



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC APPEAL NO.10 OF 2016

ALFRED KIHORO..... APPELLANT

VERSUS

1. JOSEPH GITAU GACHERU

2. NICKSON KAMAU GACHIRI..... RESPONDENTS

JUDGMENT

(Being an appeal from the judgment and orders of the Chairperson of the Business Premises Rent Tribunal Hon.D.Mochache delivered on 10th February 2012 in BPRTC No. 783 of 2010)

1. This appeal arises from the judgment and order of the Chairperson of the Business Premises Rent Tribunal, Hon. D. Mochache made on 10th February 2012 in **BPRTC No. 783 of 2010** (hereinafter “**the tribunal case**”). The respondents served the appellant with a notice under section 4(2) of the Landlord and Tenant(Shops, Hotels and Catering Establishments) Act, Cap.301 Laws of Kenya (hereinafter “**the Act**”) on or about 11th August 2010 seeking to terminate the appellant’s tenancy in respect of the premises known as L.R No. 209/136/13 Race Course Road(hereinafter referred to as “the suit property”) with effect from 1st November 2010 on the grounds that the respondents wanted to occupy the premises for a period of not less than one year for the purposes of their own business. On 3rd September 2010, the appellant through his advocates on record notified the respondents under section 4(5) of the Act that the appellant would not comply with the notice. Prior to the issuance of the said notice by the respondents, there was a pending case at the tribunal between the appellant and the respondents namely, Tribunal Case No. 203 of 2008, Alfred Kihoro Githaiga vs. Joseph Gitau Gacheru and Nickson Kamau Gachiri(hereinafter referred to only as “**BPRTC No.203 of 2008**”). Upon receipt of the said notice, the appellant filed an application in BPRTC No.203 of 2008 on 26th October 2010 seeking among others, a declaration that the notice of termination of tenancy dated 11th August 2010 that was served upon him by the respondents was null and void and an injunction restraining the respondents from evicting him from the suit property pending the hearing of the reference he had filed in that case. In ground 3 in support of the said application, the appellant stated that “*THAT the appellant is a tenant in the said premises paying rent of kshs 12,500/- per month.*” In paragraph 1 of his affidavit sworn on 25th October 2010 in support of the said application, the appellant stated that “*THAT I am the plaintiff/Subtenant herein hence competent to swear this affidavit*”. In paragraph 3 of the said affidavit, the appellant stated that “*THAT the Respondent are themselves Head tenants in the suit premises having entered into a tenancy agreement with the landlord one Charles Muvisi Kyuli on the 1st of October 2005(“Annexed and Marked AKG1 is a copy of the tenancy agreement between the Head tenants herein and the Landlord”*. It is not clear from the record as to what happened to the appellant’s application of 26th October 2010 in which he sought to have the notice of termination of his tenancy declared a nullity. Following the filing of that application, the

appellant failed to file a reference to the said notice before the expiry thereof in accordance with the provisions of the Act.

2. On 5th November 2010 after expiry of the said termination notice, the appellant filed yet another application now in BPRTC No. 783 of 2010, Alfred Kihoro Githaiga vs. Joseph Gitau Gacheru and Nickson Kamau Gachiri seeking leave to file reference out of time and an injunction to restrain the respondents from evicting him from the suit property pending the hearing and determination of the said reference. In paragraph 1 of the affidavit sworn on 4th November 2010, the appellant described himself once again as follows; *“THAT I am the Applicant/Subtenant herein hence competent to swear this affidavit”*. In paragraph 3 of the said affidavit, the appellant reiterated that, *“THAT the Respondent are themselves Head tenants in the suit premises having entered into a tenancy agreement with the landlord one Charles Muvisi Kyuli on the 1st of October 2005 (Annexed and Marked AKG2 is a copy of the tenancy agreement between the Head tenants herein and the Landlord)”*.

3. The appellant's application for leave to file reference out of time was allowed and the appellant proceeded to file his reference on 14th December 2010. The appellant's reference was heard by the Chairperson of the Business Rent Tribunal, D. Mochache who delivered a judgment on the matter on 10th February 2012 dismissing the reference and allowing the respondent's notice to terminate the appellant's tenancy. The appellant was given up to 1st April 2012 to vacate and hand over the suit property to the respondents who were also ordered to refund to the appellant a sum of Kshs. 100,000/= which the appellant had paid as goodwill at the commencement of the sub-tenancy.

4. It is against the said decision made on 10th February 2012 that this appeal has been preferred. The appellant has put forward 12 grounds of appeal against the decision of the learned Chairperson of the tribunal namely;

(i) That the Chairperson of the tribunal erred in law and in fact in her finding that there existed a tenancy relationship between the appellant and the respondents.

(ii) That the Chairperson of the tribunal erred in law and in fact in allowing the appellants' notice to terminate the appellant's tenancy.

(iii) That the Chairperson of the tribunal erred in law and in fact in disregarding the terms of the agreement dated 6th January 2006 which the appellant had entered into with the respondents.

(iv) That the Chairperson of the tribunal erred in making a finding that the said agreement created a tenancy agreement between the appellant and the respondents.

(v) That the Chairperson of the tribunal erred in fact and law in implying terms into a written agreement.

(vi) That the Chairperson of the tribunal erred in fact and law in overlooking the fact that the respondents were guilty of material non-disclosure and in failing to consider the evidence that was given by the appellant in cross-examination.

(vii) That the Chairperson of the tribunal erred in fact and law in failing to consider the fact that the appellant would lose his goodwill if the notice of termination was allowed to stand.

(viii) That the Chairperson of the tribunal erred in fact and law in finding that the respondents had shown good cause for termination of the tenancy.

(ix) That the Chairperson of the tribunal erred in ordering the respondents to refund to the appellant a sum of Kshs.100,000/- as goodwill instead of the market rate.

(x) That the Chairperson of the tribunal was openly biased against the appellant in her judgment.

(xi) That the Chairperson of the tribunal misdirected herself on both law and fact thereby occasioned a miscarriage of justice against the appellant.

(xii) That the decision of the Tribunal was manifestly unfair and prejudicial to the appellant.

5. The appeal was heard by way of written submissions. The appellant filed his submissions on 25th January 2016 while the respondents filed their submissions in reply on 10th February 2016. I have considered the proceedings of the tribunal, the judgment the Chairperson, D. Mochache made on 10th February 2012, the grounds of appeal filed herein by the appellant and the written submissions by the parties' respective advocates. I will consider the appellant's grounds of appeal together. As I have stated at the beginning of this judgment, the respondents had served the appellant with a notice to terminate the appellant's tenancy on the suit property on the grounds that the respondents wanted the premises for their own use for a period of more than one year. The issues which the tribunal was called upon to determine were, whether there was a landlord and tenant relationship between the appellant and the respondents and if so, whether the respondents had demonstrated a genuine intention to occupy the suit property. The tribunal after analyzing the evidence and other material that was before it made a finding that there was a landlord and tenant relationship between the appellant and the respondents and that the respondents had proved that they genuinely required the suit property for their own use. In arriving at the conclusion that a landlord and tenant relationship existed between the parties, the tribunal considered among others the testimony of the appellant and the affidavits which the appellant had sworn in support of the applications which he had brought in BPRTC No.203 of 2008 and BPRTC No. 783 of 2010 to restrain the respondents from evicting him from the suit property. I have set out herein earlier the averments which the appellant had made in the said affidavits. The appellant had stated on oath that he was a subtenant on the suit property and that the respondents were the head tenants who had a lease with the owner of the suit property. In the two affidavits, the appellant had annexed copies of the lease which the respondents had entered into with the owner of the suit property to show that indeed the respondents were the head tenants and that he was a sub-tenant. In the circumstances, I am unable to fault the tribunal in its finding that a landlord and tenant relationship existed between the appellant and the respondents on account of the representations which the appellant had made earlier. I am also in agreement with the tribunal's observation that if at all there was no landlord and tenant relationship between the appellant and the respondents, there was no basis for the reference that the appellant had filed before the tribunal as the tribunal would have had no jurisdiction to determine the dispute. On the issue as to whether or not the appellants genuinely required the suit property for their own use, the tribunal considered how the appellant and the respondents had carried out business on the suit property, the length of time they had operated in the premises together, the size of the premises, the respondents' testimony regarding the growth of their business and the availability of funds for expansion of the business and concluded that the appellants had demonstrated a genuine intention to occupy the premises.

6. I am not persuaded that the learned Chairperson of the tribunal misdirected herself on any point of law or fact. I am satisfied that the Chairperson of the tribunal considered all the facts of the case that was before her and applied the law correctly to the said facts. She neither misapprehended the evidence adduced before her nor did she apply wrong principles of law in reaching the conclusions that she arrived at. I am also not convinced that the Chairperson of the tribunal exhibited any form of bias against the appellant or that the respondents were guilty of any material non-disclosure. In the case of **Makube-vs-Nyamuro(1983)KLR403**, it was held that;

“a court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

7. I am not persuaded that good grounds exist that would justify this court's interference with the tribunal's finding that there was a landlord and tenant relationship between the appellant and the respondents and that the respondents had proved that they genuinely required the suit property for their

own use. As the first appellate court, I have independently considered and re-evaluated the evidence on record. From that exercise, I have reached the same conclusions as the Chairperson of the tribunal who had the advantage of seeing and hearing the witnesses who testified before the tribunal.

8. Due to the foregoing, I find no merit in grounds 1, 2, 3, 4, 5, 6, 8, 10, 11 and 12 of appeal. Grounds 7 and 9 of appeal concerned the issue of goodwill. In my view, it is not correct that the Chairperson of the tribunal did not consider the fact that the appellant had built goodwill on the suit property and that he was bound to lose the same. The tribunal considered the issue and expressed the view that, first, the fact that the appellant had built goodwill on the suit property was not sufficient reason to deny the respondents possession of the property which they had demonstrated that they required. Secondly, the tribunal was also of the view that the appellant could mitigate the loss of such goodwill by leaving his telephone contact on the suit property for a period of time so that his clientele could follow him to his new business premises.

9. I am in agreement with the tribunal that the fact that the appellant had built goodwill on the suit property was not a good ground to deny the respondents possession of the property. I am of the view that in the circumstances of this case, goodwill was only a factor to be considered when fixing the time frame within which the appellant was to hand over possession of the suit property. On the issue of compensation for the goodwill, I am unable to fault the tribunal for awarding the appellant nothing more than the sum of Kshs. 100,000/= which the appellant had paid as goodwill when the appellant agreed to become the respondents' sub-tenant. There was no basis upon the tribunal could have awarded the appellant more than the said sum of Kshs. 100,000/=. The appellant had left it to the tribunal to assume the existence of the goodwill and to make an appropriate award on account thereof. Apart from his contention that he had carried out business on the suit property for several years, no evidence was led as to the goodwill that he had built. Even if the tribunal was to award him compensation for the goodwill, there was no material before the tribunal on the basis of which it could have assessed commensurate award. In the circumstances, I find no merit in grounds 7 and 9 of appeal.

10. In the final analysis and for the reasons given above, I find no merit in the appellants' appeal. The same fails in its entirety and is hereby dismissed with costs to the respondents. The appellant shall vacate and handover possession of the suit property within 120 days from the date hereof failure to which the respondents shall be at liberty to apply for warrants for his forceful eviction.

Delivered and Signed at Nairobi this 25th day of January, 2017.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Irungu for the Appellant

Kithinji for the Respondents

Kajuju Court Assistant

S. OKONG'O

JUDGE