



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC CIVIL APPEAL NO. 2 OF 2019

PERIS WACERA KAMOCHEE.....APPELLANT

VERSUS

JOSEPH MWANGI WAMBUGU

(Sued as the executor of the will of WAMBUGU MBORA.....**RESPONDENT**)

(Appeal from the judgment and order of the Business Premises Rent Tribunal at Nakuru

(Hon.Mbichi Mbokori, (Chairman) delivered on the 25th January 2019

in the BPRT No.57 of 2016.

J U D G M E N T

1. This is an appeal against the judgment of Mbichi Mboroki, Chairman, Business Premises Rent Tribunal delivered on 25th January 2019 in Nakuru BPRT No. 57 of 2016. By the judgment the Tribunal dismissed the Tenant's (Appellant) reference dated 17th August 2016 and allowed the Landlord's (Respondent) Notice to Terminate Tenancy dated 22nd July 2016. The Tribunal further ordered the Tenant /Appellant to vacate and handover vacant possession of the suit premises on or before 1st March 2019 and in default eviction to issue. Further the Tribunal allowed the landlord/Respondent to levy distress and recover outstanding rent arrears amounting to Kshs.2,000,000/=. The Tenant was also ordered to pay costs of the Landlord for the reference and the Auctioneers charges in the event of distress.

2.The appellant was aggrieved by the judgment of the Tribunal and has appealed to this Court against the whole judgment of the Hon. Mbichi Mboroki, Chairman of the Tribunal and has set out the following grounds of appeal as per the memorandum of appeal dated 6th February 2019 filed in Court on the same date:-

- 1. That the learned Chairman of the Tribunal erred and misdirected himself in dismissing the Appellants reference to the Tribunal dated 17th August 2016.***
- 2. That the learned Chairman of the Tribunal erred in law and fact in allowing the Respondent's Notice dated 22nd July 2006.***
- 3. That the learned Chairman of the Tribunal erred in law and fact the failing to find and hold that the Appellant had deposited the sum Ksh.2,000,000/= with Respondent herein as a deposit to an aborted sale agreement with the Respondent and which amount should have been utilized as rent.***
- 4. That the learned Chairman of the Tribunal therefore erred in law and fact in allowing the Respondent to levy distress and recover the disputed arrears of Ksh.2,000,000/= within 14 days from the date of the judgment.***
- 5. That the learned Chairman of the Tribunal therefore erred in law and fact in ordering the Appellant to pay the auctioneers charges for the distress for rent and the cost of the reference.***
- 6. That the learned Chairman of the Tribunal erred and misdirected himself in the application of the principles of the law applicable in all circumstances of the case and therefore failed to exercise his direction judiciously.***

3. The Appellant prays that the judgment of the Hon. Chairman of the Business Premises Rent Tribunal be set aside and substituted therefore

with an order allowing the Appellant's Reference dated 17th August 2016 and dismissing the respondent's Termination Notice dated 22nd July 2016. The Appellant further prays for costs of the appeal and the costs before the Tribunal.

4. The brief facts giving rise to this appeal are that the appellant was a tenant in the Respondent's premises **Nakuru Municipality Block 10/20** at a monthly rent of Kshs.80,000/= under a lease /agreement dated 26th August 2008. Prior to the appellant entering into the lease agreement with the respondent the premises had been leased to her late husband one Bernard Kamoche from 1999 at the monthly rent of Kshs.45,000/=. The Appellant signed afresh lease when her late husband's lease expired. The appellant paid rent for the initial term of the lease (5 years and 3 months) and up to 2015 but declined to pay the monthly rent from January 2016 stating that her husband had paid a deposit of Kshs.2,000,000/= towards the purchase of the property that did not materialize and that she was offsetting the rent against that deposit.

5. The appellant's nonpayment of the agreed monthly rent prompted the respondent to serve the Appellant with a Landlord's Notice to Terminate Tenancy pursuant to Section 4(2) of the Land Lord and Tenants(shops, Hotels and Catering Establishment) Act, Cap 301 Laws of Kenya on the ground that the appellant had defaulted in payment of rent for a period exceeding two months when the same had become due and payable. This was the notice that prompted the Reference before the Tribunal that culminated in the judgment the subject of the instant appeal.

6. The evidence adduced by the parties before the Tribunal where both the Appellant and the respondent testified in support of their respective case is set out in the proceedings before the Tribunal forming part of the record of Appeal. The respondent's evidence was simply that the Appellant was a tenant at their plot **Nakuru Municipality/Block10/20** and was paying monthly rent of Kshs.80,000/=. The Appellant had been a tenant for 10 years pursuant to a tenancy agreement of 26th August 2008. That the appellant had not paid rent for 2 years by 22nd July 2016 when the Respondents gave her a Notice to Terminate the Tenancy. The Respondent/Landlord testified that the Appellant had not paid rent amounting to Kshs2,000,000/=. The Respondent stated that the Appellant's husband had bought the business as a going concern intimating that any sum of Kshs2,000,000/= that the Appellant's deceased husband may have paid was for the purchase of the business and could not be applied towards payment of rent. The Respondent stated the appellant entered into a fresh lease agreement after the expiry of the lease in favour of her late husband. He stated there was no documentary evidence to support the alleged payment of the sum of Kshs.2,000,000/= by the appellant's late husband.

7. The Appellant in her evidence stated that her late husband Bernard Kamoche was a tenant in the demised premises from 1999 and was paying a monthly rent of Kshs.45,000/=. When the lease given to her husband expired, the Appellant stated she signed the lease dated 26th August 2008 and that the current monthly rent was Kshs.80,000/=. The appellant stated her late husband had paid a deposit of Kshs.2,000,000/= towards the premises but did not furnish any evidence of the payment or what the payment was for. She testified that she paid rent upto 2015 and had opted to offset rent against the deposit of Kshs.2,000,000/= that her late husband had paid. She stated she had to resume rent payment from January 2018.

8. The appellant in cross examination agreed there had been a running butchery business as at the time her husband became a tenant in the premises. The appellant admitted she never participated in the negotiations at the time her husband negotiated the initial lease but said she was aware he paid a deposit of kshs2,000,000/=. After the death of her husband the appellant continued to pay the rent of Kshs.45,000/= per month until the expiry of the initial lease in favour of her husband. Upon renewal of the lease in her name the rent was revised and agreed at Ksh.80,000/= which she continued to pay up to 2015 when she decided to offset further rent against the deposit of Kshs.2,000,000/=. The Landlord/Respondent was not agreeable to that and hence the notice to terminate the tenancy and the resultant reference before the Tribunal.

9. I have endeavored to set out, albeit, briefly the evidence adduced by the parties before the Tribunal because as an appellate Court of first instance this Court has a duty and indeed an obligation to reevaluate the evidence, assess it and make its own conclusions . That is in accord with the Principles stated in the case of *Selle – vs- Associated Motor Boat Co. Ltd (1968)* EA 123 and *Williamson Diamonds Ltd –vs- Brown (1970)* EAI. In *Selle -vs- Associated Motors Ltd (Supra)* the duty of an appellate Court was set out in these words.

“—the duty of the first appellate court is to rehear the case by considering the evidence on record, evaluate it itself and draw its own conclusion, in deciding whether the judgment of the trial court should be upheld as well of course, deal with any questions of law raised on the appeal.”

10. The Court hearing the appeal must however be cautious before interfering with the trial Court's findings of fact and should not do so unless it is patently clear the findings were based on no evidence at all, or on a misapprehension of the evidence or if it is demonstrated that the Court acted on wrong Principles in reaching the findings. In the case of *Kiruga –vs- Kiruga & Another (1988)* KLR 348 the Court held that :-

“An Appeal Court cannot properly substitute its own factual findings for that of a trial Court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong”

11. In the matter before the Court the evidence was that the respondent served a notice for termination of tenancy on the appellant on the ground that the appellant had failed to pay rent for a period exceeding two months after the rent had fallen due. The appellant before the Tribunal admitted she had paid rent up to 2015 but stopped payment of further rent ostensibly because she was offsetting rent from a deposit of Ksh.2,000,000/= that her late husband had paid to the landlord. It is not clear or apparent when the alleged deposit of Kshs.2,000,000/= was paid. There was no receipt or acknowledgement of the payment produced in evidence. It was further not clear when the deposit was paid, and if indeed it was paid, for what purpose. From the evidence the appellant's husband died before she entered into the lease agreement dated 26th August 2008. In her evidence the appellant stated that when the lease entered into by her husband expired she entered into a lease in her own name and the rent was revised from Kshs.45,000/= to Kshs.80,000/=. She stated she paid rent at Kshs45,000/= until her late husband's lease expired. **If her husband had placed a deposit of Kshs.2,000,000/= why did it take the appellant more than 7 years to seek to appropriate the same as rent?. Why was no agreement struck in regard to any such deposit at the time she signed the fresh lease? Further, how come she did not seek a formal agreement with the landlord in regard to offsetting the deposit against rent?**

These questions beg answers and no answers were availed.

12. From the evidence it is evident that the decision of the appellant to offset the rent from the alleged deposit was unilateral and was not consensual. While there was no clear evidence by the respondent that there was such a deposit paid, the respondent stated the appellant's late husband and the landlord (now also deceased) negotiated the terms of the initial lease which included sale of the business that was ongoing in the premises. According to the Respondent the payment of Kshs.2,000,000/= was for the purchase of the business. The learned Chairman of the Tribunal held that there was no documentary evidence to support the payment of the sum of Kshs.2,000,000/= and/or any evidence to show what the payment was for. The Chairman further held the appellant's act of offsetting Ksh.2,000,000/= against the rent due to the landlord lacked any legal foundation and that it was calculated to deprive the landlord of rent that had fallen due.

13. Upon evaluation of the evidence I do not find any basis upon which I could possibly fault the learned Chairman of the Tribunal. There was clearly no evidence to support the payment of the sum of Kshs.2,000,000/= and or if it was paid, the purpose for which it was paid. The averment that it was for the purchase of the business that was being carried on in the premises cannot be discounted. The Appellant admitted in evidence that she was not present when her husband negotiated the lease terms and therefore could not clarify on what account the deposit was paid, if at all it was paid. The fact that the appellant entered a fresh lease agreement with the Landlord in August 2008 after her husband's death and there was no mention of the alleged deposit in the new lease speaks volumes. The appellant further paid rent up to 2015 without raising any issue of the deposit. What changed to trigger the unexplained decision to offset the rent from the alleged deposit?

14. The undeniable fact was that at the time the Landlord served the Tenant /Appellant the Notice to Terminate the Tenancy dated 22nd July 2016, the tenant had not paid rent for a period exceeding two months. There was no agreement that she could offset the rent from any deposit. The tenant had been paying rent from 1st October 2008 when her lease commenced and there was no evidence tendered to show that the mode of rent payment had been altered in any respect. The Tenant/ Appellant could not arbitrarily determine how and when to pay rent when there was a lease agreement that provided how the rent was payable. Any alteration of the lease agreement could only be effective if there was agreement between the parties. There was none.

15. The net result is that find no merit in the appellant's appeal and the same is dismissed with costs to the Respondent.

JUDGMENT DATED SIGNED AND DELIVERED AT NAKURU THIS 28TH DAY OF NOVEMBER 2019.

J M MUTUNGI

JUDGE