trial before the tribunal he had not provided any evidence of overpayment.

16. In his judgment the chairman of the Business Premises Rent Tribunal noted that the tenant did not dispute the landlord demand of Kshs.172,487/-. The tenant’s letter dated 4th February 2010 admitted he was in arrears. He also came to the conclusion that:-

“the tribunal is impressed by the landlord’s statement of account and it has no doubt on its mind that the tenant owes the landlord a sum of Kshs.157,873/- as at 31/6/2012. The tribunal is satisfied that the landlord has proved its case beyond the balance of probabilities and it is entitled to the prayers sought”.

17. The appellant admitted that he was in arrears of rent and requested to pay in instalments of Kshs.5,000 per month and to pay the monthly rent of Kshs.13,750/. The appellant at the time did not raise the issue of reconciliation of accounts but instead made a payment proposal. There is no doubt that it is the landlord responsibility to give the tenant a rent book. However, I find that proof of payment would be by receipts. The respondent presented all the receipts issued to the appellant for payment of rent. The appellant on the other hand failed to prove that he had made an overpayment.

18. Failure to keep rent book therefore is not fatal to the respondent’s case. The cheque stubs produced by the appellant are not evidence of payment of rent. Section 7(1)(b) of the Act entitles the landlord to terminate tenancy if the tenant has defaulted in paying rent for a period of two months after such rent has become payable or has persistently delayed paying rent which has become due and payable.

19. In the case of **Dorca Ondieki Gisege vs Nyakarangania Farmers Co-operative Society (2010) eKLR** D Musinga J stated thus:

“Under section 7(1) (b) of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act, Cap 301 one of the grounds upon which a landlord may terminate tenancy is where the tenant has defaulted in paying rent for a period of two months after such rent has become due or payable. One of the implied terms and conditions of any tenancy is that the tenant shall pay rent in advance except where it is specifically agreed otherwise. Where there is no tenancy agreement as was the case herein the appellant was under an obligation to pay rent in advance. From the evidence on record there is no dispute that the appellant was persistently in arrears of rent and or delayed in payment of the same for several months. At the time of service of the notice of termination of tenancy, the appellant was in substantial arrears of rent. It matters not whether the rent arrears were cleared shortly thereafter”.

I am guided by this authority.

20. As I earlier stated, as at the hearing at the tribunal, the respondent’s witness produced statement of account and a letter dated 19th January

2010 (page 154 of the Record of Appeal) which demanded arrears of Kshs.172,484/- and a reply to the said letter dated 4th February 2010 by the appellant where he admitted he was in arrears of rent and requested to pay it in instalments of Kshs.5000/- per month in addition to paying the monthly rent of Kshs.13,750/-.

21. I find that the respondent notice of termination of the appellant's tenancy is justified in law and has been proved. The chairman could not be faulted for finding that the landlord/respondent's notice dated 21st January 2012 was merited and in dismissing the appellant's reference dated 20th January 2013. The chairman did not have any basis to refuse the notice by the respondent. Where evidence of non-payment was self-evident at the time the notice was issued. I find no reason to set aside and/or vary the judgment rendered on 18th August 2017.

22. In conclusion, I find no merit in this appeal and the same is dismissed with costs to the respondent. The appellant is hereby given sixty (60) days from the date of this judgment to vacate and handover a vacant possession of the impugned premises in default the respondent/landlord be at liberty to evict him using lawful means.

It is so ordered.

Dated, signed and delivered in Nairobi on this 25th day of September 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

.....**Advocate for the Appellant**

.....**Advocate for the Respondent**

.....**Court Assistant**