



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CIVIL APPEAL NO. 137 OF 2016

FRANCIS MOYI.....APPELLANT

-VERSUS-

DOROTHY MUSYOKA.....RESPONDENT

JUDGEMENT

1. The appellant Francis Moyi was the landlord of the Respondent Dorothy Musyoka appealed against the judgement of the learned Chairman of the Business Premises Tribunal Hon. Mbichi Mbovoki delivered on 7th August 2015 in BPTC No 155 of 2014. He listed five (5) grounds in his memo of appeal which in my view can be summarized into two grounds i.e.

(a) The learned Chairman erred in awarding the Respondent Kshs 100000 as compensation.

(b) The learned Chairman erred in awarding the Respondent costs in BPRT Case No 159 of 2014.

2. From the record, it is the Appellant who filed a reference on 16th October 2014 claiming that the Respondent had defaulted in paying rent for a period of two months and that the Respondent had persistently delayed in paying rent and thirdly that the Respondent had refused to pay the power bills for two months.

3. The matter proceeded on 19th June 2015 with each of the parties presenting their evidence before the Tribunal. The appellant said they had no written tenancy agreement and the monthly rent was Kshs 6000/= plus electricity at Kshs 1000/= from March 2013. That the tenant paid rent upto August 2014 and from September 2014 defaulted. Later she paid two months' rent at the tribunal. The appellant stated that he is owed rent from January – June 2015. That on 5th February 2015, the Respondent closed the business. He wanted the Respondent to vacate to enable him rent the premises to someone else. In cross – examination, the appellant denied that he closed the premises on 17th January 2015. He also denied threatening the Respondent.

4. The Respondent on her part stated that she became a tenant on 3rd March 2014 having bought the business from Lilian for Kshs 68,000= . That she was served with the notice dated 16.10.2014. She paid a deposit of Kshs 12000= . That the landlord/appellant requested her not to pay rent to the tribunal. The Respondent said the Appellant has been switching off power whenever he wants. She produced a copy of the order in BPRTC No 159 of 2014. She asked for release of her goods; demanded for compensation; her business is about Kshs 30000= and to be paid costs of Kshs 4800 in BPRT Case No 159 of 2014. In cross – examination, the Respondent said she has not closed her business.

5. In his judgment, the Chairman said that upon hearing evidence of both, the Tribunal is satisfied that the landlord has not facilitated the tenant to do business in the premises. That the tenant has no objection to vacate the premises provided her properties are released and she is compensated. The Tribunal therefore made the following orders: -

i) Dismissed the tenant's reference.

ii) Allowed the landlord to take possession on condition that:

(a) He releases the tenant's properties in the presence of the O.C.S. of the area or his representative.

(b) He pays the tenant compensation of Kshs 100000 under section 12 (1) (k) of Cap 301.

(c) He pays the tenant costs awarded in BPRT Case No 159 of 2014 of Kshs 4800.

iii) Each party to bear their costs of this reference.

6. The appeal was argued by way of filing written submissions which both parties did file. I have taken my time to read the same. Both parties in their submissions agree that it is section 12 (1) (i) which empowers the chairman to award exemplary costs and not section 12 (1) (k) referred to in the judgement. This was in error. Be that as it is, was the Chairman in error in awarding the Respondent compensation of Kshs 100000=?

7. I have perused the record as filed and I did not see anywhere that there was an order consolidating reference No 155 of 2014 with No 159 of 2014. The hearing in 155 of 2014 proceeded on its own. There was also no evidence presented and forming part of the record that Reference No 159 of 2014 was already conducted at the time of hearing Reference No 155 of 2014. In the absence of the consolidation order, I do not understand the basis which formed the finding of the learned chairman in awarding costs of a reference that was not before him for determination at the time of reaching his decision in BPTC No 155 of 2014.

8. The learned Chairman also awarded compensation from my deduction in his judgement because the Appellant had not opened the suit premises as ordered in reference No 159 of 2014. The Respondent in their submissions justified the compensation on account of the sum of Kshs 68000= used by the Respondent to **“buy the business from Lilian”** and Kshs 30,000= as loss of business during the time the business was closed. The Respondent submits that the Appellant did not contest these figures. If this line of submission is to be adopted as true then the Respondent had an obligation to present to the tribunal evidence that she actually purchased the business for Kshs 68000 and indeed paid the amount. She did not present any documents to show the existence of such an agreement or call Lilian to corroborate her evidence. Secondly she did not present any audited reports or books of accounts to show how much income she was making per month. Her evidence was very brief not even giving details of her business. For lack of proof I disagree with their submission justifying the award of the compensation.

9. Assuming there was proof that she indeed paid the Kshs 68,000=, the details of what the payment was for is also not explained. The evidence on record shows her relationship with the Appellant was landlord/tenant. It does not say the appellant was expected to abide by certain conditions in their contract with Lilian. Thus the Appellant was not obligated to compensate her for a loss arising out of that transaction which is not stated that he was a party to.

10. Did the Chairman have discretion to award compensation as he did? The reference by the appellant before the Chairman concerned default on the part of the tenant in paying rent and electricity bills. The Respondent did not deny the averment of the Appellant that she was delaying in paying rent given that she was testifying after the Appellant. She also did not deny being in default of 2 months' rent. Instead she said she had paid a deposit of Kshs 12000=. The Appellant also admitted she had paid rent at the tribunal of two months. If the Respondent was delaying in paying rent, why then reward her for her omission?

11. Further section 12 (1) (c) of Cap 301 provides thus **“to award compensation for any loss incurred by a tenant on termination of a controlled tenancy in respect of goodwill and improvements carried out by the tenant with the Landlord's consent.”** The Appellant submits that this section provides for compensation at the time of termination in respect of good will and improvements. The section is indeed self-explanatory. The goodwill in my opinion & which I so hold is only payable where the tenant is found not to blame for the termination. The chairman did not find the reference filed as being frivolous or vexatious meaning the Landlord had a genuine grievance. The goodwill would have been the sum **“paid out to Lilian”** but again I am unable to conclusively find it was for goodwill only as there was no agreement documenting such that was presented to Court to make such a finding. In the heading **“or improvement,”** the Respondent did not lead any evidence that she had undertaken certain improvements on the suit premises for which she was entitled to compensation.

12. Consequently the chairman having made a determination that the Appellant release to the Respondent her properties in the business premises in the presence of the O.C.S he had no basis to make any award for compensation under this provision of the law where the Appellant followed the laid down procedure in terminating the tenancy. He therefore did so in error.

13. In conclusion, I find merit in the appeal and allow it by setting aside the judgement which allowed the Appellant to obtain vacant possession upon fulfilling the set conditions and also dismissed the tenant's reference. Instead I substitute it with an order that: -

a) The order dismissing the tenant's reference be made in its respective file No 159 of 2014.

b) The Appellant shall release to the Respondent her goods in the suit premises in the presence of the O.C.S or his nominee of the area where the suit premises falls.

c) The award of compensation of Kshs 100,000= awarded to the respondent is set aside and/or is dismissed.

d) The tenancy between Appellant and the Respondent is terminated and the Appellant is allowed vacant possession immediately upon taking stock of the goods in the suit premises in the presence of the O.C.S or his nominee.

e) The issue of any rents due from January 2015 to be determined after determination is made in BPRT Case No 159 of 2014 on whether the Appellant closed the suit premises on 17.1.15 as alleged or not.

f) Costs of this appeal awarded to the appellant.

Dated & signed at Mombasa this 13th April 2018

A. OMOLLO

JUDGE

Delivered at Mombasa this 16th April 2018

L.C. KOMINGOI

JUDGE