



Bahajj v Said Bin Seif Properties Ltd (Environment and Land Appeal E015 of 2023) [2024] KEELC 139 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEELC 139 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E015 OF 2023
NA MATHEKA, J
JANUARY 25, 2024**

BETWEEN

ABDO MOHAMED BAHAJJ APPLICANT

AND

SAID BIN SEIF PROPERTIES LTD RESPONDENT

JUDGMENT

1. The Appellant herein Abdo Mohamed Bahaji appeals to the High at Mombasa against the Decree/ Orders of the Vice Chairperson, Mombasa Business Premises Rent Tribunal made in Mombasa BPRTC No. E256 of 2022 delivered on 31st July, 2023 on the following amongst other reasons;
 1. The Learned Vice Chairperson erred in Law and in fact in holding that the Notice of Termination served upon the Appellant was valid.
 2. The Learned Vice Chairperson erred in Law and in fact holding that Respondent had produced evidence of approved plans.
 3. The Learned Vice Chairperson erred in Law and in fact in Law in holding that the Appellant did not rebut most items by the Respondent.
 4. The Learned Vice Chairperson erred in Law and fact in dismissing the Appellant's Preliminary Objection.
 5. The Learned Vice-Chairperson erred in Law and fact in ordering the O.C.S Makupa Police Station to enforce the order when it had not been prayed for by the Respondent.
 6. The Learned Vice Chairperson erred Law and in fact in holding that the Appellant do give vacant possession by 15th August, 2023.



7. The Learned Vice Chairperson erred in Law and in fact in granting the Respondents costs and interest.
 8. The Learned Vice Chairperson erred in Law and in fact in failing to appreciate the Appellants Written Submissions and cited Case Law.
 9. The Learned Vice Chairperson erred in Law and in fact by failing to dismiss the Respondent's Notice.
2. He seeks for the court for Orders that;
- a. This Appeal is allowed with costs.
 - b. The Decree of the Vice Chairperson delivered in Business Premises Rent Tribunal, Mombasa BPRTC No. E256 of 2023 delivered on 31st July, 2023 be set aside and this Appeal be allowed by setting aside the entire Judgment as against the Appellant with costs.
 - c. The cost of the Appeal be granted to the Appellant.
3. This court has carefully considered the appeal and the submissions therein. In their written submissions the Appellant withdrew ground 7 of the memorandum of appeal on the issue of costs and interest. This is an appeal from the judgment and decree of reference no. E256 of 2022 delivered on 31st July 2023 by Hon C. Mugambi of Mombasa Business Premises Rent Tribunal whereby he upheld the respondent's termination notice dated 16th November 2022. The learned chairperson was satisfied with the reasons for demolition of shop no.7 comprised on title 4/R Section XXXIX.
4. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123, this principle was enunciated thus:
- ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."
5. The brief background is that there was a fire outbreak that occurred on 10th July 2021 at Markiti or Mackinnon market whereby one of the stalls caught fire due to short circuiting after excessive power supply. The fire caused damage and loss of around Kshs. 55,000,000 and therefore after a technical report by Eng. Joshua W. Achia the respondent decided to issue a termination notice dated 16th November 2022 to the appellant for purposes of demolition or reconstruction and also for breach of obligations by the appellant. The alleged breach was in the sense that the appellant sublet the shop to other tenants without the consent of the respondent.
6. During the trial, the respondent produced its manager (PW1) and the above-mentioned engineer (PW2) as its witnesses. The appellant (DW1) testified alongside another witness Eng. David Jomeli (DW2). The respondent's case is that owing to the said fire, he severally tried to inspect the suit property but was denied access by the appellant for a few months and that after the inspection by PW2, the respondent deemed it fit to demolish and /or do repairs. It was the evidence of PW1 the respondent intends to remove all the tenants to achieve the above said goal.



7. The appellant's case was substantially different as he testified that the respondent increased the monthly rent by 100 percent and is trying to evict him only and even argued that it is impractical to do any constructions while the other tenants are in the premises next to the suit property. DW 2 testified that the integrity of the building was sound and could survive the next ten to twenty years. In his judgment, the Vice Chairperson stated that the court also caused a report on the suit property which report was dated 24th March 2023 and was adverse to the report of DW 2.
8. In the said report, it gives a clear picture of Shop no.7 being divided into 12 stalls on both sides of the wall and a corridor in the middle which serves as entry and exit on both ends. It reveals that the fire did not start at Shop 7 but in an adjacent shop. The fire caused substantial damage to the walls of the shop, ceiling and roof. There was no further mention on the integrity of the Shop. Counsel for Appellant submitted that the tenancy notice was defective as it was to lapse in the middle of a month while the tenancy was monthly and began on the 1st day and ended on the last day of the month. That the Vice Chair erred in law and fact because PW1 had admitted there is no license for demolition from the County Government of Mombasa or any architectural drawings for any intended project. That the Vice Chair depended more on expert reports than the testimony of the appellant such as he disregarded the fact that the appellant has been paying rent, the new lease agreement which the appellant refused to sign and so forth. Failing to appreciate the appellants submissions with regard to his preliminary objection and relied on Nyeri Civil Appeal No. 306 of 2010 Municipal Council of Thika v Elizabeth Wambui Kamicha. That the Vice Chair ordered the OCS of Makupa police station to effect the termination notice and it was not a prayer by the respondent. I have carefully considered the Vice Chairman's said judgment and I find that he referred to the appellant and DW2 and all their statements and considered them. He also referred to the testimony by DW1 where he held;

I find no merit in the argument that the tenancy notice must be given on the actual date of the tenancy being the 1st of each subsequent month. If this was the intention of the drafters of Cap 301 nothing would have been easier than to say so, in their wisdom they simply stated more than 2 months.”

9. On the fourth ground that the Learned Vice Chairperson erred in Law and fact in dismissing the Appellant's Preliminary Objection. The court has to look at the meaning of a preliminary objection. A preliminary objection was described in *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 as follows;

----a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case Sir Charles Newbold, P. stated;

a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.



10. The point of law raised in the said preliminary objection is that the tenancy notice is defective and the defect was elaborated in the appellant's submissions filed on 4th April 2023. The argument is that the tenancy notice was to lapse in the middle of the month i.e. 10th February 2023 and not at the end of the month which according to the appellant is contrary to the tenancy relationship which started on the 1st day of the month and ended on the last day of the month. The appellant also argued that the 60 days rule of service before it takes effect was not adhered to. Vide an affidavit sworn by the appellant on 31st March 2023, the said notice was served upon the same on 21st November 2022 and was to take effect on the 10th February 2023 which is an 80 days interval. The other argument was that the respondent was still receiving the monthly rent which in my view is not a pure point of law. Finally, there was the argument that the respondent was trying to take 'shortcuts' through the use of affidavits and that the matter ought to go full trial. I find that these are issues of fact and not law and the Vice Chairman did not err in reaching the same finding.
11. Consequently, I find that the Vice Chairperson considered the testimonies and submissions before making his judgment. Based on the foregoing, it is my opinion that the learned Vice Chairperson properly applied himself to the facts and the law and came up with a just conclusion. Consequently, I find that this Appeal is not merited and is dismissed with costs.
12. It so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF JANUARY 2024.

N.A. MATHEKA

JUDGE

