



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**CIVIL APPEAL NO. 147 OF 2017**

**CHARLES OKOTH.....APPELLANT**

**-VERSUS-**

**ABDULRAHMAN HAMUMY.....RESPONDENT**

*(being appeal from the whole of the decision, judgment and orders of the Hon. D. Mochache (Mrs) delivered on August 17, 2012 in Mombasa in MOMBASA BPRT CASE NO. 155 of 2011 CHARLES OKOTH =vs=*

***ABDULRAHMAN HAMUMY)***

**JUDGEMENT**

1. This appeal arises from the decision of the learned Chairman of the Business Premises Rent Tribunal delivered on 17<sup>th</sup> August 2012 in Business Premises Rent Tribunal case No 155 of 2011. The appellant is the tenant while the Respondent is the landlord in respect of the suit premises. The appellant raised six grounds vide his memo of appeal filed on 17<sup>th</sup> September 2012 to include:

- 1. The learned Honourable Chairperson erred in law and in fact when she did not consider and or take into account the admissions by the Landlord.**
- 2. The learned Honourable Chairperson erred in law and in fact when she failed to appreciate and or take into account the overwhelming evidence tendered by the Tenant.**
- 3. The learned Honourable Chairperson misdirected herself in law and fact in failing to properly and fully analyze and determine each and every issue that arose and the evidence tendered at the hearing.**
- 4. The learned Honourable Chairperson failed to recognize and appreciate the disparities and contradictions between the grounds in support of the Landlord's Notice of Termination dated June, 20, 2011 and the evidence tendered by and on behalf of the Landlord.**
- 5. The learned Honourable Chairperson did not appreciate and consider the weight of evidence tendered by the Tenant and in the process giving a decision, judgment and or orders that were one sided.**
- 6. The learned Honourable Chairperson was completely biased in so far as she only relied entirely on evidence tendered by the Landlord.**

2. The parties after taking directions agreed to argue the appeal by filing of written submissions. The appellant filed his written submissions on 6<sup>th</sup> March 2017 while the Respondent filed his on 16<sup>th</sup> February 2015. This is a first appeal although final and this Court is allowed by law to reevaluate the facts adduced & the law before the Tribunal in drawing its conclusion whether the chairman misdirected herself thus came to a wrong determination.

3. The brief summary of the facts of this case from the record of appeal filed is that the Respondent served the appellant with a notice to vacate the suit premises standing on plot No 60/XVI/271 dated 20<sup>th</sup> June 2011. The appellant opposed the notice by filing a reference in the Business Premises Rent Tribunal case No 155 of 2011 on 29<sup>th</sup> July 2011. The learned chairman after hearing both parties upheld the notice. The appellant is aggrieved by that decision hence the appeal.

4. On record parties produced exhibits. Of first importance is a tenancy agreement signed between the parties herein on 13<sup>th</sup> December

2005. Although the evidence adduced does show that the relationship had been subsisting from 1997. The tenancy agreement set the terms between the parties which the Respondent in his notice felt had been breached by the Appellant. He listed the breaches to which in my view forms the questions for determination during trial in the Court below and in this appeal and they are:

- i) **Whether there was failure to pay rent on time.**
- ii) **Whether cooking fish in the premises blocked access of other tenants.**
- iii) **Whether there was failure to maintain the internal parts of the premises in good state of repair.**
- iv) **Whether there was subletting part of the premises without consent of the landlord.**

5. The tenancy agreement in **clause 2 (a)** provided that rent was payable monthly in advance without any deduction whatsoever. Was there proof of default on the part of the Appellant? The appellant in his evidence in chief in answering to this question stated that he used to pay rent to the Respondent's agent known as Jitihanda Agencies upto 2009. Later on he used to pay rent to Salma (DW 1) and sometimes to the wife of the Respondent but they did not issue him with receipts immediately. That they would issue receipts after receiving rent of the subsequent month. He wrote on 28.9.2009 complaining to the landlord of his failure to issue receipts on time. That he had also been previously served with notices to vacate which were later withdrawn for being defective. At page 10 of the proceedings he said this, **"I have paid rent for May. I will pay rent for June at the end of the month. I have paid rent for April. I paid on the 7<sup>th</sup> of May."**

He continued that he paid rent for May on 5<sup>th</sup> of June but I have not received the receipt. At page 11 of the record he said, **"I have never been in rent arrears for more than one or two months."**

6. At page 13 during cross-examination, the appellant stated that he stays on the premises before paying the rent. He continued on receipts showed to him for payment of rent for December to which he said that he paid on 5<sup>th</sup> December but the receipt was issued on 15.12.2011 while for January 2012, he paid on 8<sup>th</sup> January but the receipt was issued on 15.1.2012. **That he is not the one who pays rent. It is my brother who told me that he pays on the 5<sup>th</sup>.** That it is this brother who collects the receipts and bring home. The Respondent's witness on her part said the appellant does not pay rent on time. See page 4 – that on 8.12.09, he paid rent for October, on 14.1.10 he paid part rent for December 2009 & balance for November 2009 rent. She produced the rent book as Pex 3 and asked the Court to terminate the tenancy.

7. The learned chairman captured the evidence on the issue of payment of rent in pages 3 and 4 of the judgement. At page 4 line 13 she quoted clause (a) of the tenancy agreement which stated that **"To pay the said monthly rent in advance without any deduction whatsoever."**

The chairman continued in her judgement in analyzing this clause together with the evidence of the appellant and stated thus; **"The agreement clearly stated that he was to pay his rent in advance. Yet the tenant has confidently stated that I stay before paying. He clearly pays rent in arrears."**

8. In his submissions, the Appellant stated that section 7 (1) (b) of Cap 301 permits termination of a tenancy where the tenant has **persistently defaulted in paying rent for a period of two months after such rent has fall due or has persistently delayed** in paying rent which has become due and payable. The appellant submitted further that the chairman erred in fact in not considering the admission of the Respondent's witness that they were receiving rent. That this witness stated that she did not receive rent directly from the Appellant and therefore could not confirm when the appellant paid the rent. The appellant in his submissions stated that the learned chairman erred in law for failing to correctly interpret and apply section 7 (1) (b) particularly the use of the word **persistently**. It is the appellant's contention that it is the landlord who was delaying in issuing him with receipts.

9. I have considered this matter based on the evidence adduced and the submissions rendered as well as the tenancy agreement that was produced. The Appellant has rightly submitted that the Courts do not re-write the terms of contracts for parties but they have a duty to enforce such terms and to support this, he quoted the case of **Lalji Karsan Rabadia & 2 others vs Commercial Bank of Africa Ltd (2015) eKLR**. The appellant also submitted that the Respondent is bound by the terms of the lease and is not allowed to add and or infer. On the same breath, I wish to remind the Appellant that he was also bound by the terms of this same contract which he signed and which he wishes the Respondent to uphold.

10. Did the learned chairman err in holding that the Appellant was in default? I think not. From excerpts of the evidence I have referred to in paragraph 6 of this judgement, it is clear that the Appellant did not keep the terms of clause (a) of the contract. In his own admission, he stated that he would pay rent after staying in the premises i.e. in arrears not in advance. He also delayed in making remittances of this rent which he paid in arrears. The examples are given for the **months of October, November & December 2009; November & December 2011 and Rents for April, May & June 2012** where all payments were made late. The Appellant stated that it is his brother Jack who used to pay the rent and collects the receipts. This means he cannot therefore ascertain that indeed Jack paid on time. The Appellant was hanging on the use of the word **persistent** to qualify his default. However, this Court forms the opinion that indeed the Appellant persistently defaulted in paying rent by virtue of the fact that he was not paying rent every month when it fell due. Instead he was paying in arrears when the month had ended. On the issue of delay in issuing receipts, the dates mentioned did indicate the receipts were issued in the same month. For instance rent for December 2011 paid on 5<sup>th</sup>, receipt was issued on 15.12.11.

11. Given that section 7 (1) (b) allowed for termination of tenancy on account of default of payment of rent, I am satisfied that proof was made of such default on the part of the Appellant and aided with his own admission of paying rent in arrears contrary to the provisions of their tenancy agreement. The chairman came to the right conclusion in upholding the notice of termination. Consequently I find no reason to go to the other grounds of appeal as they will not upset that finding. The result is that I find this appeal as lacking in merit and is hereby dismissed with costs to the Respondent. The Court has taken account of the facts given from the proceedings that the premises is used for business. I therefore give the Appellant 60 days from the date of this judgement to vacate. In default eviction to issue.

**Dated, signed & delivered at Mombasa this 7<sup>th</sup> February 2018.**

**A. OMOLLO**

**JUDGE**