



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NYERI
ELCA NO. 8 OF 2016
NANYUKI EQUATOR SAVINGS AND
CREDIT COOPERATIVE SOCIETY LTD..... APPELLANT
-VERSUS-
JANE NYAWIRA KIAMA RESPONDENT

(Being an appeal from the judgment of the chairman Business Premises Rent Tribunal (BPRT) (Hon. Mbichi Mboroki) delivered on 18th March 2016)

JUDGMENT

1. At all times material to this suit, the appellant was a tenant of the respondent at the respondent's premises known as LR No.287/4/IV Nanyuki Municipality.
2. By a notice of termination of tenancy dated 30th May, 2013 the respondent issued the appellant with a notice of termination of the tenancy that existed between them.
3. The notice was premised on grounds that the appellant had persistently defaulted in payment of rent as and when it became due and that the landlord intended to occupy the premises for a period of not less than one (1) year and carry business therein.
4. The appellant objected to the notice on the grounds that the notice was defective in form and substance; that they had not defaulted in payment of rent; that the respondent did not have firm intention of carrying business in the suit premises and that they intended to file a reference before the Tribunal for investigation of the notice.
5. In accordance with their notified intention of filing a reference before the Tribunal, on 17th July, 2013, the appellant filed a reference to the Tribunal urging it to investigate the termination notice.
6. When the matter came up for hearing before the Tribunal, the appellant's Chief Executive Officer, Faith Njeri Muchoki, informed the court that the lease that existed between the respondent (landlord) and the appellant (tenant) had expired. She further informed the court that upon expiry of the lease, the appellant continued paying rent at the rate of Kshs. 50,000/= per month.
7. Concerning the allegation that the appellant had persistently defaulted in its rent paying obligation, she contended that the appellant had no rent arrears and that the respondent had not issued termination notices to other tenants in the suit premises.

8. Arguing that the premises is in a good state of repair she explained that it was inspected by the Sacco Regulatory Authority (Sasra).
9. Because the respondent had allegedly admitted new tenants, the appellant did not think that the respondent was serious in her claim that she wanted to reconstruct the suit premises.
10. In cross-examination, she admitted that the respondent always paid rent in arrears yet the lease executed required it to be paid in advance.
11. She also admitted that as at 9th July, 2013 the appellant had not paid rent for May, June and July, 2013.
12. She claimed that the appellant was always waiting for the respondent to collect the cheque.
13. On her part, the respondent maintained that the appellant had persistently defaulted in payment of rent and that it needed to renovate the suit premises with a view of running a supermarket business thereon.
14. Upon considering the cases urged before him the Chairperson of the BPRT held:

“the mandate of the tribunal upon hearing the parties is now to make a determination in respect of the tenant’s reference under section 9 of Cap 301. The landlord seeks to terminate the tenancy of the tenant on the following grounds:

- 1. The tenant has persistently failed and defaulted in paying rent as and when the same fell due.**
- 2. The landlord intends to occupy the premises for a period of not less than one (1) year and carry on business therein.**

The tribunal will now evaluate the above ground in the light of the evidence before the tribunal and the law in respect of the same.

Ground No.1 of termination of tenancy

This ground of termination of tenancy is provided under section 7(1)(b) of Cap 301 which provides as hereunder:

‘that the tenant has defaulted in paying rent for a period of two months after such rent has become due or payable or has persistently delayed in paying rent which has become due and payable.’

The evidence on record and in particular the evidence of Faith Njeri Muchoki confirms that the last lease agreement between the parties expired in September 2012.

The relationship between the parties from 28th September 2012 was governed by a lease agreement which was for more than five (5) years. There was no controlled tenancy relationship between the landlord and the tenant upto 30th September 2012.

After the expiry of the lease the tenant continued to be in possession of the suit premises and the landlord continued to accept rent thereby creating a periodic tenancy under section 60(2) of the Land Act, 2012. It is clear from the record that the tenant continued to pay rent on quarterly basis even after expiry of the lease.

The landlord’s schedule of payments and in particular landlord exhibits 3, 4, 5, 7 and 13 clearly demonstrate that the tenant has delayed in paying rent when the same is due and payable and has persistently delayed in paying rent.

A perusal of all the letter forwarding the cheques and the amounts. The cheques clearly shows that the tenant committed a substantial breach of the tenancy obligation by not paying rent when due and payable. There is overwhelming evidence on record for the tribunal to hold that the landlord has proved ground No. 1 of the notice of termination of tenancy.

Ground No. 2

Ground No.2 of termination of tenancy is provided for under section 7(1) of which provides as follows:

“subject as hereinafter provided that on termination of tenancy the landlord himself intends to occupy for a period of not less than one year the premises comprised in the tenancy for the purposes, or partly for purpose of business to be carried on by him therein or as...”

The evidence on record clearly shows that the landlord intends to establish the business of a supermarket in the suit premises after the same has been reconstructed...There is no evidence on record to show that the landlord is motivated by malice against the tenant. The tribunal is satisfied that on the evidence on record that the landlord is a genuine developer and that the proposed developments cannot be carried out when the tenants are in possession. However, the tribunal notes that the landlord should have combined ground No. 7(1)(g) and section 7(1) (f).

The tribunal under article 159 of the Constitution 2010 does not administer justice on the basis of procedural technicalities.

The tribunal is satisfied that the tenant having been in the suit premises from 28th September, 2000 should allow the landlord to implement their new concept of business.

The tribunal does not believe the landlords have mobilized resources and put all the experts on board just to have the tenant evicted from the suit premises.

The totality of the evidence on record clearly shows that the landlord proved the notice dated 30th May 2013 on a balance of probabilities....”

15. Consequently, the Tribunal made the following determination in respect of the appellant’s reference:

- i. That the tenant’s reference dated 17th July 2013 is dismissed with costs to the landlord.**
- ii. That the landlord’s notice dated 30th May, 2013 is allowed.**
- iii. The tenant is to vacate and deliver vacant possession of the suit premises on or before 1st July 2016 in default an eviction order shall issue without further reference to the tribunal.**
- iv. The costs of the reference to be agreed by the parties or assessed by the tribunal.”**

16. Aggrieved by the above determination, the tenant (hereinafter referred to as the appellant) appealed to this court on 30 grounds which can be summarized as follows:

- a) The Tribunal erred by holding that the respondent (landlord) had proved its notice of termination on a balance of probabilities;
- b) The Tribunal was biased against it;
- c) The Tribunal did not consider its evidence;
- d) The Tribunal erred by importing ground 7(1)(f) as one of the grounds of the notice of

termination of the tenancy when the respondent had not made it a ground of his notice;

e) The Tribunal failed to consider its submissions; and

f) That the Tribunal erred by awarding costs to the respondent.

17. This being a first appeal this Court must reconsider the evidence adduced before the Tribunal, evaluate it itself and draw its own conclusions bearing in mind that it neither saw nor heard the witnesses testify and make due allowance in that respect. See **Selle V Associated Motor Boat Company Ltd, (1968) EA 123.**

18. The court should also be privy to the principle enunciated in 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 that 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.”

19. In applying the foregoing cited principles to this case, I have, by way of introduction, flanked out the cases urged before the Tribunal and the Tribunal’s determination in respect thereof.

20. The sole issue for determination is whether the Tribunal misdirected itself on the issues presented before it to warrant interference with its finding by this court.

21. On this question, I begin by pointing out that the appellant’s own witness admitted that the appellant always paid rent in arrears when it ought to be paid in advance. On account of that admission and the evidence flanked out by the court which shows that the appellant was always in breach of his rent paying obligation, I find and hold that the Tribunal did not error by finding that the appellant was persistently in breach of his contractual obligation to pay rent in advance as opposed to in arrears. That finding was well supported by the evidence adduced before the trial court at the admission of the appellant’s own witness.

22. By dint of the provisions of **Subsection (3) of Section 7** of the Act, the respondent was not obligated to prove all the grounds on which the notice of termination of tenancy was premised before the Tribunal could find in her favour. In this regard, see the said section of the law which provides as follows:

“subject to subsection (2) of this section, a requesting party may oppose a reference on any ground which has been specified in the tenancy notice concerned.”

23. **Subsection (2)** referred to in **Subsection (3)** above, provides for circumstances when the landlord shall not be entitled to oppose a reference to a Tribunal.

24. It is noteworthy that in the circumstances of this case, the appellant did not contend that the respondent was not entitled to oppose the reference on account of the circumstances contemplated under **Subsection 2 of Section 7** of the Act.

25. Under **Section 9** of Cap 301, the Tribunal is empowered upon inquiry on a reference to either approve the terms of the tenancy notice in their entirety or subject to such amendments or alterations as it thinks just, having regard to all the circumstances of the case and/or to make such further or other order as it thinks appropriate.

26. Under **Section 12** of the Act, the Tribunal has power to make orders, upon such terms and conditions as it thinks fit, for the recovery of possession and to award costs in respect of references made to it among

other orders.

27. Having determined that the respondent did not have to prove all the grounds on the notice of termination of tenancy and the appellant having failed to make a case for interference with the decision of the Tribunal, I dismiss the appeal with costs to the respondent.

Dated, signed and delivered at Nyeri this 30th day of May, 2017.

L N WAITHAKA

JUDGE.

In the presence of:

Ms Wanjiku h/b for Mrs Ndung'u for the appellant

Mr. Kimunya h/b for Mr. Mwangi for respondent

Court clerk - Esther