



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC APPEAL CASE NO 44 OF 2017

PIONEER HOLDINGS (AFRICA) LIMITED..... APPELLANT

VERSUS

RUP PHARM LIMITED.....RESPONDENT

(Being an Appeal from the Judgment delivered on 13th October 2017 by the Honourable Mbichi Mboroki (Mr) Chairperson, Business Premises Rent Tribunal in Nairobi BPRT No. 300 of 2013)

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 13/10/2017, in a reference lodged in the Tribunal by the respondent. The reference was provoked by a notice of termination of tenancy issued by the appellant in relation to business premises located on Land Reference Number 209/2546, situated within the Nairobi Central Business District. At all material times, the appellant was the respondent's landlord in the said premises. The appellant served the notice under Section 4 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (**the Act**), contending that it wished to terminate the tenancy because it wanted to occupy the business premises for a period not less than one year for the purpose of its business.

2. The respondent did not wish to comply with the notice of termination and proceeded to lodge **Nairobi BPRT Case Number 300 of 2013**, contesting the notice. In summary, its case was that it had been in occupation of Shop Number 1 (**the business premises**) for over 20 years where it had established a pharmacy. It contended that the appellant's notice was not genuine. It further contended that the appellant wanted to terminate the tenancy because it did not get the increment of rent which it had sought in Tribunal Case No. 499 of 2008. The respondent stated that the appellant had been harassing them and had refused to issue them with receipts for payments in respect of rent since May 2013. On its part, the appellant contended that the notice was *bonafide* and legitimate.

3. Upon evaluating the evidence presented to the Tribunal, the Tribunal found that the appellant had not satisfied the requirements of Section 7 of the Act. Consequently, the Tribunal allowed the respondent's reference and dismissed the appellant'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 judgment and orders on the following verbatim grounds set out in its memorandum of appeal:

- a. The Learned Chairman erred in allowing the respondent's reference dated 26th April 2013.**
- b. The Learned Chairman erred in dismissing the appellant's notice dated 20th February 2013 with costs.**
- c. The Learned Chairman erred in failing to find that the appellant was entitled to terminate the respondent's tenancy.**
- d. The Learned Chairman erred in failing to consider and accept the appellant's evidence in support of its case.**

Submissions

5. The appeal was argued by way of written submissions. The appellant combined its submissions on grounds 1 and 2. It was submitted that the appellant had not met the requirements of Section 7 (g) of the Act. It was further submitted that the Tribunal's finding that the premises were not suitable for the appellant's particular departments was arrived at without any evidence or basis. The appellant argued that it had

produced floor plans which indicated that the premises were spacious and suitable for the appellant's use. Reliance was placed on **Zacharia Orwa Ondoro vs South Nyanza Sugar Co. Ltd [2108] eKLR** where Justice Mrima interfered with the finding of the subordinate court on the ground that the decision of the trial court was based on an issue that had not been placed before it for determination. It was further contended that the landlord as legal owner of the premises was entitled to use it for its own purposes. Reliance was placed on **Sohan Singh & Sons Limited vs Parkview Properties Limited [2004] eKLR**. It was argued that Article 40 of the Kenyan Constitution provided for the right of every person to own and enjoy his property and therefore, the Tribunal did not have a right to dictate what the appellant could do with its property.

6. On ground 3 of the appeal, it was submitted that the appellant's notice of termination of tenancy was lawful and fully compliant with the provisions of Section 4(2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments Act) Cap 301. It was argued that the termination notice issued to the respondent stated the reason for terminating the tenancy. Reliance was placed on **Alex Kadenge Mwendwa vs Grace Wangari Ndikimi & 2 others [2006] eKLR**. On ground 4 of the appeal, it was submitted that the appellant had produced enough evidence to prove that its intention to occupy the premises was genuine. It was further submitted that the appellant had produced a layout plan which showed that the premises were spacious enough to accommodate the appellant's departments. Reliance was placed on **Hannah Wanjiku t/a Guthera Provision Store vs Jowell T Kamano [2004]eKLR** where the court held that the landlord had demonstrated a firm and settled intention to use the premises for his own business.

7. The respondent filed its submissions on 15/7/2019. It was submitted that the landlord's notice to terminate the tenancy was not genuine. It was argued that rent had been assessed twice but was never enhanced to the level which the appellant wanted. It was contended that the appellant's failure to get the desired rent is what prompted the appellant to issue the notice of termination of tenancy. Reliance was placed on **Gurdial Singh & another v Indian Spray Painters [1995] eKLR** where the court held that the landlord's intention to terminate the tenancy had not been proved on a balance of probability considering that in the past, he had issued notices for other reasons. In this case, the Tribunal found that the landlord who was not satisfied with the rent paid by the tenant preferred to have the premises for its own use.

Analysis & Determination

8. I have considered the tenor and import of the reference before the Tribunal, the evidence tendered before the Tribunal, the Judgment of the Tribunal, the grounds of appeal in this appeal, and the parties' respective submissions in the appeal. I have also considered the relevant legal framework and jurisprudence on the key issue in this appeal. The reference was filed in opposition to the appellant's statutory notice to terminate a subsisting statutory tenancy between the parties to this appeal. The ground for termination was that the appellant, as landlord, intended to occupy the business premises for its 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 appellant had not met the statutory requirements, dismissed the appellant's notice of termination of tenancy and allowed the respondent's reference. The appeal challenges the judgment.

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 the 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. Taking into account the four grounds set out in the memorandum of appeal together with the parties' submissions, the single broad issue falling for determination in this appeal is whether the Tribunal failed to consider and accord due weight to the totality of the parties' respective evidence in the context of the requirements of Section 7(g) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (**the Act**). Section 7(g) of the Act contains one of the seven (7) statutory grounds upon which a landlord in respect of a controlled tenancy is allowed to issue notice of termination of tenancy. The ground contained in the legal framework relates to the landlord's intention to occupy the premises for a period of not less than one year for the purpose or partly for the purpose of a business to be carried on in the premises by the landlord or at his residence.

11. The Tribunal's verbatim findings in the reference were as follows:

- i. The Tribunal is satisfied that the Landlord has sufficient space in his other properties in which the services being sought to be relocated to the Tenant's premises can be based without evicting the Tenant.**
- ii. The Tenant's premises are on the ground floor and the Tribunal doubts the suitability of relocating the departments of the Landlord on the ground floor shop.**
- iii. The Landlord has sufficient resources to relocate the departments in issue to the Tenant's premises.**
- iv. The Landlord is not satisfied with the current rent being paid by the Tenant and would rather have the premises for its own use.**
- v. The Tenant herein is a protected Tenant and the rents payable can only be increased by the procedure set out in Cap 301.**
- vi. The Tribunal is satisfied that the Landlord has not met the threshold of the good faith and wants to terminate the tenancy of the Tenant because of the rent of the Tenant is paying which the Landlord considers to be below the open market rent.**

12. I have on my own evaluated the evidence tendered by the parties before the Tribunal. The notice of termination leading to the filing of the reference was preceded by rent disputes between the parties herein. In the year 2000, the parties were involved in a rent dispute which culminated in a ruling by the Tribunal in 2006 in which the Tribunal increased rent. In 2008, the parties were involved in yet another rent dispute in the Tribunal. The appellant wanted monthly rent to be increased. Although the Tribunal increased the monthly rent, the appellant

did not get the figure it wanted. The notice of termination came about one year after the Tribunal had declined to grant the appellant the desired rent.

13. Secondly, Mr Shiraz Jeraj who gave evidence on behalf of the appellant testified in his evidence in chief that the respondent's rent was one of the lowest in the building and that the premises occupied by the respondent was not generating the market rent. Based on the above evidence, the Tribunal found that the appellant was not satisfied with the rent paid by the respondent and that was the reason why it wanted to terminate the tenancy.

14. In a protected tenancy, the avenue of redress available to a landlord in relation to low rent is to file a rent dispute and have rent assessed. In the present appeal, the appellant utilized the avenue twice but did not get the desired rent. The appellant's only witness, purposely or inadvertently, testified that the low rent was one of the considerations informing the appellant's decision to terminate the tenancy. In my view, the appellant having led evidence to the effect that the rent paid by the tenant was low and was one of the factors (although not the main factor) informing its decision to terminate the tenancy, the Tribunal properly found that the ground set out in the notice of termination fell short of the requirements of Section 7(g) of the Act.

15. It is also noted from the evidence on record that whereas the appellant contended that the intended relocation of some of its departments to the suit premises was occasioned by its expanding property portfolio, no evidence was tendered to demonstrate the additional properties which had been acquired by the appellant between the date when the ruling on the last rent dispute was rendered by the Tribunal and the date when the appellant issued the impugned notice of termination of tenancy.

16. Counsel for the appellant faulted the Tribunal for finding that the suit premises were unsuitable for the appellant's intended use yet there was no evidence to support that finding. Although I agree with counsel on this point, the other findings by the Tribunal cannot be faulted and, in my view, outweigh this one error.

17. The result is that this appeal lacks merit. I accordingly reject the appeal. Parties shall bear their respective costs of the appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF OCTOBER 2019.

B M EBOSO

JUDGE

In the presence of:-

Sebastian Advocate for the appellant

Court Clerk - June Nafula