



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. APPEAL NO. 2 OF 2019

ASUMPTER WANGARI NJENGA..... APPELLANT

VERSUS

BONAVENTURE MWANGI NJOGA.....RESPONDENT

(Being an Appeal from the Judgment and Orders delivered and made on 20th December 2018 by the Honourable Mbichi Mboroki (Mr.) Chairperson, Business Premises Rent Tribunal, in Nairobi BPRT Case No. 163 of 2017)

JUDGMENT

Background

1. This appeal arises from a Judgment rendered by the Chairman of the Business Premises Rent Tribunal (**the Tribunal**), Hon Mbichi Mboroki, on 20/12/2018, in a reference lodged in the Tribunal by the appellant. The reference was provoked by a notice of termination of tenancy issued by the respondent in relation to business premises located on Land Reference Number 209/1354, situated in Ngara, Nairobi. At all material times, the respondent was the appellant's landlord in the said premises. The respondent served the impugned notice under Section 4 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (**the Act**), contending that he wished to terminate the tenancy because he wanted to occupy the business premises for his personal use for a period exceeding one year.

2. The appellant did not wish to comply with the notice of termination and proceeded to lodge **Nairobi BPRT Case Number 163 of 2017**, contesting the notice. In summary, her case was that she occupied Shop Nos 1 and 3. Shop Number 1 was leased to her by the respondent while Shop Number 3 was handed to her by the previous tenant, Joseph Wahome, whom she paid goodwill of Kshs 350,000 in 2014 with the full knowledge of the respondent's agent, Sedco Consultants Limited. There was a pending dispute in court relating to Shop Number 3, namely, Nairobi ELC No 607 of 2017. On 25/8/2015, the respondent's agents offered to renew her lease for a further term of 6 years. She verbally confirmed her willingness to accept the renewal. She was however not granted the renewal. Her position was that the respondent's notice was not genuine and that the respondent wanted to take her business upon the termination of her tenancy.

3. Upon evaluating the evidence presented to the Tribunal, the Tribunal found that the respondent intended to carry on business in the suit premises and had set aside a sum of Kshs 10,000,000 for the business. The Tribunal further found that there was no evidence before the Tribunal to demonstrate that the respondent had any grudge against the appellant. Consequently, the Tribunal dismissed the appellant's reference and allowed the respondent's notice of termination of tenancy.

Grounds of Appeal

4. Aggrieved by the Tribunal's findings and decision, the appellant brought this appeal and sought the setting aside of the Tribunal's findings and orders on the following verbatim grounds:

a) The learned Trial Chairman erred in Law and in fact by failing to apply the Rule of legality of the Landlord's intended business in the Appellant's/Tenants Reference in the face of uncontradicted and uncontroversial (sic) evidence by Mr. Antony Muiruri, Tenant's/Appellant's witness No. 2, an environment and safety expert, to the effect that the Tenant's/Appellant's premises are statutorily irregular and unsuitable for the Landlord's/ Respondent's intended business.

b) The Learned Trial Chairman erred in law and in fact by not according sufficient weight to the respondent's letter dated 25th August 2015 which clearly and automatically extended the appellant's tenancy for a period of up to 6 years including the year 2021 and automatically ousted the jurisdiction of the Business Premises Rental Tribunal to determine any issues of the tenancy between the appellant and the respondent.

c) The Learned Trial Chairman erred in law and in fact by making a finding that the Business Premises Rent Tribunal had jurisdiction to hear and determine the Reference when it became apparent during the trial that the respondent's letter to the appellant dated 25th August 2015 automatically ousted the jurisdiction of the Tribunal.

d) The Learned Trial Chairman erred in law and in fact by making findings against the appellant that were not supported by any evidence or were so erratic or contradictory that they were incapable of constituting any credible evidence as to justify the respondent's Notice of Termination of the Tenancy.

e) The Learned Chairman erred in law and in fact in not finding that the Notice to Terminate by the landlord/ respondent was tainted with malice and a desire to victimize the appellant/tenant at whatever cost even in the view of glaring evidence of such malice and victimization.

f) The Learned Trial Chairman erred in law and in fact in upholding the respondent's flimsy, inconsistent, fabricated and unjustifiable reasons for termination adduced by the respondent/ landlord thereby failing to consider the law, given that the law is for the protection of the appellant/ tenant; the appellant's/ tenant's evidence before making the impugned orders.

g) The Learned Trial Chairman erred, failed(sic) to appreciate the fact that the Tenant had established goodwill on the premises having been in occupation for a long period thereby making it difficult to get an alternative premise having established that:

a. The appellant had been granted a lease extension by the respondent to stay in the premises for a further 6 years up to sometime in August 2021.

b. The appellant had not defaulted in rent payment.

c. The appellant had an estimated stock and machine worth Kshs. 80,000,000/=.

d. The landlord had an alternative to occupy the rear of the suit premises which had enough space to carry on his intended business.

h) The Learned Trial Chairman erred in law and in fact in not finding that the notice to terminate was premature, unjustifiable and inappropriate hence illegal in the circumstances of the case.

i) The Chairman failed to decide the Reference based on the weight of evidence on record.

Submissions

5. The appeal was canvassed through both oral and written submissions. Mr Mbabu, counsel for the appellant, framed the following two issues as the key issues falling for determination in the appeal: i) **Whether Sedco's letter dated 25th August 2015 automatically extended the appellant's tenancy for a period of 6 years and automatically ousted the jurisdiction of the Business Premises Tribunal**; and (ii) **Whether the Landlord/Respondent had made out a case to justify the orders issued by the Business Premises Tribunal on 20th December 2018**. He argued that the respondent extended her tenancy for a further period of six years through a letter dated 25/5/2015. He contended that pursuant to the said letter, the tenancy was to expire in the year 2021. It was counsel's contention that because the appellant did not formally reject the offer for extension, it was to be presumed that the tenancy was automatically renewed because the respondent continued to receive rent from the appellant. It was counsel's further contention that the six year tenancy fell outside the purview of the Act and therefore the Tribunal did not have jurisdiction to entertain the reference.

6. It was the appellant's further submission that the respondent had not met the requirements of Section 7(1) (g) of the Act because, from the evidence tendered by the appellant, it was not clear whether he wanted to occupy the premises under the name Bonaventure Knitters Embroidery Limited or Bomwanjo Knitters Embroidery Limited. It was further submitted that the respondent had failed to demonstrate that he had obtained the requisite statutory approvals for his intended business. It was contended that to satisfy the requirements of Section 7(1) (g) of the Act, the respondent was required to demonstrate a firm and settled intention to occupy the business premises for a period exceeding one year. Counsel for the appellant contended that occupation through a limited liability company does not meet the requirements of the Act because a limited liability company is a third party. Lastly, it was argued that the respondent had failed to demonstrate that the intended business was permissible by law. Counsel for the appellant urged the court to allow the appeal and set aside the impugned orders of the Tribunal.

7. Mr. Kamau, counsel for the respondent submitted that the Tribunal properly considered the evidence of Antony Muiruri and concluded that the suitability of the respondent's business was an issue to be dealt with by the relevant licensing authorities. He added that the gist of the appeal was the letter dated 25/8/2015 by M/s Sedco Consultants Limited. He argued that the letter did not extend the lease and no lease was prepared and delivered to the appellant. He contended that under Section 3 of the Law of Contract Act and Section 38 of the Land Act, no action can be brought to enforce an interest in land without a signed contract. He contended that once the lease expired and the respondent continued to receive monthly rent from the appellant, the tenancy became a month to month tenancy, hence the Tribunal had jurisdiction over the tenancy. He urged the court to dismiss the appeal.

Analysis & Determination

8. I have considered the tenor and import of the reference giving rise to this appeal, the entire record of the Tribunal, the grounds of appeal, and the parties' respective submissions. I have also considered the relevant legal framework and jurisprudence on the key issues in the appeal.

9. The reference was filed in opposition to the respondent's statutory notice to terminate a subsisting statutory tenancy between the parties to this appeal on the ground that the respondent, as landlord, intended to occupy the business premises for his own use for a period not less

than one year. Upon hearing the reference and evaluating the parties' evidence and the law, the Tribunal found that the respondent had met the statutory requirements, dismissed the appellant's reference, and allowed the respondent's notice of termination of tenancy. The appeal challenges that judgment.

10. 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**.

11. The appellant set out nine grounds of appeal in her memorandum of appeal dated 18/1/2010. In her subsequent written submissions before this court, the appellant argued that the "real issues" falling for determination in this appeal were only two: (i) **Whether Sedco's letter dated 25th August 2015 automatically extended the appellant's tenancy for a period of 6 years and automatically ousted the jurisdiction of the Business Premises Tribunal**; and (ii) **Whether the Landlord/Respondent had made out a case to justify the orders issued by the Business Premises Tribunal on 20th December 2018**. (see page 4 of the written submissions).

12. Taking into account the nine grounds of appeal set out in the memorandum of appeal and the two issues framed by the appellant in her written submissions, it is my view that three key issues fall for determination in this appeal. The first issue is whether the Tribunal erred in failing to find that its jurisdiction was ousted by the letter dated 25/8/2015 by M/s Sedco Consultants Limited. The second issue is whether the Tribunal erred in failing to find that the business which the respondent intended to run in the premises was illegal hence the respondent had not met the requirements of the Act. The third issue is whether the Tribunal failed to consider and give due weight to the totality of the evidence of the parties in the context of the requirements of the Act.

13. The first issue is whether the Tribunal erred in failing to find that its jurisdiction was ousted by the letter dated 25/8/2015 by M/s Sedco Consultants Limited. The appellant's contention is that M/s Sedco Consultants Limited were the respondent's duly appointed agents engaged to manage the suit premises and the contents of their letter dated 25/8/2018 is very important for the determination of the present appeal. In the said letter, M/s Sedco Consultants Limited invited the appellant to confirm her desire to have a further term of 6 years at the adjusted rent of Kshs 40,000 per month. It is the appellant's contention that the letter created a six years tenancy outside the purview of the Act, hence it ousted the jurisdiction of the Tribunal.

14. I do not agree with that view. The reference giving rise to this appeal was lodged by the appellant in 2017. At that time, the appellant had in her possession the letter dated 25/8/2015. The appellant did not object to the Tribunal's jurisdiction to entertain the dispute. Consequently, jurisdiction of the Tribunal was not one of the issues which the Tribunal was invited to determine in the reference. Indeed, in her written submissions before the Tribunal, the appellant made the following submissions in paragraph 2 regarding the issues falling for determination by the Tribunal.

" In our view, there are only two issues for determination by this Tribunal which are, one whether the termination notice issued by the Landlord to the tenant is justified and two, whether the said notice ought to be given effect by this Honourable Tribunal"
(see paragraph 2 on page 42 of the Record of Appeal)

15. In my view, jurisdiction of the Tribunal not having been one of the issues falling for determination by the Tribunal, the issue of jurisdiction cannot be canvassed as a ground of appeal at this stage. I say so partly because the reference giving rise to this appeal was filed by the appellant (not by the respondent) and the appellant never raised the issue of lack of jurisdiction on part of the Tribunal. If she had doubts on the Tribunal's jurisdiction, she was entitled to apply to the Tribunal to strike out the respondent's statutory notice on the ground that the tenancy fell outside the purview of the Act. She failed to do so. She ventilated her case fully and invited the Tribunal to make a substantive finding in her favour on the premise that the Tribunal had jurisdiction. She is now raising the issue of jurisdiction at the appellate stage after the Tribunal rendered a finding unfavourable to her. This, in my view, is untenable.

16. Not too long ago, the Supreme Court made it clear in the case of **Mohamed Abdi Mohamed v Ahmed Abullahi Mohamad & 3 others; Ahmed Ali Mukta (Interested Party) [2019]eKLR** that a litigant in an appellate court is not at liberty to introduce fresh issues which were not canvassed or pronounced on in the lower court. It is therefore my finding that the Tribunal did not error in failing to find that the letter dated 25/8/2015 ousted its jurisdiction to entertain the appellant's reference. This is because, the question as to whether the Tribunal had or lacked jurisdiction to entertain the reference was not one of the issues canvassed before the Tribunal nor one on which the Tribunal was invited to make a determination

17. The second issue is whether the Tribunal erred in failing to find that the business which the respondent intended to run in the premises was illegal hence the respondent had not satisfied the requirements of the Act. The appellant called one Antony Muiruri who testified that he was an environmental impact assessment expert. He produced a report which he had authored at the behest of the appellant, in which he contended that the business proposed to be carried out on the suit premises by the respondent was not suitable for the location. The Tribunal considered the issue and found it to be a hypothetical issue because it could only be considered by the licensing authorities after the respondent had submitted the application for licence in respect of the intended business. The Tribunal found that the respondent had retired from formal employment and had genuine intention to use the suit premises for his own use.

18. From the record of appeal (page 70), the National Environment Management Authority (NEMA) contended that the report was authored by Antony Muiruri in contravention of Section 6 of the Code of Practice and Professional Ethics for Integrated Environmental Assessment and Audit Experts because the author purported to procure a report involving a project by the respondent without the consent or involvement of the respondent. Secondly, it is clear from the report that it was procured after the respondent had closed his case.

19. The report lacked the input of the project proponent. It lacked the finer details of the proposed business and any mitigating factors which the proponent proposed to put in place to ensure the environment and the neighbourhood were not adversely affected. I therefore agree with the view taken by the Tribunal on Antony Muiruri's evidence. My finding on the second issue therefore is that the Tribunal did not err in

failing to find that the business which the respondent intended to run in the premises was illegal.

20. The last issue is whether the Tribunal failed to consider and give due weight to the totality of the respective evidence of the parties in the context of the requirements of the Act. Section 7 of the Act sets out the grounds upon which a controlled tenancy may be terminated by a landlord. One of the grounds upon which a landlord is allowed to terminate a controlled tenancy is when the landlord himself intends to occupy the premises for a period of not less than one year for the purposes or partly for the purposes of a business to be carried on by him in or at the premises.

21. The respondent testified that he had retired from formal employment and he had set aside Kshs 10,000,000 for the purpose of starting a business at the premises. He wanted to use Shop Nos 1 and 2 for the purpose of the business. Shop No 2 had remained vacant because he wanted to use it together with Shop No 1 which was occupied by the appellant. He produced bank statements to show that he had put aside the requisite funds for the intended business. He had incorporated a one man company and procured licence from the County Government.

22. The appellant contended that the requirements of Section 7(1) (g) of the Act were not met because the respondent intended to carry out business in the name of a limited liability company as opposed to carrying out business in his own name. It is noted from the respondent's oral and documentary evidence presented to the Tribunal, and from the written submissions made before the Tribunal that the Respondent procured the registration of Bonwanjo Knitters Embroidery Limited as a one man company which he sought to use as his business vehicle. There was no controverting evidence to suggest that the said one man company belonged to a third party.

23. Having evaluated the above evidence, I am satisfied that the respondent tendered evidence which met the requirements of Section 7 (1) (g) of the Act. It is therefore my finding that the Tribunal did not fail to consider and give due weight to the totality of the respective evidence of the parties in the context of the requirements of the Act.

24. In light of the above findings, I hold that this appeal lacks merit and is rejected. The appeal is accordingly dismissed. The respondent shall have costs of the appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF SEPTEMBER 2019.

B M EBOSO

JUDGE

In the presence of:-

Mr Lawrence Mbabu for the appellant

Mr Bonaventure Mwangi Njoga - the respondent – present in person

Court Clerk - June Nafula