REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELCA NO. 33 OF 2015

TEKIMANO COMPANY LIMITED .... APPELLANT

-VERSUS-

JAMES WANJOHI GITAHI ....1ST RESPONDENT

GITHINJI NGOTHO ....2ND RESPONDENT

JOSPHAT KAHIHIA MUHORO ....3RD RESPONDENT

JOHN KABUKURU MUNYI ....4TH RESPONDENT

MWANGI RUITA .... 5TH RESPONDENT

(Being an appeal from the judgment of the Chairperson BPRT (Hon. Mochache D) delivered on16th November, 2012)

JUDGMENT

Introduction

1. At all times material to this suit, the respondents were tenants of the appellant at the appellant's premises known as **Nyeri Municipality Block III/6** (the suit premises).

2. On 23rd October, 2009, the appellant issued the respondents alongside the other tenants in the suit premises with notices of termination of their tenancies on the ground that it intended to carry out major renovations on the suit premises.

3. The termination notices required the respondents to vacate the suit premises by 1st January, 2010.

4. Dissatisfied by the notices, eight out of the nine tenants of the appellant in the suit premises opposed the notices and filed references before the Tribunal for investigation and determination of the issues involved.

5. When the matter came up for hearing, the appellant through its secretary, maintained that the appellant needed to renovate the suit premises and that the renovations could not be done while the tenants remained in possession of the suit premises.

6. The respondent's on their part opposed the notices on the grounds that the appellant did not have a genuine intention to renovate the suit premises.

7. Upon considering the cases of the respective parties, the Chairperson of the Tribunal dismissed the appellant's notices on the grounds that:

(i) The appellant did not proof that it genuinely wanted to carry out the intended renovations;

(ii) The impugned notices were issued without a resolution of the company hence a nullity ab initio;

(iii) The intention of the appellant was not to undertake renovation but to subdivide the suit premises to have more tenants;

(iv) There was bad faith on the part of the appellant in issuance of the notices.

8. Aggrieved by the decision of the Tribunal, the appellant appealed to this court on eight grounds which can be summarised as follows:

(a) That the learned Chairperson of the Tribunal erred by holding that it had no genuine intention of renovating the suit premises;

(b) That the learned Chairperson of the Tribunal erred by holding that it had manufactured evidence;

(c)That the learned Chairperson of the Tribunal took into account extraneous matters;

(d) That the learned Chairperson of the Tribunal erred by determining the reference on procedural technicalities;

(e) That the learned Chairperson of the Tribunal erred by holding that in issuing the impugned notices it was actuated by bad faith; and

(f) That the learned Chairperson erred by decreeing that the tenants who had signed leases with it should remain in the suit premises yet he had no jurisdiction to entertain the references by the persons who had signed leases with it.

9. In essence the appellant contends that the learned Chairperson of the Tribunal should not have dismissed its notices.

10. This being a first appeal, it is my duty to reconsider the evidence adduced before the Tribunal, evaluate it and draw my own conclusions bearing in mind that I neither saw nor heard the witness testify and to make due allowance in that respect. See **Selle V Associated Motor Boat Company Ltd, (1968) EA 123**.

11. The evidence adduced before the Tribunal and which led to the impugned decision can be summarised as follows:

(i) The suit premises had not been renovated for a long period of time (since they were acquired);

(ii) The landlord/appellant wanted to reconstruct the building in order to attract more customers (the premises occupied by the tenants would be subdivided to create more units);

(iii) The intended renovations would entail demolishing of walls and building others;

(iv) Some of the tenants in the suit premises had leases which had not expired;

(v) Some of the tenants had undertaken renovation of the suit premises with the permission of the appellant but the appellant had not made any arrangements to help them recoup there investment;

(vi) During renovation, it would not be possible to have the tenants in the premises;

(vii) The notices issued to tenants with leases were struck out with costs to the tenants;

(viii) By the time the impugned notices were issued, the company had neither passed any resolution authorising the issuance of the notices to the tenants, nor obtained the necessary approvals from the Local Authority and NEMA;

(ix) It also emerged that the plan relied on did not have the stamp of the architect who allegedly drew it;

(x) There were no minutes of the local authority passing the plan;

(xi) Resolution to issue the notices was made after the notices were issued;

(xii) Approval of NEMA was obtained after the impugned notices had been issued.

(xiii) Some of the tenants had not been issued with termination notices yet the intended renovation of the suit premises extended to the premises they occupied.

12. On the basis of the foregoing evidence, the learned Chairperson of the Tribunal framed the issues for determination as follows:

(i) Whether the landlord had proven a genuine intention to renovate the premises?

(ii) Whether the renovations are of such a nature that the tenants must grant vacant possession to the landlord? and

(iii) Whether the tenants had proved bad faith on the part of the landlord?

13. Concerning those issues she had this to say:

“For the landlord to prove that they have a genuine intention, they must produce plans duly approved by the Municipal Council. The plans produced by the landlord bears the stamps of the Town Engineer, however, the minutes that approved the plan were not produced.

The minutes usually give conditions which must be complied with by the developer. This very vital information is missing to support the fact that the plan was placed before the council to go through the rigorous vetting. Why do I say this? I note that the landlord wants to put up an upper floor. I doubt the Town Engineer would turn a blind eye to a plan which is not accompanied by the Structural Plan. What is going to support the upper floor?

In the absence of Structural Plan, it’s my view that I have not been furnished with sufficient evidence to prove that the foundation as is will be able to sustain another floor and additional rooms.

Secondly, the landlord’s witness clearly stated that there was a meeting of the directors which resolved that he should testify on behalf of the landlord. This meeting was held after the notices were issued. The question then is, how were the notices issued without a resolution of the company?

The company ought to have held a meeting, through an Annual General Meeting (AGM) and passed a resolution that the tenancy should be terminated. That resolution was not produced. The resolution to terminate should have come first then the notices. A resolution cannot be passed after the notices have been issued.

Anyhow, there is no such resolution that was passed before the notices were issued. the notices were therefore a nullity abinitio.

Thirdly, the landlord’s intention is not to undertake any renovations as such, the landlord wants to subdivide the shops into smaller shops so that they can have more tenants. the witness conceded that the shop by James will not be subdivided. So why was he issued with a notice to terminate the tenancy?

Could it be because they refused to sign the leases as the witness stated? That’s not for me to conjencture. Suffice to note that if the issue disturbing the landlord was higher rent, then they could have issued notices to increase rent rather than seek to terminate the tenancy.

The Bills of Quantities produced reveals that the landlord will require Kshs. 2 million to undertake the renovations, yet at the time of giving evidence the landlord did not half of this money in his account.

So how do they commence renovation without sufficient funds?

Fourthly, there are tenants who have leases. They must occupy the premises up to the end of the lease period. The landlord will therefore have to wait until these tenants’ tenancies are terminated before commencing construction/renovation.

One will therefore be tempted to think that the landlord’s directors have not been properly advised.

The witness further conceded that Gathua undertook renovation of the premises with the landlord’s permission. What proposal has the landlord made to refund the amount incurred on the said renovations.

The landlord does not expect the tenant to vacate without recovering the amounts ingested in the premises. It’s therefore my view that the landlord’s notice was premature.

When the witness first gave evidence, he admitted in cross-examination that he did not have NEMA report. His counsel sought to adjourn the matter to recall the witness.

When the witness was recalled, he produced the NEMA report. It’s obvious the landlord was manufacturing evidence from the question that had arisen from cross-examination.

This goes for the resolution of the Board of the directors too.

The witness had conceded that they had no such resolution. On being recalled, he produced one. One can only conclude that the landlord’s intention was not to renovate the premises but rather they wanted to use the law to get rid of the tenants.

The manufacturing of the evidence during pendency of the suit shows bad faith on the part of the landlord.

From the foregoing, it is evident that the landlord has failed to prove a genuine intention to renovate the premises.

I would accordingly proceed to dismiss the landlord’s case with costs to the tenants.”

14. The sole issue for determination is whether the learned Chairperson of the Tribunal erred by dismissing the landlord’s (appellant’s) case.

15. Having carefully reviewed the evidence adduced before the lower court, I am not satisfied that the learned Chairperson of the Tribunal either misdirected herself on the issues placed before her for determination or erred by dismissing the appellant's notices. I say that because:

(i) No valid notices could have been issued without a resolution of the appellant for issuance of the notices. According to the evidence adduced before the Tribunal, the appellant had not passed a resolution authorising the issuance of those notice. I agree with the submissions by the advocates for the tenants (respondents) that without a resolution by the appellant for issuance of the notices, the notices cannot be said to have been issued by the appellant. I also, agree with the learned Chairperson of the Tribunal, that the notices were a nullity abinitio and as such incapable of forming the basis of any orders in favour of the appellant.

(ii) I also find the determination of the learned Chairperson of the Tribunal unimpeachable because before the appellant can be said to be ready to carry out the intended developments, he needed to demonstrate that he had obtained permission from the Local Authority to carry out the intended development and that the project had received approval from the relevant regulatory authorities like NEMA. No development permit had been obtained before the notices were issued.

(iii) Because the approvals sought to be relied on were obtained during the pendency of the suit, the learned Chairperson of the Tribunal cannot, in my view be faulted for holding the view that the appelllant was manufacturing evidence to answer to issues raised in the case.

16. In view of the foregoing, given that the appellant's case turned on issues of fact; there being no evidence that *the determination of the trial court was based on no evidence or on a misapprehension of the evidence or the learned Chairperson of the Tribunal acted on wrong principles in reaching the finding or failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, I find that the appeal has no merits and I dismiss it with costs to the respondents.*

In this regard see the case of ***Mwangi v Wambugu,*** ***[1984] KLR 453*** *where it was held:*

> ***"A Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."***

Dated, signed and delivered in open court at Nyeri this 8th day of March , 2017

L. N. WAITHAKA

JUDGE

In the presence of:

Mr. Wahome h/b for Mr. Kebuka for the 5th respondent

Mr. Kamau h/b for Mr. Karweru for 2nd and 3rd respondents

N/A for the appellant