REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELCA NO. 25 OF 2015

(Formerly Nyeri HCCA NO. 29 OF 2009)

NGUNJIRI WAHOME ..... APPELLANT

-VERSUS-

KIYU GRADE CATTLE BUYING SELF HELP GROUP ..... RESPONDENT

(Being an appeal from judgment and decree of the Chairman Rent Restriction Tribunal, Nyeri (The Hon. Mochache) made on 12th March, 2009 in Nyeri B.P.R.T Case Nos. 68 and 69 of 2008)

JUDGMENT

Introduction

1. On 24th July, 2008 the respondent issued the appellant with a notice of termination of the tenancy that existed between them.

2. The notice was premised on the ground that the tenant had persistently defaulted in paying monthly rent when due and payable for more than sixteen (16) months amounting to Kshs.12,960.00.

3. Upon being served with the notice, the appellant filed a complaint against the respondent.

4. The complaint was that the respondent had persistently refused to refund the monies used to install steel doors, windows, replacing ceiling with timber ceiling and cement given to them. The complaint also related to payment for water to OMWASCO.

In total, the appellant claimed Kshs.32,120/= from the respondent on account of developments he had effected on the suit property (Plot No.16B Witima Market).

5. In his complaint, the appellant urged the Tribunal to order the respondent to refund all the above monies or order for the money to be converted into rent.

6. When the references preferred before the Tribunal came up for hearing, the respondent through its assistant secretary, Joseph Kiriba (P.W.1), informed the Tribunal that the appellant is their tenant in plot No. 16b at Witima Market, Kerima Location Othaya Division.

7. The Tribunal heard that the appellant took over the tenancy of his mother, Mary Wangari who had been their tenant for 9 years and 6 months. The Tribunal heard that during the time the appellant's mother was a tenant, she was offsetting rent arrears of kshs. 33, 283/-. In that regard, he produced minutes of the general meeting of the respondent held on 16th June, 2001 as Exhibit 1.

8. P.W.1 informed the Tribunal that he did an agreement with the appellant's mother to the effect that the money the respondent owed her had been paid and that she would start paying rent. He produced the agreement as Exhibit 2.

9. It was the testimony of P.W.1 that from that time the appellant became their tenant and began paying rent. He, however stopped paying rent from December, 2006. To show that the appellant was paying rent before he stopped, he produced receipt no. 2200 and 2192 as Exhibit 5(a) and (b) respectively. He also produced minutes as Exhibit 4.

10. While admitting that the respondent allowed the appellant to install burglar proof windows in the suit properties, P.W.1 informed the Tribunal that they allowed the appellant to offset the Kshs.4000/= for which he provided them with receipts with rent.

11. With regard to the claim in respect of cement, P.W.1 informed the Tribunal that the value of the cement given by the appellant's mother (4 bags) was converted into her monthly contributions. To attest to that fact, P.W.1 produced a letter as Exhibit 6.

12. Explaining that the plot had water, P.W.1 denied the appellant's claim that he incurrred expenses in connecting water to the suit premises.

13. While admitting that the appellant installed a wooden ceiling to the suit property, P.W.1 informed the Tribunal that they had not given the appellant permission to install the ceilings. According to P.W.1 the appellant was to leave with the ceiling.

14. In cross examination, P.W.1 acknowledged that there was no written agreement between the appellant and the respondent which can attest to the allegation that the appellant was a tenant of the respondent. That notwithstanding, he maintained that the fact that all receipts in respect of rent payment were issued in the appellant's name sufficed to prove that the appellant was a tenant of the respondent.

15. The appellant who described himself as a manager of his mother since 1998, denied having defaulted in payment of rent or having refused to pay rent.

16. Maintaining that he incurred expenses totalling Kshs.26,000/= in developing the suit premises, he faulted the respondent for saying that he had used Kshs. 4, 143/= yet he had given them receipts in respect thereof.

17. The Tribunal heard that the appellant thought that the respondent would convert the expenses into rent.

18. Upon being cross examined by counsel for the respondent, the appellant maintained that he was not the tenant but he was acting on behalf of his mother. That notwithstanding, he acknowledged that he was listed as the owner of the suit premises by OMWASCO and that receipts issued in respect of the suit premises were issued in his name.

19. Maintaining that he has not refused to pay rent, he explained that after he got the notice to terminate the tenancy, he went to pay all the rent arrears but the respondent refused to receive the money.

20. The appellant's mother, Mary Wangari Wahome who testified as D.W.2, informed the court that the she is the tenant.

21. Explaining that she is a member of the respondent, D.W.2 further informed the Tribunal that the appellant was merely her manager.

22. Like the appellant, D.W.2 informed the Tribunal that she had not refused to pay rent.

23. Explaining that there is bad faith between them and the management of the respondent, D.W.2 stated that she is never invited to attend the respondent's meetings.

24. Wondering how the respondent can remove her from the suit premises or even hold meetings in her absence yet she is a co-owner, D.W.2 maintained that she is never invited to attend the meetings of the respondent.

25. In cross-examination, D.W.1 stated that the receipts are issued in the appellant's name because he is her manager.

26. While admitting that they have not been paying rent since December 2006, she explained that they have not been paying rent because they wanted to recover the costs incurred on repairs.

27. Upon considering the evidence adduced before her, the Chairman of the Tribunal entered judgment in favour of the respondent and against the appellant in the following terms:

> **"The landlord issued a notice to terminate the tenancy on the ground that the tenant has defaulted in paying rent from december 2006 to date. The tenant's testimony is that they incurred costs of installing burglar proof windows and doors. The parties however agreed that the costs should be deducted from future rents.**
>
> **The landlord's evidence has been disputed by the tenant. Exhibits produced show that the tenant did attend the meeting of 3rd March, 2002 in which it was decided that the costs incurred on installing burglar proof doors and windows be offset from rent. The cost was worked out to be kshs.4,143/- which was duly deducted from rent.**
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> **The tenant has produced some receipts dated april, 2001 showing that he incurred expenses of more than kshs.10,000/= to fix two windows and one door.**
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> **If find the tenant to be a dishonest person. If indeed the landlord owed him that much money why did he pay rent all the way up to 2006 and then stop?**
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> **Why didn't he file a complaint in the tribunal raising the issue?**
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> **His complaint came in August after the landlord had issued him with a notice to terminate the tenancy. The minutes produced are very clear, the expenses incurred were offset at a monthly rate of kshs. 590/- for seven months. Exhibit 5(a) is very clear how the costs incurred were offset from the rent.**

I have observed the demeanor of the tenant and he did not strike me as an honest person. He has tried to shout to his mother answers from where he was sitting and until i told him to go and sit at the back.

The mother kept on looking at him for guidance and he would nod or shake his head.

Both of them are dishonest people and i eject their evidence as a pack of lies aimed at derailing this tribunal from the path of truth.

The landlord has proved his case as required. The tenant is in arrears since december 2006.

I therefore allow the notice, terminate the tenancy and order the tenant to vacate the premises on 1st april 2009.

In the meantime the landlord is granted permission to levy distress under section 12(1)(h).

Costs to the landlord."

28. Aggrieved by the aforementioned decision, the appellant appealed to this court on the grounds that the learned Chairman of the Tribunal erred by:-

i. Failing to find that the appellant had expended Kshs.32,120/= on the premises which was not defrayed or offset against the alleged rent arrears;

ii. Failing to take into consideration that the appellant had a stake in the suit premises which are a family business;

iii. Failing to take into consideration the right's of the appellant's family in the suit property;

iv. Believing the respondent's assertion that the appellant had expended only Kshs. 4000;

v. Peremptorily dimissing his evidence and that of his mother which according to him was cogent, reliable and tangible;

vi. Deciding the matter on extraneous issues.

29. The appeal was disposed of by way of written submissions.

Appellant's submissions

30. On behalf of the appellant, it is reiterated that the court erred by holding that the appellant had not proved his case to the standard required by law. In that regard, it is pointed out that the Tribunal agreed with the appellant's claim that the respondent had defaulted in his rent paying obligation and entered judgment on admission in respect thereof and submitted that proof of none payment of rent and judgment on admission in respect thereof was enough reason to repudiate the tenancy agreement.

31. By entering judgment on admission against the respondent, the Tribunal is said to have made definitive findings on the provisions of **Section 14(1)(a)** of the Rent Restriction Act (The Act), Cap 296 which provides as follows:

"No order for recovery of possession of any premises or for the ejectment of a tenant therefrom shall be made unless-

a. Some rent lawfully due from the tenant has not been paid, or some other obligation of the tenancy (whether under the contract of tenancy or under this Act) so far as is consistent with the provisions of this Act has been broken or not performed; or ..."

32. It is contended that by failing to pay rent for 6 months the tenant had repudiated the tenancy contract that existed between him and the appellant and as such liable to deliver vacant possession of the demised premises.

33. It is reiterated that the notice issued to the respondent and which was annexed to the appellant's further affidavit and marked **AWM-1** was valid and effective under **Section 15** of the Act which provides as follows:

"where notice to quit is required to be given in respect of the premises it shall be in writing, and where the required period of notice is not elsewhere specified in this Act, it shall be not less than one month's notice ending at the end of a tenancy month:

Provided that the tribunal shall construe notices to quit liberally and without undue regard to technicalities."

34. According to counsel for the appellant, a person who refuses to pay lawful rent for six months and ignored lawful notices cannot be a person worthy of protection of the court. In that regard, it is submitted that this being a court of equity, it cannot allow a party to benefit from the fruits of their own illegality.

35. It is reiterated that the relationship between the appellant and the respondent had become so frosty that it was extremely prejudicial to the appellant's right as the owner of the demised premises.

36. Based on the decision in the case of **De Fransesco vs. Barnum (1980)45 Ch.D cited in the case of Communication Workers Union of Kenya v. Telkom (K) Ltd and 2 others (2006) eKLR** where the Chancery Court stated:

> **"I should be very unwilling to extend decisions the effect of which is to compel persons who are not desirous of maintaining continuous personal relations with one another to continue those personal relations...the courts are bound to be jealous lest they turn contracts of service into contracts of slavery; and ... I should lean against the extension of the doctrine of specific performance and injunction in such a manner;"** it is submitted that by sustaining the tenancy, the learned Chairman of the Tribunal converted a contract of personal service into a contract of slavery.

37. Terming the appellant's right to the suit premises constitutional, counsel for the appellant submitted that they cannot be taken lightly and that they can only be departed from in the circumstances ordained by the constitution.

38. Arguing that no court should protect a tenant found to have been in gross transgression of the tenancy agreement in the name of being a protected tenant, counsel for the appellant has submitted that in the circumstances of this case the appellant is entitled to seek the ejectment of the respondent on account of the breaches of the tenancy agreement.

39. Maintaining that the appellant has made up a case for being granted the prayers sought in this appeal, the appellant urges the court to allow the appeal as prayed.

Respondent's submissions

40. In his submissions, the respondent contends that the grounds of appeal relate to standard of proof in civil matters and in that regard submits that the appellant failed to proof the various averments in the plaint.

41. Concerning the contention that entry of judgment on admission against him was enough evidence that he had refused to pay rent for six months, the respondent explained that the learned chairman of the Tribunal agreed with his explanation that the appellant had refused to receive rent from him.

42. Pointing out that he paid the rent due from him to the appellant as ordered by the Tribunal and that he continued paying rent, he explains that the appellant again refused to accept rent from him from the month of February, 2016 forcing him to continue paying rent by M-pesa.

43. Terming the appellant a diabolical nuisance, the respondent urges the court to dismiss the appeal and reprimand the appellant for being in contempt of court. The respondent further urges the court to order the appellant to pay costs of the appeal and the case appealed from.

The duty of this court on a first appeal

44. This being a first appeal, it is my duty to examine and re-evaluate the evidence. In this regard see the case of **Mwanasokoni v Kenya Bus Services Limited (Mombasa) Civil Appeal No. 35 of 1985 (ur) where Hancox, JA** (as he then was), speaking for the court, stated of the duty of a first appellate court thus;

> ***"…Although this Court of Appeal will not lightly differ from the Judge at first instance on a finding of fact it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary."***

45. Also see the case of **Peters v Sunday Post Ltd (1958) EA 424,** where **Sir Kenneth O'Connor, P** (as he then was) stated:

> ***"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witness.***
>
> ***But the jurisdiction "(to review the evidence) should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion.***
>
> ***Accordingly, only when the finding of fact challenged on appeal is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the finding he did, will this court interfere with it. See Ephantus Mwangi & Another v Wambugu, (1983/84) 2 KCA 100 at page 118."***

46. From the grounds of appeal and the submissions made for and against the appeal, the sole issue for determination is whether the Tribunal erred by holding that the respondent had proved its case as required since the appellant was in arrears of rent since December, 2006.

47. Having reviewed the evidence adduced before the Tribunal and considered the law applicable to first appeals, I agree with the respondent that the appeal lacks in merit for the following reasons:

> (i) No material has been placed before me capable of proving that the *finding of the chairperson of the Tribunal on the amount allegedly spent by the appellant in developing the suit premises was based on no evidence, or on a misapprehension of the evidence, or the chairperson of the Tribunal acted on wrong principles in reaching the finding she did, to warrant differing with the Tribunal's*

chairperson on a question of fact.

(ii) The honourable chairperson, based on the conduct and demeanor of the appellant and his mother found the appellant and his mother to be dishonest persons, apart from opining on what, in his view, the court ought to have done, no material has been placed before this court capable of showing that the finding of fact concerning the conduct of the appellant was not a true finding concerning the character of the appellants.

48. The upshot of the foregoing is that this appeal has no merit. I consequently dismiss it with costs to the respondent.

Dated, signed and delivered in open court at Nyeri this 19th day of February, 2018.

L N WAITHAKA

JUDGE

Coram:

Mr. Muthoni Peter for the appellant

Ms. Wanjira h/b for Ms Nderitu for the respondent

Court assistant - Esther