



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**APPEAL NO. 146 OF 2014**

**ZACHARIA BOERA.....APPELLANT**

**VERSUS**

**GRACE MAKORI.....RESPONDENT**

**J U D G M E N T**

**(Being an appeal from the Judgment and decree/orders of Hon. Mbichi Mboroki, Chairman Business Premises Rent Tribunal sitting at Kisii on the 5<sup>th</sup> December 2014 in Kisii B.P Rent Tribunal Case No. 30B of 2012)**

1. This appeal is against the judgment of the chairman Business Premises Rent Tribunal in BPRT Case No. 30B of 2012 delivered on 5<sup>th</sup> December 2014. After hearing the parties the chairman in his judgment dismissed the tenant's reference dated 30<sup>th</sup> May, 2012 and allowed the landlord's notice dated 30<sup>th</sup> April 2012 seeking to terminate the tenancy to enable major repairs to be done. The chairman further ordered the appellant to vacate and deliver vacant possession of the suit premises on or before 31<sup>st</sup> December 2014 and in default the landlord/respondent to be at liberty to evict the appellant. The costs of the reference were awarded to the landlord/respondent.

2. Aggrieved by the judgment/decision, the appellant filed this appeal where he raises the following grounds of appeal:-

**1. The learned chairman of the Business Premises Rent Tribunal (hereinafter referred to as "the chairman") misdirected himself on several matters of law and fact and consequently arrived at a decision that was not just and fair in the circumstances of the case.**

**2. The learned chairman erred in law in failing to note that the respondent did not have locus standi to issue the notice dated 30<sup>th</sup> day of April 2012 as she was neither the registered proprietor nor the appointed legal administrator of the estate of Kingoina Kinyuri the registered proprietor of title No. "Kisii Municipality/Block III/85 known as Kiongoso Building.**

**3. The learned chairman erred in law of evidence and practice in deciding the case against the weight of evidence in that;**

**a) He failed to appreciate that the repairs and renovations set out in the letter dated 10<sup>th</sup> March 2012 from the Municipal Council of Kisii for the painting and sealing water seepage from the 1<sup>st</sup> floor does not amount to "substantial work of construction on the premises" as stipulated in Section 7(1) (f) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.**

**b) He failed to acknowledge the fact that the leakage had been repaired as stated by the appellant and that the painting could be done by merely temporarily closing the business for one week or thereabout and then allowing the tenancy to continue.**

**c) He failed to note that the allegations made in evidence by the self imposed landlady were not corroborated by any other independent witness or tenant and therefore she failed to satisfy the provisions of Section 107, 108 and 109 of the Evidence Act.**

**4. The learned chairman erred in law in failing to properly exercise the discretion accorded to him by Section 9 (1) (a) of the Landlord and Tenant Act and failing to note that in the circumstances of the case there was no justification for termination of the tenancy as the repairs or renovations could be effected even by the tenant.**

**5. The learned chairman erred in law in ordering the tenant/appellant to pay the costs of the case in the circumstances and to vacate the premises before the expiry of the 30 days statutory period provided for lodgment an appeal.**

3. As is the norm, this being a first appeal, the court is obligated to re-evaluate the evidence adduced before the trial court to satisfy itself that the decision reached by the trial court was justified having regard to the evidence. The appellate court will ordinarily not interfere with the trial court's findings of fact unless the court acted on wrong principles and/or a misapprehension of the evidence. In the Court of Appeal case of **Ephantus Mwangi & Another –vs- Duncan Mwangi Wambugu [1982] 1 KAR 278** Hancox, JA at page 292 stated as follows:-

**“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 misapprehension of evidence or the judge is shown demonstrably to have acted on wrong principle in reaching the finding he did.”**

The court in the same case inter alia held:-

**“The Court 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 or probabilities material to an estimate of the evidence or (b) that his impression based on the demeanor of material witness is inconsistent with the evidence in the case generally.”**

4. In the matter before the Tribunal the landlord/respondent served the tenant/appellant herein with a notice to terminate the tenancy under Section 4(2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, cap 301 Laws of Kenya on the ground that:-

**“On termination of tenancy I intend to renovate the leaking roof which you complained severally to me which will not be done while in occupation.”**

Upon receipt of the notice to terminate the tenancy the appellant filed the BPRT reference to oppose the notice of termination. The reference was duly heard and the parties testified before the chairman who gave his reasoned judgment on 5<sup>th</sup> December 2014 which is the subject of the instant appeal.

5. The respondent testified that he was the owner of the suit premises **Kisii Municipality/Block III/85** where the appellant was a tenant carrying on a hotel business. The respondent stated that the premises was in a state of disrepair and needed to be renovated and whatever renovations that needed to be carried out could not be undertaken whilst the appellant was in possession and in occupation. The respondent further stated that even the appellant had previously complained that the roof was leaking and filed a complaint vide BPRT No. 49 of 2011. Additionally, the Kisii Municipal Council had served the respondent with a notice via the letter dated 10<sup>th</sup> March 2012 requiring him to undertake the specified repairs namely:

- **The verandah balcony was worn out.**
- **There was water seepage leaking from the 1<sup>st</sup> floor of the hotel to the underground floor.**
- **The building had not been given a face lift over a long period and needed to be repainted.**

It was the landlord/respondent's position that he required the appellant to vacate the premises to enable him to carry out the required repairs.

6. The appellant in his evidence before the Tribunal admitted that in 2011 he had complained about the leaking roof and that he had filed BPRT No. 49 of 2011 in that regard. He stated that the leaking roof had been repaired and it was his position that the premises did not require any renovations and specifically stated the premises he was occupying did not require any renovations as the crack on the upper floor had been repaired by the tenant on the upper floor and was not leaking any further. The appellant further stated he had been a tenant since 1980.

7. Upon evaluation of the evidence adduced before him the Chairman of the Tribunal made the following findings:-

**1. There was no evidence of ill will or bad feelings or grudge between the parties and that the appellant and the respondent had a good working relationship.**

**2. The tenant had enjoyed a quiet and peaceful enjoyment of the premises from 1980.**

**3. The tenant had admitted no renovations had been carried out on the premises from 1980.**

**4. That the tenant had previously complained to the tribunal in respect of the leaking roof.**

**5. That there was no evidence that the leaking roof and/or other renovations had been carried out in the tenants premises.**

**6. That the tenant had not challenged the authenticity of the letter dated 10<sup>th</sup> March 2012 from the Municipal Council of Kisii that pointed out the repairs that needed to be made.**

8. The tribunal was satisfied on the basis of the evidence that the respondent had proved on a balance of probabilities the grounds for seeking termination of the appellant's tenancy and was accordingly entitled to an order of vacant possession to enable her to carry out the renovations. The chairman was further satisfied that the renovations that needed to be done could not be carried out whilst the appellant was in possession of the premises.

9. On the 1<sup>st</sup> ground of appeal the appellant avers that the chairman misdirected himself on issues of law and fact thereby arriving at a decision that was not just or fair in the circumstances of the case. I have reviewed the evidence and the findings of the tribunal and I am persuaded that the chairman properly evaluated the evidence and arrived at a correct and justifiable decision on the basis of the evidence. His findings were supported by the evidence and the court finds there was no misdirection on any point of law or fact.

10. On the 2<sup>nd</sup> ground of appeal the appellant argues that the respondent lacked *locus standi* to issue the appellant with the termination notice dated 30<sup>th</sup> April 2012 as she was not the registered owner of title **Kisii Municipality/Block III/85**. This was not an issue that was raised before the Tribunal and the issue whether or not the respondent had capacity to serve the notice to terminate the appellant's tenancy is not one the tribunal was called upon to make a determination on and the same cannot be properly raised before this court. Having gone through the record of the proceedings it is evident the matter proceeded on the basis that the respondent was the appellant's landlord. The appellant was paying rent to the respondent and clearly the appellant regarded the respondent as his landlord. I find no merit in this ground of appeal.

11. Grounds 3 and 4 of appeal relate to evaluation of the evidence and the exercise of discretion by the chairman of the tribunal. The appellant argues that the decision of the tribunal was against the weight of the evidence. The appellant's contention is that the repairs/renovations required were not of such a nature as to warrant vacation of the premises and/or could be undertaken by having a temporary closure of the premises for a short duration of time. The appellant further argues the respondent's evidence was uncorroborated and did not satisfy the provisions of Sections 107, 108 and 109 of the Evidence Act Cap 80 Laws of Kenya respecting the burden of proof. As the Hon. Chairman observed, there was evidence that the appellant had earlier on complained of a leaking roof in 2011 which had even been a subject of complaint by the appellant before the Tribunal. The appellant had been in the premises from 1980 as a tenant and no repairs had been carried out on the premises ever since. The Kisii Municipality had given a formal notice for repairs to be undertaken on the premises vide the letter dated 10<sup>th</sup> March 2012 following inspection of the premises. Of the repairs identified was water leakage from the 1<sup>st</sup> floor to the ground floor where the appellant's hotel was located. I do not suppose the repairs identified were such as would have been possible to execute when the appellant's business was still running. There was credible and ample evidence that the premises were in need of repairs and the tribunal found as much. The chairman was of the view that the repairs could not be carried out while the appellant was in occupation.

12. In rendering his decision, I am satisfied the chairman properly exercised his discretion as he was mandated to do under Section 9 of Cap 301 Laws of Kenya which provides thus:

**(1) Upon a reference a Tribunal may, after such inquiry as may be required by or under this act, or as it may deem necessary-**

**(a) Approve the terms of the tenancy notice concerned, either in its entirety or subject to such amendment or alteration as the tribunal thinks just having regard to all the circumstances of the case; or**

**(b) .....**

**(c) And in either case make such further or other order as it thinks appropriate.**

**(2) Without prejudice to the generality of this section, a tribunal may, upon any reference:-**

**(a) .....**

**(b) Terminate or vary any of the terms or conditions of the controlled tenancy, or any of the rights or services enjoyed by the tenant, upon such conditions, if any, as it deems appropriate.**

13. Upon review and evaluation of all the evidence adduced before the tribunal, I find no basis upon which the Hon. Chairman can be faulted both in his findings and the consequential decision. He exercised his discretion judiciously and this court will not interfere with his exercise of the discretion as there has been no demonstration that he misdirected himself in any material respect and/or applied and relied on any wrong principles.

14. The upshot is that I find the appeal to lack any merit and the same is dismissed with costs to the respondent.

**JUDGMENT DATED, SIGNED and DELIVERED at KISII this 22<sup>ND</sup> DAY of JUNE, 2018.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Mr. Nyambati for G. S. Okoth for the appellant

Mr. Kimaiyo for Mose for the respondent

Ruth court assistant

**J. M. MUTUNGI**

**JUDGE**