



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC APPEAL NO. 27 OF 2017

MOHAMMED BWANA BAKARI.....APPELLANT

-VERSUS-

SALHA ABDULATIF.....RESPONDENT

JUDGEMENT

1. This appeal arises from the decision of the learned Chairman of the Business Tribunal in BPRT No 131 of 2013. The Appellant raised the following as his grounds of appeal:

- 1. That the Learned Chairman erred in law in his evaluation of the evidence and coming to a wrong conclusion.**
- 2. That the Learned Chairman erred in law in his finding that the Respondent had proved her case.**
- 3. That the Learned Chairman erred in law in failing to consider the fact that there were previous proceedings between the parties which had impacted on the tenancy.**
- 4. That the judgment of the Tribunal on the whole cause to be supported by the evidence on record.**

2. The appeal proceeded by way of written submissions. I have read both and taken their contents into consideration while writing this judgement. From the evidence adduced before the learned chairman, it is not in doubt that the Appellant was in arrears of rent for 4 months when the notice to terminate the tenancy was served by the Respondent. The Appellant however felt he was justified in being guilty in arrears because of the existing case between himself and the father of the Respondent at the Municipal Court where in his statement filed in Court he stated that he had **“to engage an advocate to defend him in the proceedings before the Municipal Court.”** The proceedings before the Municipal Court in case No 4741/2012 were also produced in evidence as exhibit.

3. The proceedings before the Municipal Court case No 4741/2012 shows the Accused is Abdullatiffa Mohamed while the prosecution was done by the County. Abdullatifa is said to be the father of the Respondent herein. The proceedings also show the charge was read over to him on 20th November 2012. On 15.1.2013, the accused stated he was unable to comply with the notice served upon him as the tenants (Appellant included) were still in the premises. In the proceedings before that Court on 29.1.2013, Mr Omwenga advocate stated to Court that it is the tenants who had complained to the Municipal Council and that the accused was not a busy body but had been an agent of the owners. Mr Khatib advocate on his part on 20.5.2013 informed the Court that the accused **“should use the right procedure to remove the tenants and should desist from circumventing the law.”** The Court on 21.6.2013 discharged the accused under section 35 (1) of the Penal Code having found the premises were a protected tenancy for which he had no jurisdiction.

4. During these proceedings before the Municipal Court, the issue of payment of rent did not arise. The Appellant presumably was still conducting business in the suit premises. Both of them i.e. Accused and Tenants were represented by counsel. The right to legal representation is a right bestowed on all parties by article 50 (1) (g) of the Constitution. However in this instance, the tenants were not the accused person hence their engaging an advocate in those proceedings was a matter of their choice. Having chosen to enjoy that right did not in my opinion constitute a reasonable justification to be exempted from meeting his obligations under the existing landlord/tenant relationship and without prior consent of the landlord or approval of the Court hearing the complaint or the Business Premises Rent Tribunal.

5. In his statement, he admits irregularity in payment of rent forms a ground for termination. He went further to state that there has been only one instance of delay in payment of rent. The rent was in arrears for May, June, July & August. Section 7 (1) (b) of Cap 301 does not specify how many times a tenant should default in paying rent before a landlord is entitled to terminate such a tenancy. It provides thus:

“(1) Where under section 4 of this Act a landlord has served a notice of termination of a controlled tenancy on the tenant, the

grounds on which the landlord seeks to terminate such tenancy may be such of the following grounds are stated in the aforesaid notice –

(b) that the tenant has defaulted in paying rent for a period of two months after such rent has become due or payable or has persistently delayed in paying which has become due or payable.”

6. The Appellant instead feels the notice was served because the Respondent wanted him out of the premises. If that is true, then he provided the Landlord with an opportunity to serve him with such a notice by virtue of his default in rent payment. Was the notice to have been dismissed now that the Appellant complied by paying the arrears before its determination? In my opinion, I do not fault the chairman because at the time the notice was served & reference filed, the Landlord/Respondent had not withdrawn the notice. Thus the notice in seeking to terminate the tenancy and the tenant/Appellant having not surrendered vacant possession, the dispute was still alive.

7. The proof of being in arrears was actually provided by the Appellant himself stating that he made payment two days after being served with the notice. The chairman's duty in the circumstances of the case was to determine whether the ground given for the termination was provided under the Act and if the same was proved. He did not have any basis to refuse the notice by the Respondent where evidence of non-payment was self-evident at the time the notice was issued & not withdrawn. Consequently I come to the conclusion that the Tribunal reached the correct decision in dismissing the Appellant's reference dated 9.10.2013 and allowing the Respondent's notice dated 6.8.2013. I find no reason to set aside and or vary the judgment rendered on 19.12.2014.

8. The result of the above finding is that the present appeal is hereby dismissed for want of merit with costs to the Respondent. The Appellant is hereby given 45 days to move out of the impugned premises taking into account that the BPRT had in its judgement given him about 5 months to vacate. In default, the Respondent/Landlord is at liberty to evict him using lawful means.

Dated, signed & delivered at Mombasa this 23rd May 2018

A. OMOLLO

JUDGE