REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT KISII

APPEAL NO. 3 OF 2018

DAKIANGA DISTRIBUTORS LIMITED.....APPELLANT

VERSUS

PEBO (KENYA) LIMITED.....RESPONDENT

J U D G M E N T

(Being an appeal from the Ruling of Hon. Mbichi Mboroki, Chairman

Business Premises Rent Tribunal sitting at Kisii on the 6th May 2016

in Kisii B.P Rent Tribunal Case No. 69 of 2015)

1. This appeal arises from the ruling of the Business Premises Tribunal (BPRT) Case No. 69 of 2015 delivered on 6th May 2016 by Mbichi Mboroki, Chairman of the Tribunal. In the application before the Tribunal dated 16th December 2015, the Tenant/applicant, the Respondent in the present appeal had complained that the Respondent/Landlord, the appellant in the present appeal, had arbitrary increased the rent from kshs. 10,000/= to Kshs. 30,000/= per month. The tenant sought orders for the rent to be assessed and for the appellant to be restrained from denying the respondent access to the demised premises and further sought a declaration that the lease agreement between the respondent and the appellant was valid and that any other lease between the appellant with any other third parties was a nullity.

2. After hearing the application the Chairman of the Tribunal rendered a ruling on 6th May 2016 holding interalia:-

> **1. That there was a periodic tenancy between the applicant and the landlord/respondent which could only be altered and/or terminated in accordance with the procedure set out in Cap 301 Laws of Kenya.**
>
> **2. That the rent payable by the tenant/applicant was the one which was in force at the expiry of the lease which was kshs.10,000/= per month.**
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> **3. That each party was to bear its own costs in the circumstances of the case.**

3. Being aggrieved by that decision the appellant now appeals to this court against that ruling and has set out the following grounds of appeal:

> **1. The honourable chair failed to appreciate that based on facts presented before him which were uncontested, the respondent herein had for all intents and purposes effectively surrendered the lease it held and that the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Chapter 301 of the Laws of Kenya in so far as termination/alteration of the tenancy between the appellant and the respondent did not apply.**
>
> **2. The honourable chair erred in holding that there was a periodic tenancy between the parties herein.**
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> **3. The honourable chair failed to appropriately consider, evaluate rival facts which were presented before him by the parties and make a determination as to which of the facts he believed to be true and thereby arrived at a demonstrably wrong decision.**
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> **4. The honourable chair failed to appreciate that Gerick Kenya Limited was for all intents and purposes the appellant's tenant.**

5. The decision of the honourable chair is against the weight of evidence presented by the appellant.

6. The honourable chair failed to find that having surrendered its lease the respondent had no locus standi to lodge a reference before the Business Premises Rent Tribunal.

7. The honourable chair failed to find that payments of rent done by Gerick Kenya Limited were incompatible with the lease purported to have been held by the respondent. Conversely, the honourable court failed to find that the nonpayment of any rental premium by the respondent between May, 2015 and November 2015 was incompatible with the claim that it still held a tenancy with the appellant.

8. The honourable chair erred by failing to find that the reference before it was a mischievous device by the respondent to illegally secure a review of rent in favour of Gerick Kenya Limited.

9. The honourable chair's evaluation of the appellant's submission and facts before it was perfunctory.

The appellant prays that:

(a) The order and decision of the honourable chair made in Kisii BPRT No. 69 of 2016 on 6th May 2016 be set aside in its entirety and an order be made dismissing Kisii BPRT No. 69 of 2015 with costs.

(b) Costs of this appeal and of Kisii BPRT No. 69 of 2015 be borne by the respondent.

4. The grounds of appeal clearly are challenging the findings made by the Honourable Chairman of the Tribunal on the basis of the law, evidence and the facts and material placed before him. The appellant contends the Chairman of the Tribunal erred in his evaluation and appreciation of the law and the facts leading him to arrive at a wrong decision. The appellant through its written submissions has urged this court to re-evaluate the evidence and the facts to determine whether the Chairman arrived at the correct decision. The appellant has correctly submitted that this court being the first appellate court has the jurisdiction to re-evaluate the evidence and the facts to ascertain whether the Tribunal's decision was correctly arrived at.

5. It is trite law that the court of first instance is required and indeed is under a duty and obligation to reconsider and re-evaluate the evidence adduced before the trial court and come up with its own findings and/or conclusions. However, there is usually a caveat that the appellate court should not normally interfere with findings of fact by the trial court unless it is based on no evidence or misapprehension of the evidence or that the trial court acted on wrong principles to arrive at the findings. Where oral evidence was tendered at the trial, an appellate court should be slow to interfere with the findings of the trial court based on that evidence as the trial court will have had the benefit of seeing the evidence testify and would therefore be better placed to assess the demeanour of the witnesses.

6. In the Court of Appeal case of **Ephantus Mwangi & Another -vs- Duncan Mwangi Wambugu [1982] 1 KAR 278**, **Hancox J.A** at page 292 observed thus:-

"A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or a misapprehension of evidence or the judge is shown demonstrably to have acted on wrong principle in reaching the finding he did."

In the case the court inter alia held:-

"The Court of Appeal would hesitate before reversing the decision of a trial judge on his findings of fact and would do so if (a) it appears that he failed to take account of particular circumstances of probabilities material to an estimate of the evidence or (b) that his impression based on the demeanour of material witness sis inconsistent with the evidence in the case generally."

7. In an earlier Court of Appeal case **Seller & Another –vs- Associated Motor Boat Company Ltd & Others 1968 (EA) 123** at pg 126 Sir Clement De Lestang VP, stated:

"An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should make due allowance in this respect. In particular, this court is not bound to follow the trial Judge's finding of fact if it appears either that he clearly failed on some point to take account of particular circumstances or probabilities material to estimate the evidence or if the impression based on demeanour of material witness was inconsistent with the evidence in the case generally. (Abdul Hameed Saif –vs- Ali Mohamed Sholani [1955] 22 EACA 270)".

In the Court of Appeal case of **Jabane –vs- Olienja [1986] KLR 661** at page 664 Hancox JA stated thus:-

"I accept this proposition, so far as it goes, and this court does have the power to examine and re-evaluate the evidence and the findings of facts of the trial court in order to determine whether the conclusion reached on the evidence should stand see Peters -vs- Sunday Post [1958] EA 424. More recently, this court has held that it will not likely differ from the findings of facts of a trial judge who had the benefits of seeking and hearing all the witnesses, and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he

did - see in particular Ephantus Mwangi -vs- Duncan Mwangi Wambugu [1982-88] 1KAR 278 and Mwana Sokoni -vs- Kenya Bus Services [1982-88] 1KAR 870."

8. In the appeal before me, no oral evidence was tendered before the BPRT and the evidence placed before the Tribunal was by way of affidavit evidence and documents annexed thereto and the submissions made before the Tribunal by counsel of the parties. This court therefore will in determining this appeal consider and re-evaluate the evidence contained in the affidavits and annextures furnished by the parties to the Tribunal and come to an appropriate conclusion.

9. The appeal was argued by way of written submissions as per the court's directions given on 5th March 2018. The court will consider all the grounds of appeal together as they can be collapsed into one ground, which is, whether or not the chairman of the Tribunal properly evaluated the evidence before him and whether upon such evaluation he arrived at the correct findings.

10. **The Evidence:**

Before the Tribunal Hellen Onchoga, a director of the respondent's company had sworn an affidavit in support of the Notice of Motion dated 16th December 2015. The application as indicated earlier in this judgment sought orders restraining the appellant from arbitrarily and unlawfully increasing the rent; an order that a valuation carrier out to determine the current rent; an order restraining denial of access to the toilets; and a declaration that the lease between the appellant and the respondent was valid and that any other lease between the appellant with any other third parties was a nullity. In the affidavit sworn in support of the application, Hellen Onchonga stated that the respondent company entered into a tenancy agreement on 3rd September 2010 at a monthly rent of kshs.10,000/=. She averred that the respondent had been paying rent regularly and without any default. She further depones that one of her sons was the one managing the business and was paying rent using cheques from a company where he had shares. She further deponed that she was surprised when she stumbled upon an agreement between the landlord and her son's company increasing the rent to kshs. 30,000/=. It was her position that the respondent was a protected tenant and the rent increase was beyond the true value of the premises. The deponent further stated the appellant had denied the respondent's employees access to toilets and water rendering it necessary to institute the reference.

11. One, Charles Mageto, a director of the appellant swore an affidavit in reply to oppose the respondent's Notice of Motion filed in the reference before the PBRT. Charles deponed that the respondents had mutually agreed amongst themselves during a meeting with him (Charles on behalf of the appellant) that the respondent would relinquish the leased premises to the company owned by Geoffrey Mayieka Bogonko (Hellen's son) Gerick Kenya Limited to carry on its business thereon. Following the mutual agreement, Charles states he had a meeting with Geoffrey where the rent for the premises was renegotiated and agreed at kshs. 30,000/= and that a draft lease was drawn between the appellant and Gerrick Kenya Limited but which however had not been executed at the time the respondent instituted the reference. After agreeing the lease terms with Gerick Kenya Limited the respondent avers that it was issuing rent invoices to Gerick Kenya Limited and not the respondent and that it was Gerick Kenya Limited who was paying the rent as per the cheques exhibited at pages 15, 17, 20 and 22 of the record of appeal.

12. The appellant's position is that the lease/tenancy with the respondent was extinguished when the lease premises were handed over to Gerick Kenya Limited and the latter commenced paying the new rent to the appellant. The appellant contends the respondent had no *locus standi* to approach the BPRT for any remedies as it had ceased being a tenant in the appellant's premises. The appellant avers that the reference made to BPRT was essentially a conspiracy contrived between the respondent and Gerick Kenya Limited with a view of avoiding paying the enhanced rent of kshs. 30,000/= that had been agreed between the appellant and Gerick Kenya Limited.

13. The respondent in its submissions supports the findings and holdings by the Tribunal asserting that the Chairman properly evaluated the evidence placed before him and arrived at the correct findings on the facts and on the law. The respondents argument is that after the expiry of the initial 2 year lease on 31st July 2012 the same was extended and the chairman properly held that there was a periodic tenancy in place which under the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301 Laws of Kenya is a controlled tenancy which could only be terminated in accordance with the provisions of Section 4(2) of the Act.

14. The appellant counters the respondent's argument that the tenancy between them could only be terminated in compliance with Section 4(2) of the Act by arguing that there was no lease in existence between the appellant and the respondent to call for the invocation of the provisions of Cap 301 Laws of Kenya relating to termination of controlled tenancies since the respondent had already surrendered and/or relinquished its lease over the premises and that a new tenant Gerick Kenya Limited had taken over the premises. The chairman of Tribunal upon review of pleadings before him made the following findings:-

1. That the applicant and landlord herein entered into a lease agreement for a period of two years from 1st August 2010 ending on 31st July 2012. This was controlled within the meaning of Section 2 of Cap 301. This lease was entered by both parties.

2. The lease agreement between the landlord and Gerick Kenya Ltd which is annexed in the affidavit of the applicant and the landlord herein is not executed by any of the parties and is of no evidence value before the Tribunal.

3. That there is no affidavit from any director of Gerick Kenya Ltd to show in what capacity the company was paying rent to the landlord herein.

4. That there is no evidence in writing to show that the applicant herein surrendered the interest or assignment of its lease to Gerick Kenya Ltd.

15. On the basis of those findings the Tribunal went on to hold that there was a landlord and tenant relationship between the appellant and the respondent which could only be terminated in accordance with the procedure set out in Cap 301 Laws of Kenya. The appellant contends that the findings by the Tribunal were not supported by any evidence and that to the contrary the evidence pointed to the fact that the respondent

had relinquished and/or surrendered the premises which were taken over by Gerick Kenya Limited.

16. I have reviewed the evidence and re-evaluated the annextures that had been placed before the Tribunal and in my view there is overwhelming evidence pointing to the fact that the respondent had indeed relinquished and/or surrendered the premises leased to it which gives credence to the assertion by the appellant that there was a mutual agreement to handover the premises to Gerick Kenya Limited to carry on as the new tenant in place of the respondent. Why do I hold that view?

17. The affidavit sworn in reply by Charles Mageto to the respondent's application before the Tribunal in paragraphs 3, 4, 5 and 6 explains in some considerable detail the relationship between Gerick Kenya Limited and Pebo (Kenya) Limited, the respondent herein. They are companies owned by members of one family who the said Charles Mageto knew very well. There is no dispute that the respondent was a tenant in the appellant's premises pursuant to the lease annexed for a term of two years from 1st August 2010 to 31st July 2012 which was renewable for a further term of 2 years. The issue that arises is whether in December 2015 when the reference at the Tribunal was filed, the respondent was a tenant in the premises.

18. The existence of a tenancy may be deduced from the conduct of the parties. The payment of rent no doubt must be one of the clearest signals that a landlord and tenancy relationship exists. In the present matter, the respondent annexed before the Tribunal copies of invoices for rent drawn by the appellant to **"Pebo Kenya Ltd - Mpesa"** (the respondent) for the months of August, September and October 2014 (invoice No. 333 of 4th September 2014) and for the months of November, December 2014 and January 2015 (Invoice No. 345 of 27th November 2014). The respondent further annexed rent invoices for the months of May 2015, June to August 2015 and September - November 2015 which were all drawn to Gerick (K) Ltd where the monthly rent was stated at kshs. 30,000/= and not kshs.10,000/= which the respondent had been paying monthly. The payments were all effected on cheques drawn by Gerick Kenya Ltd. In regard to the invoices drawn to Pebo (K) Ltd, Gerick Kenya Ltd must have been settling the same on behalf of the respondent. From May 2015 all the invoices were drawn to Gerick Kenya Limited and clearly showed that they were in respect of the rent for the specified months at the rate of kshs. 30,000/= per month (exclusive of VAT).

19. While it is true there was no formal document in writing to evidence the surrender of the lease held by Pebo (K) Limited over the demised premises to Gerick Kenya Ltd, there is ample evidence to corroborate the appellant's assertion that it was mutually agreed that Gerick Kenya Limited would take over the premises previously leased by the appellant to the respondent.

20. It is not probable that Gerick Kenya Limited would all of a sudden have commenced paying rent at kshs. 30,000/= per month and make payments for 7 months (May - November 2015) up from kshs. 10,000/= unless there was an agreement. The appellant indeed when the rent for the quarter December 2015 to February 2016 fell due and Gerick Kenya Limited had delayed in effecting payment, through its advocates made a formal demand for payment of the rent vide letter dated 6th January 2016 annexed at page 52 of the record of appeal. The letter in part stated:-

> **"Demand is hereby made for your payment of rent due for the quarter beginning 1st December 2015 and terminating, 29th February, 2016 being kshs. 90,000/= together with VAT thereon at 16%. You are aware that all rental premium is payable in advance on or before the 7th day of the first month of each quarter.**
>
> **In the event that full payment of outstanding rental premium together with ax thereon is not made within the next seven (7) days and the lease agreement in your custody not executed and returned to our client within the same said seven (7) days our peremptory instructions are to issue formal notice of termination of your tenancy without recourse to you whatsoever."**

21. The lease referred to in the said letter is the same lease the respondent claimed to have stumbled upon. The unexecuted lease was from the appellant to Gerick Kenya Ltd and was to be for a term of 5 years and 3 months from May 2015 to 31st July 2020 at the initial monthly rent of kshs. 30,000/=. The rent was to be paid quarterly in advance. My view is that on the material and evidence placed before the Tribunal, the Chairman ought to have found that as at December 2015 when the reference was filed at the Tribunal, the respondent had ceased to be a tenant of the appellant and that Gerick Kenya Limited was the tenant. The Hon. Chairman's finding that the respondent was a periodic tenant of the appellant in the premises was against the weight of the evidence and was not supported by the evidence.

22. This court having found as a fact that the respondent was not a tenant of the appellant as at the time the reference was filed at the Tribunal, it follows that the respondent did not have the *locus* to file the reference and consequently the decision of the Tribunal was unsustainable. The Hon. Chairman erred in failing to find no tenancy relationship existed between the appellant and the respondent and thus made the orders that he made without jurisdiction.

23. In the result, this appeal succeeds and is allowed. The orders made by the Hon. Chairman of the Tribunal on 6th May 2016 are set aside and are substituted with an order dismissing the reference before the Tribunal in its entirety.

24. The costs of this appeal and the costs of Kisii BPRT No. 69 of 2015 are awarded to the appellant as against the respondent.

25. Orders accordingly.

JUDGMENT DATED, SIGNED and DELIVERED at KISII this 29TH DAY of JUNE 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

Ms. Kebungo for Nyamurongi for the appellant

N/A for the respondent

Ruth Court Assistant

J. M. MUTUNGI

JUDGE