



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. APPEAL CASE NO. 55 OF 2017

JOHN NGUGI NGIGI.....APPELLANT

=VERSUS=

DANSON NJOROGE MURATA.....RESPONDENT

(Being an Appeal from the Judgment and Orders delivered and made on 17th November 2017 by the Honourable Mbichi Mboroki (Mr) Chairperson, Business Premises Rent Tribunal in Nairobi BPRT Case No 422 of 2015)

JUDGMENT

Background

1. This appeal arises out of the Judgment and Orders of the Business Premises Rent Tribunal (**the Tribunal**) rendered by the Chairman of the Tribunal, Hon Mbichi Mboroki (Mr), at Nairobi on 17/11/2017, in **Nairobi BPRT Case Number 422 of 2015**. The Judgment was rendered in a reference lodged by the appellant on 30/6/2015. The reference challenged the respondent's statutory notice of termination of tenancy served upon the appellant by the respondent under Section 4 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (**the Act**). Through the statutory notice, the respondent sought to terminate the appellant's tenancy on the ground that he intended to carry out extensive renovations and reconstructions on the suit property and he intended to utilize the premises for other ventures and the same could not be done while the appellant was in occupation of the premises. The premises are situated in Ruai, Nairobi.

2. After full trial, the Tribunal evaluated the parties' evidence and submissions and came to the finding that the respondent had satisfied the requirements of Section 7 of the Act. It dismissed the appellant's reference and allowed the respondent's notice of termination of tenancy.

Grounds of Appeal

3. Aggrieved by the judgment and orders of the Tribunal, the appellant brought this appeal seeking to overturn the said judgment and orders on the following verbatim grounds:

- a) That the Learned Chairman of the Tribunal erred in fact and in law in dismissing the tenant's reference filed on 30th June 2015 and allowing the landlord's notice dated 15th April 2015.*
- b) That the Learned Chairman of the Tribunal erred in law and fact in reaching into a conclusion that the landlord had made out a case for vacant possession without giving any reasons thereto was incompetent without giving any reasons therein. (sic)*
- c) That the Learned Chairman of the Tribunal erred in fact and law by not finding that the landlord had not made out his case for vacant possession on the ground on the face of the notice that (upon termination the landlord intends to carry out extensive renovations, reconstruction, and to utilize the premises for other ventures and they cannot do so while you are in occupation.)*
- d) That the Learned Chairman of the Tribunal erred in law in not finding that the landlord's notice was actuated by malice since the reason given for termination based on evidence given was based on need to increase rent without giving a proper notice to increase rent pursuant to provisions of Section 4 (2) CAP 301 Laws of Kenya.*
- e) That the Learned Chairman of the Tribunal was outrightly biased against the appellant and thus occasioning a miscarriage of justice against the appellant since the landlord had not made a case as per the notice and when indeed there were some other premises that the landlord had not attended to despite them being vacant.*
- f) That the Learned Chairman of the Tribunal findings (sic) is contrary to the mischief that was meant to be cured within the meaning and provisions in the preamble of Cap 301 Laws of Kenya, that is- to protect the tenants of such premises from eviction or from exploitation and for matters connected therewith and incidental thereto.*

Submissions

4. On 24/10/2018, with the concurrence of the parties, the court directed that the appeal be canvassed through written submissions. On 7/2/2019, the appellant, through M/s Kithinji Thurania & Company Advocates, filed written submissions dated 7/2/2019. The said written submissions by the appellant were erroneously captioned “**SUBMISSIONS FOR AND ON BEHALF OF THE RESPONDENTS**”. It is however clear from the body of the said written submissions that they were authored by counsel for the appellant and they relate to the appellant. The word “RESPONDENTS” was an obvious error.

5. Mr Kithinji, counsel for the appellant submitted that he had consolidated all the six grounds of appeal for the purpose of arguing the appeal. He argued that the witness who testified on behalf of the respondent did not have a power of attorney nor a letter authorising her to testify and therefore her evidence was contrary to the law of evidence. Counsel added that Exhibit Nos 4 and 5 did not authorize the respondent to undertake extensive renovations, reconstruction and/or removal of the roof. It was counsel’s view that the letter dated 15/9/2014 only granted the respondent authority to undertake painting and floor repairs. The appellant’s view was that the authorized repairs did not warrant termination of the tenancy. It was contended that the evidence of Sarah Wambui Njoroge confirmed that the respondent’s intention was to enrich the appellant and get other tenants who would in turn pay higher monthly rent of Kshs 13,000. Counsel added that the impugned notice was actuated by malice because the respondent did not like the appellant’s business. Lastly, it was argued that if the repairs were necessary, the appellant would have been the first person to request for them. Counsel urged the court to allow the appeal with costs.

6. Mr Kirimi, counsel for the respondent submitted that in dismissing the appellant’s reference and allowing the respondent’s notice of termination, the Tribunal acted in accordance with the provisions of Section 4(2) of the Act. Counsel added that the respondent had proved that he intended to carry out repair works and the inspection report presented in evidence confirmed that the premises were in need of repairs. It was the respondent’s submissions that the Tribunal correctly found that the repairs could not be carried out while the appellant was in occupation of the premises. Counsel further submitted that the 4th and 5th grounds of appeal were ill-guided and unjustified allegations because the grounds set out in the notice of termination of tenancy were provided for under Section 7 of the Act. Lastly, counsel submitted that the Tribunal’s findings and orders were within the law and did not in any way offend the preamble to the Act. He urged the court to dismiss the appeal.

Analysis and Determination

7. I have perused the entire record of the Tribunal and I have considered the six grounds of appeal set out in the memorandum of appeal. I have also considered the parties respective submissions. Similarly, I have considered the relevant legal framework and jurisprudence on the key issue in this appeal.

8. Although the appellant set out six grounds of appeal, Mr Kithinji, counsel for the appellant, elected to consolidate all the six grounds of appeal in his written submissions dated 7/2/2019. Mr Kirimi, counsel for the respondent opted to respond to each of the six grounds sequentially and separately. Taking into account the six grounds and the appellant’s approach of consolidating them into one ground for the purpose of arguing the appeal, the single issue falling for determination in this appeal is whether the Tribunal erred in finding that the respondent had satisfied the requirements of Section 7(1) (f) of the Act. Before I make pronouncements on that single issue, I will set out the general jurisdiction of this court in an appeal of this nature

9. This being a first appeal, the court is required to re-evaluate the evidence tendered and make its own findings and conclusions. Exercise of that appellate jurisdiction is guided by well-established principles. The appellate court will ordinarily not interfere with the trial court’s findings of fact unless it is demonstrated that the findings are based on no evidence or on a misapprehension of evidence or the trial court acted on wrong principles in reaching the findings. See **Ephantus Mwangi & Another vs. Duncan Mwangi Wambugu (1982) IKAR 278**.

10. The reference giving rise to this appeal was provoked by the respondent’s statutory notice of termination of tenancy issued to the appellant under Section 4 of the Act. The notice read thus:

“3. The grounds on which I seek the termination are upon termination the landlord intends to carry out extensive renovations, reconstruction and to utilize the premises for other ventures and they cannot do so while you are in occupation”

11. Section 7(1) (f) provides the following as one of the grounds upon which a landlord may issue a statutory notice of termination of tenancy:

7 (1) (f) that on termination of tenancy the landlord intends to demolish or reconstruct the premises comprised in the tenancy, or a substantial part thereof, or to carry out substantial work of construction on such premises or part thereof, and that he could not reasonably do so without obtaining possession of such premises;

12. The appellant’s key gravamen is that the Tribunal erred in law and fact in reaching a conclusion that the respondent had made out a case for vacant possession without giving any reasons thereto. (See ground number 2). The respondent called his wife, Sarah Wambui Njoroge, as his only witness. In summary, her testimony was as follows: the respondent was her husband, was ill and could not hear properly; she was familiar with all matters relating to the dispute; the appellant was their tenant; they wanted to renovate the premises occupied by the appellant; they had engaged all the tenants and the other tenants had vacated from their respective premises to allow repairs but the appellant had refused to vacate; they had authority from the County Government of Nairobi to carry out repairs; the County Government had given them notice to carry out repairs; and they had put aside money for the repairs; they wanted to repair the floor, do paintwork, repair the damaged walls and put a new roof on the premises. She produced the following documents as exhibits: (i) notice dated 30/8/2014 from

Nairobi City County Government requiring the respondent to carry out repair works to the suit premises; (ii) letter dated 15/9/2014 from Nairobi City County Government authorizing repair works to the suit premises; (iii) Bank Statement showing that the respondent had Kshs 385,344 on the bank account as at July 2018.

13. On his part, the appellant testified that they were six tenants in total. They had all been served with notices. The other tenants had vacated the premises. He had repaired the premises which he was occupying and had no problem with the premises. The respondent had cemented the verandah of the vacant premises and painted the doors but had not removed the roof of the buildings.

14. I have considered both the oral and the documentary evidence tendered before the Tribunal. The respondent's witness tendered a notice from the County Government requiring the respondent to undertake specified repairs including repair works on the floor. She also produced a letter authorizing the respondent to carry out repair works on the premises. Further, she produced a Co-operative Bank statement in the name of the respondent showing that as at 26/4/2016, the respondent held Kshs 385,344 in the bank account. She contended that the said money was intended for repair works on the suit premises. Although the appellant stated that he had carried out repair works in the premises occupied by him and did not require any further repairs, he did not present any approvals authorizing any repair by him or any documentary evidence of the alleged repairs.

15. Having evaluated the evidence presented to the Tribunal, I am satisfied that the Tribunal did not err in its finding that the respondent had satisfied the requirements of Section 7 of the Act and in allowing the respondent's notice of termination of tenancy.

16. Counsel for appellant contended that Sarah Wambui Njoroge was not qualified to testify on behalf of the respondent. No specific Section of the Evidence Act or any other law was cited to support that view. Secondly, throughout the testimony of the witness before the Tribunal, there was no objection from counsel. The competency of the witness or the admissibility of her evidence were not in issue during trial. Indeed, counsel allowed production of various documents by the witness without any objection. I do not therefore think there is a proper basis for challenging the competency of the witness at this stage.

17. The totality of the foregoing is that I see no proper basis for faulting the findings of the Chairman of the Tribunal. The net result is that the appeal herein lacks merit. The appeal is accordingly dismissed. The respondent shall have costs of the appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF SEPTEMBER 2019.

B M EBOSO

JUDGE

In the presence of:-

Danson Njoroge Murata - respondent in person

Court Clerk - June Nafula