



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELCA NO.85 OF 2017

ADBULMAJID MOHAMED ADAM.....APPELLANT

VERSUS

NIMISH SHAH T/A FLORA PRINTERS.....RESPONDENT

JUDGMENT

1. The Appeal herein arises from the Judgment of the Business Premises Rent Tribunal (“Tribunal”) dated and delivered on 9th September 2016 dismissing the Notice to terminate the tenancy served by the Appellant herein to the Respondent terminating the tenancy between Respondent and the Appellant.

2. In a memorandum of Appeal dated and filed on 4th October, 2016, the Appellant has set out the following grounds of appeal.

1. The Honourable Chairman of the Business Premises Rent Tribunal erred in law and in fact in failing to take into consideration the admission by the respondent that he (the Respondent) broke a wall of the Appellant’s premises without the Appellant’s express consent.

2. The Honourable Chairman of the Business Premises Rent Tribunal erred in law and in fact in failing to allow the Appellant’s Notice of 7th March, 2011 despite admission by the Respondent of breach of implied fundamental term of the tenancy.

3. The Honourable Chairman of the Business Premises Rent Tribunal erred in law and in fact in failing to take into consideration the evidence by the Appellant denying ever giving the Respondent consent or at all to demolish the wall of the premises.

4. The Honourable Chairman of the Business Premises Rent Tribunal erred in Law and in fact in placing too much reliance on the unsubstantiated and uncorroborated evidence of the Respondent that the Appellant gave him verbal consent.

5. The Honourable Chairman of the Business Premises rent tribunal erred in law and in fact in failing to find that there is an implied condition in a tenancy that consent of landlord is required before undertaking any fundamental structural changes in the landlord premises.

6. The Honourable Chairman of the Business Premises Rent Tribunal erred in law and in fact in assuming that were there is no express clause prohibiting a tenant from carrying out alteration in the Landlord premises without consent then there cannot be implied conditions prohibiting the tenant from undertaking such alteration without the landlords consent.

7. The Honourable Chairman of the Business Premises Rent Tribunal erred in law and in fact in assuming that where there is no express clause prohibiting a tenant from carrying out alteration in the Landlord premises without consent there is an implied condition allowing the tenant to undertaking such alteration without the landlords consent.

8. The Honourable Chairman of the Business Premises Rent Tribunal erred in law and in fact in failing to find that the consent of the landlord was required before undertaking alteration and changes that will fundamentally affect the structural plans of the building.

9. The Honourable Chairman of the Business Premises Rent Tribunal erred in law in failing to find that structural changes in a rental premises is a responsibility of the Lessor (Appellant) and not the lessee(Respondent) as provided for under Cap 301.

10. The Honourable Chairman of the Business Premises Rent Tribunal erred in law and in fact in failing to find that since the responsibility of fundamental structural changes is that of the lessor (Appellant), the lessee (respondent) could only undertake the same with express consent of the Lessor (Appellant).

11. The Honourable Chairman of the Business Premises Rent Tribunal erred in law and in fact in finding that the Respondent has express authority from the Appellant to break the wall without any evidence whatsoever to prove the same.

12. The Honourable Chairman of the Business Premises Rent Tribunal erred in law and in fact in placing too much reliance on the period of time it has taken for the landlord to formally complain than on the facts, substance and weight of the evidence adduced.

13. The Honourable Chairman of the Business Premises Rent Tribunal erred in law and in fact in placing too much reliance on the period of time it has taken for the landlord to formally complain than on the fundamental breaches by the Respondent.

14. The Honourable Chairman of the Business Premises Rent Tribunal erred in law and in fact in finding that there was ostensible authority and express authority from the landlord despite the Appellants evidence that he never gave the Respondent any authority whatsoever and further without any evidence confirming the same.

15. The Honourable Chairman of the Business Premises Rent Tribunal erred in law and in fact in dismissing the Appellants Notice despite the existence of sufficient evidence proving his claim.

16. The Honourable erred in law and in fact in allowing the Respondent reference despite the landlord having rendered sufficient evidence to warrant the termination of the tenancy.

3. For those reasons, the Appellant proposed that the Court should make the following orders: -

a) THAT this Appeal be allowed with costs.

b) THAT the decision of the Chairman of the Business Premises Rent Tribunal be varied as follows: -

i. The judgment of 9th September 2016 be set aside.

ii. The Tenant's Reference dated 27th April 2011 be dismissed.

iii. The Landlord's Notice dated 7th March 2011 be allowed.

iv. The costs of the Tribunal be awarded to the Appellant.

c) THAT the costs of this appeal be awarded to the Appellant.

4. Counsel for the Appellant and the Respondent both filed written submissions for and against the appeal herein. The Appellant's Counsel's submissions dated 2nd June, 2017 were filed on 5th June 2017. Those of Counsel for the Respondent were filed on 8th November, 2017. In addition, Counsel made oral submissions at the hearing of the Appeal on 15th March, 2018, and adopted their respective written submissions.

5. In his submissions the Appellant contended that the finding of the Honourable Chairman of the Tribunal was based on no corroborated evidence, misrepresentation of the evidence and further that he acted on wrong principles in reaching his conclusion. The Appellant submitted that the Honourable Chairman erred in failing to take into account the express admission by the Respondent that he broke the wall of the Appellant's premises without consent from the Appellant. The Appellant argued that in light of the sworn testimony by the Appellant to the effect that he did not give the tenant any consent and or authority to break the wall, the burden shifted to the Respondent to explain to the Tribunal the circumstances that led to the breakage of the wall. The Appellant further argued that the Chairman erred in failing to take into account the testimony by the Appellant that he only came to realize about the wall and the access door created by the Respondent immediately before he issued his notice of termination and that he was not aware that the wall had been broken and access door created 10 years before as alleged by the Respondent.

6. It was further submitted by the Appellant that since repairs to main walls of the premises is the responsibility of the landlord under the Landlord & Tenant (shops, Hotels & Catering Establishments) Act, the tenant could only undertake such repairs and alterations with the consent of the landlord. The Appellant argued that since no such consent was sought and no consent and/or permission was granted to the tenant by the landlord to undertake such alterations, the conduct of the tenant amounted to material breach of the tenancy and fundamental breach of implied terms of the tenancy as provided under the said Act and therefore the Honourable Chairman interpretation of the Act was erroneous. According to the Appellant, the Honourable Chairman in reading his conclusion failed to take into account the evidence by the landlord and placed too much reliance on the evidence by the tenant.

In support of this submission, reliance was placed on the case of **Gerry Wanyaonyi –v- George Monari Maiso (2013) eKLR**. The Appellant submitted that the Honourable Chairman was in error in allowing the Respondent's Reference and dismissing the Appellants Notice. The Appellant urged the court to allow the appeal with costs and have the Tribunal's decision varied as follows:

- i. **The judgment of 9th September 2011 set aside.**
- ii. **The Tenant's Reference dated 27th April 2011 be dismissed.**
- iii. **The Landlord's Notice dated 7th March 2011 be allowed.**
- iv. **Costs of the Tribunal be awarded to the Appellant.**

7. The Respondent contended that since it was admitted by the Landlord that he would personally visit suit premises to collect rent cheques every month, it is inconceivable and beyond reason as to how he failed to see a hole in the wall and door in its place.

8. The Respondent submitted that the Appellant is also time barred by virtue of the provisions of the Limitation of Action Act for failure to object to the wall and door before the expiry of 6 years. The Respondent further submitted that the consent to break the wall was implied from the circumstances of the case, and citing Halsbury's Laws of England, Third Edition, Volume 23, Paragraph 1284, argued that the tenant ran a printing press and has rented 3 adjacent go downs through which he made internal doors for ease of movement and which would be sealed when the tenant leaves.

9. Relying on the case of **Roseline Achieng Atengi –v- Mark Odhiambo & Another (2005) eKLR** and the case of **Joginder Auto Service Limited –v- Mohamed Shaffique & Another (2008) eKLR**, the Respondent submitted that the court should not interfere with the finding of the Tribunal when the Chairman of the Tribunal did not misdirect himself or acted on wrong principle.

10. The Respondent submitted that the Appellant had knowledge of the wall for 10 years and he condoned it. The Respondent denied that there was any admission that the wall was broken without permission. The Respondent urged the Court to strike out grounds 5, 8 and 10 as they refer to structural changes which was not an issue at the Tribunal.

11. The Respondent submitted further that the appeal is null and void as there is no certified copy of the decree filed in court or as part of the Court record contrary to the provision of Order 42 Rule 2 of the Civil Procedure Rules. He relied on the case of **of Premier Dairy Ltd –v- Amarjit Singh Sagoo & Another (2009)eKLR** and the case of **James Oluoch –v- Hamid Dine Abdi (2006)eKLR**.

12. Regarding the issue of having not filed a certified copy of the appeal, counsel for the Appellant relied on Article 159 of the Constitution and Section 1A and 1B of the Civil Procedure Act and argued that the authorities cited by the Respondent related to decisions made before the promulgation of the New Constitution in 2010.

13. The main issues which arises for determination are threefold; whether the appeal is incompetent for want of a certified copy of decree in the record; whether the Appellant was time barred in issuing the notice of termination of tenancy on the ground that the tenant had committed substantial breaches of the tenancy by breaking a portion of the boundary wall and in its place built a door connecting to other persons plot/premises without the authority and consent of the landlord and whether the tenant required consent from the landlord before breaking a portion of the wall in order to build a door connecting to adjacent premises.

14. Regarding the first issue, it is not disputed that the record of appeal before this court does not contain the decree appealed from. Section 15 (4) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301 provides that "the procedure in and relating to appeals in civil matters from subordinate courts to the Environment and Land Court shall govern appeals under this Act." This therefore brings into focus the provisions of Order 42 Rule 2 of the Civil Procedure Rules which provides *inter alia*:

"where no certified copy of the decree or order appealed against is filed with the Memorandum of Appeal, the Appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under Section 79B of the Act until such copy is filed."

15. However, the Appellant did not take advantage of this provision to subsequently file a certified copy of the decree so that the appeal proceeded to hearing in the absence of the decree appealed from. The question that arises is whether this omission is fatal to the appeal. The Respondent thinks so as according to him the requirement is couched in mandatory terms. The Appellant however thinks otherwise.

16. The Proviso to the definition of the word "decree" under Section 2 of the Civil Procedure Act states:

"provided that, for the purposes of appeal, "decree" includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up."

17. The record of appeal herein filed on 24th November 2016 has a certified copy of the judgment of the tribunal. In my view, therefore the record of appeal is competent notwithstanding the fact that a formal decree has not been included in the record. In the case of **Emmanuel Ngade Nyoka –v- Kitheka Mutisya Ngata (2017)eKLR**, the Court of Appeal entirely agreed with the reasoning of Angote, J who was face with an issue such as this. In the above case, the Court of Appeal added:

"In any event, this was a mere technicality that could not have sat well with the current constitutional dispensation that calls upon courts to go for substantive justice as opposed to technicalities. Further holding otherwise would run counter to the overriding objective as captured in Sections 1A and 1B of the Civil Procedure Act. Finally, one would ask what prejudice did the Appellant suffer with the omission of the certified copy of the decree in the record of appeal. We do not discern any."

I am bound by the above decision of the Court of Appeal and therefore find that the appeal herein is not incompetent as submitted by the Respondent. I agree with submissions by the Appellant's Counsel that the authorities relied on by the Respondent relate to decisions given before the new constitution and the amendments to the Civil Procedure Act came into force and in my humble view, are no longer good law.

18. The other issue concerns whether the tenant required the consent of the landlord before breaking the wall, and if so, whether the consent was given as submitted by the Respondent or not as argued by the Appellant.

19. In his evidence –in- chief, the Appellant states:

“... The Tenant broke the wall of my premises and made an access to the premises adjacent to mine. The Tenant did not obtain my consent to do so. I discovered this matter before I served the Tenant with a notice”.

On cross-examination by counsel for the tenant regarding the consent, the Appellant answered, inter alia

“... The tenant did not seek my consent... I did not give the tenant oral consent to break the wall.”

20. On his part, the record shows that the Respondent's evidence on the same issue was as follows:

“... I was served with the notice dated 7th March, 2011. This notice came to me as a shock because the issue being complaints off (sic) (breaking of the wall was done). It was done ten (10) years before the notice dated 7th March 2011. The door was done with the full knowledge of the landlord who gave him (sic) the consent verbally subject to the condition that when we vacate the premises we shall leave the premises as it was.

The landlord inspected the premises regularly and he was aware of this access to the adjacent premises. The door area has assessed to the adjacent go down which they have leased. We have not been communicating with the landlord in writing. The landlord does not issue him with invoices for rents or receipt books. I am the tenant of the adjacent go down. We have not endangered the property of both landlords. The other landlord has not complained.”

21. During cross-examination by the counsel for the Landlord, the Respondent stated, inter alia:

“I was served with the notice to terminate the tenancy. It is time that we have erected an assess (sic) door (metal door) to the adjacent go down.... The consent was oral... ”

22. It is clear from the record that on the issue of consent, the evidence of the Appellant and that of the Respondent were at variance. Whereas the Appellant categorically denies that there was no consent sought and none was given, the Respondent maintains that the wall was broken with the knowledge of the Appellant who according to him gave verbal consent. In my humble view, in light of the denial by the Appellant, it was incumbent to prove that indeed the said consent was given. Whereas the Respondent alleges that the Appellant gave verbal consent, I note that in the affidavit sworn by the Respondent on 6th June 2011 in support of the notice of Motion dated 6th June 2011 before the Tribunal, the Respondent has deponed that since he took over the possession of the subject premises, he only dealt with Ms. Haji Adam Yusuf Ltd, and not the Appellant. It was therefore clear there is contradiction in the evidence presented by the respondent regarding the consent. The Respondent could not deny ever dealing with the Appellant and at the same time allege that the Appellant gave verbal consent ten (10) years earlier and has been aware of the wall having been broken all along. In my view, this raises clear doubts and credibility on the evidence by the Respondent. These were two contradictory statements made on oath by the same person over the same issue. It is my holding that there was contradictory and insufficient evidence presented before the Tribunal in support of the Respondent's contention that there was consent. In the circumstances, the finding by the Tribunal is not well grounded in law. The Chairman clearly misdirected himself on this issue and reached the wrong conclusion.

23. The other issue I would like to address is whether consent was required by the Respondent from the Appellant before breaking the wall. The answer to this question is to be found in the lease and the Act. It is apparent, however that the lease between the parties herein was not in writing as no lease is attached to the record of appeal. I therefore proceed under the presumption that the lease was one that was not reduced into writing, in which case the terms and conditions to be implied and applied in the tenancy are those under the Act.

24. **Section 3(2)** of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act provides as follows:

“(2) The terms and conditions set forth in the schedule to this Act shall be implied in every controlled tenancy which is not reduced to writing or which is in the prescribed form.”

The said schedule lists the terms and conditions to be implied in tenancies and among them, the ones that in my view are relevant to the present case are:

iii) The lessee shall have quiet enjoyment of premises provided that he complies with express or implied covenants.

v) The lessor shall be responsible for all repairs to roofs, main walls, main drains, main electric wiring and structures, and shall be responsible for all necessary renewals to the premises.

vi) The lessee shall be responsible for all internal repairs and decorations, fair wear and tear excepted.

vii) The lessor shall be responsible for the repair, maintenance, cleaning and lighting of common parts where part of building is let.

25. The Respondent had admitted that he broke the wall of the rented premises and created a door which made him have access to adjacent go down which he had leased from a different person. From the schedule referred to above, in particular paragraph (v) repairs of main walls is the responsibility of the landlord. The breaking of a wall in my view entails main repairs. I have already made a finding that the Respondent did not seek or obtain consent of the Appellant to break the wall which, in any event, was the responsibility of the Appellant as per the Act. The tenant could only undertake such alterations on the wall with the consent or authority of the Landlord. There was no factual or legal basis of the learned Chairman to have found that “there is no express clause which prohibits a tenant from carrying out alterations in the suit premises subject to obtaining authority from the landlord and relevant authorities.” Alteration of a wall, in my view are repairs and under the schedule, it is the responsibility of the Landlord to repair main walls.

26. The learned Chairman clearly misdirected himself on this issue and reached the wrong decision. There was no factual or legal basis for the Chairman to have found that the Tribunal is satisfied on the evidence on record that the tenant has ostensible and/or express authority of the Landlord to break part of the wall and create a door to access adjacent premises and further to state that the Tribunal is satisfied that the Landlord had not proved the two grounds of termination of tenancy on a balance of probabilities. The totality of the evidence by the parties and the law applicable in this case, on the contrary to what the Tribunal found, is clear that the Appellant had proved his case on a balance of probabilities. The major changes to the main wall of the premises by the Respondent without the consent and or authority of the Appellant amounted to material and fundamental breach of the tenancy. The Respondent’s learned Counsel, Mrs. Moolraj submitted that the tenant was permitted under common law to carry out alterations and improvements and cited Halsbury’s Laws of England Volume 23, Paragraph 1284 which states:

“It is a breach of the covenant to repair if the tenant pulls down any part of the premises or makes alterations in them, unless he is expressly or impliedly given power to do so by the lease.

In order to determine whether the pulling down or alteration constitutes a breach of the covenant, regard must be had in each case to the user of the premises which is permitted by the lease. It may be that the demised property may be used for a variety of purposes, for which without alteration and adaptation it is not suitable, in which case a right on the part of the tenant to adapt the premises for such user is to be inferred.”

My understanding of this passage is that it is a breach of the covenant to repair if the tenant pulls down any part of the premises or makes alterations in them unless he is expressly or impliedly given power to do so by the lease. Where there was no written lease as in the present case, consent of the landlord was necessary before such repairs or alterations are made. There was no consent or authority sought from the Appellant hence the actions of the Respondent amount to a breach of the lease.

27. The Respondent has also submitted that the Appellant’s action is barred by limitation because the wall was broken over ten (10) years before the notice to terminate was issued. However, the Appellant gave evidence that he only came to learn of the access door and the broken wall immediately before he served the notice of termination on the Respondent. Moreover, as I have already stated, the Respondent in his own affidavit sworn on 6th June 2011 confirms that he never dealt with the Appellant before he was served with the tenancy notice. This averment in my view supports the Appellant’s contention that he only came to learn of the broken wall immediately before issuing the notice. It is therefore my finding that the claim was not time barred as submitted by the Respondent.

28. In the result, I allow the appeal, set aside the judgment of the Tribunal dated 9th September 2016, and substitute therefore an order dismissing the tenant’s Reference dated 27th April 2011 and the Landlord’s Notice dated 7th March 2011 is allowed. The Appellant shall have the costs of the Tribunal and of this appeal.

Dated, signed and delivered at Mombasa this 28th day of May 2018.

C. YANO

JUDGE