



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 38 OF 2016

LUCY SHARON MWENDAAPPELLANT

VERSUS

SUSAN KATHURE MARETE.....RESPONDENT

J U D G M E N T

Background:

1. Appellant was and is still a tenant in the Respondents premises Plot No. Block 79 (B) in Meru Municipality. The Respondent was and is still the Landlord in respect of the aforementioned premises. Appellant has been operating a saloon business in the said premises.
2. A dispute arose when Respondent served Appellant with a Notice terminating the tenancy on 13:02:14. Appellant then filed a reference No. 3/2014 Meru in the business tribunal. In the undated Judgment, the tenant's reference was allowed and the Notice to vacate the premises was dismissed.
3. It was further ordered that the landlord was allowed to serve the tenant with a fresh Notice which complies with provisions of section 7 of Cap 301 upon expiry of one month, after the date of Judgment.
4. The Respondent (land lord) had then issued a fresh Notice to the Appellant on 11.06 15. Appellant was back again before the tribunal and filed the reference No. 41 A /2015 before the same tribunal. The Judgment there of was delivered on 15:07:16 whereby this time round, the tenants reference was dismissed and the Respondents Notice of 11.06.15 was allowed.

It is this Judgment that has sparked off the present appeal.

5. There grounds set out in the Memorandum of Appeal are that:-

- 1) The Learned Chairman erred in law and in fact in dismissing the appellant's reference whereas the respondent did not prove on balance of probability that she intended to occupy the suit premises for the purposes of a business to be carried on by her therein.
- 2) The Learned Chairman erred in law and in fact in dismissing the appellant's reference whereas the notice to terminate tenancy which was issued to the appellant by the respondent did not indicate for what purpose the respondent intended to occupy the suit premises for.
- 3) The Learned Chairman erred in law and in fact in dismissing the appellant's reference whereas the notice to terminate tenancy which was issued to the appellant by the respondent was incurably defective for contravening provisions of section 7 (1) (g) of the Landlord and Tenant (shops, Hotels

and catering establishment) Act, Cap 301 of the laws of Kenya.

4) The Learned Chairman erred in law and in fact in dismissing the appellant's reference whereas the respondent owns other empty premises from which she can carry on her alleged business.

5) The Learned Chairman erred in law and in fact in failing to find that the respondent was not terminating the tenancy between herself and the appellant if good faith.

6) The Learned Chairman erred in law and in fact in failing to find that the respondent was not terminating the tenancy between herself and the appellant so that she can use the suit premises for carrying on her business therein.

7) The Learned Chairman erred in law and in fact making a decision on issues that were not raised by the respondent in the notice to terminate tenancy.

8) The Learned Chairman erred in law and in fact in making a decision on the issue of rent whereas the same had not been raised by the respondent in her notice to terminate tenancy.

9) The Learned Chairman erred in law and in fact in holding that the appellant had outstanding rent owed to the respondent.

10) The Learned Chairman erred in law and in fact in holding that the appellant had defaulted in payment whereas the tenant had deposited in Court rent for upto January, 2020 in Meru –CMCC No. 173 of 2001.

11) The Learned Chairman judgment was against the weight of evidence.

6. The appellant prayers in this appeal are that;

- a) The Learned Chairman aforesaid judgment/ orders be set aside.
- b) The appellant's reference be allowed with costs to the appellant.
- c) The appeal be allowed with costs to the appellant.

Parties agreed that the appeal be canvassed by way of Submissions.

Appellant's Submissions

7. Appellant has taken issue with the fact that the Business Premises Rent Tribunal (here in after referred to as BPRT) gave two different versions of Judgment which is BPRT No. 3 of 2014 and BPRT No. 41 A of 2015 where by the parties were the same and the cause of action was the same.

8. Appellant contends that having exhaustively dealt with the issues in dispute in BPRT No. 3 of 2014, it was wrong for the tribunal to entertain the Respondent's Notice in Meru BPLT No. 41 A of 2015.

9. The Appellant also contends that the BPRT failed to take into account the fact that the dispute arose when appellant sought to be refunded Sh. 148. 802 in respect of renovations carried out in the premises.

10. Appellant avers that she has totally improved the face of the premises by installing water, electricity, ceiling board, tiles repairing wooden door with metallic door, creating double room etc. Appellant avers that it is the Respondent who consented to all these improvements.

These renovations appears to have been the bone of contention.

11. In the final analysis Appellant avers that the BPRT should not have entertained the claim.

Respondents Submissions

12. The Respondent avers that the Appellant filed the reference No. 41A of 2015 because of the Notice dated 11.06.15. The Respondent is in agreement with the decision of the Judgment in No. 41A of 2015.

13. Respondent avers that the reasons given in the Notice of 11.06.15 are provided for under Section 7 of cap 301.

14. In support of her case, the Respondent relied on the cases of:-

a) PETERS VS SUNDAY POST LIMITED (1958) E.A 424.

b) KIRUGA VS KIRUGA & ANOTHER (1988) K.L.R 348

c) CIVIL APPEAL NO. 335 OF 2010 –LAZARO KABERE VS NDEGE MAKAU AND ANOTHER.

15. Respondent prays that the appeal be dismissed.

Determination

16. I will deal with all the grounds set out in the memorandum of appeal at once. This is because it is apparently clear that the bone of contention is the Notice that was issued by Respondent on 11.06.15.

17. It is evident that the fall out between the two parties was the renovations that appellant had embarked upon in respect of the premises. She apparently incurred costs of sh. 148, 802. All was apparently quiet until when she demanded for a refund or in the alternative, she wanted this amount to be factored in the rent. Everything appears to have been done orally.

18. Respondent was not about to entertain the claim and hence she issued the first notice of 13.02.14 The Notice did not meet the requirements of section 7 of cap 301.

19. In the decision that was delivered by the tribunal in reference No. 3 of 2014, it is the tribunal which actually allowed the Respondent to issue a fresh Notice and that is what she did.

20. I find that the issues being raised by Appellant are in the realm of contract law. It is also apparent that the tribunal was unable to deal with such issues as they fell outside their mandate.

21. Just like the tribunal, this Court cannot wade into the contractual obligations that the parties entertained when the agreement was made.

22. In the case of **National Bank of Kenya ltd vs. Pipealastic Samkolit (k) ltd (2002) EA 503** the court stated thus:-

“A court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract, unless coercion fraud or undue influence are pleaded and proved..... As was stated by Shah J. A. In the case of Fina Bank Limited Vs. Spares and Industries Ltd (2001) EA, 52; it is clear beyond peradventure that some of those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain.”

23. It is apparent that the parties entered into some kind of bargains which have rendered the relationship sour as between the two litigants. They cannot escape from the consequences their bargains.

24. What is clear is that the grounds listed in the Notice of 11.06.15 are provided for under Section 7 of cap 301. Further, the appellant was content with the earlier decision in reference no. 3 of 2014, yet this is

the decision that allowed the Respondent to issue a subsequent notice to the appellant. How comes the appellant did not lodge any appeal on this issue?

25. All in all, I find that the Judgment delivered by the BPRT is proper. The appeal fails.

Conclusion.

26. Final orders are given as follows:-

- 1) The appeal herein is dismissed.**
- 2) Any stay orders given in respect of these proceedings are hereby vacated.**
- 3) Appellant is to pay costs of this appeal.**

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 6TH DAY OF DECEMBER, 2017 IN THE PRESENCE OF:-

CA: Janet

M.Kariuki H/B for Omari for Appellant present

Miss Munga for Respondent Present

L. N. MBUGUA

ELC JUDGE