



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT

AT KISII

APPEAL NO. 6 OF 2015

JANED OBURU ODHIAMBO.....APPELLANT

VERSUS

ST. JOSEPHS MISSION HOSPITAL – MIGORI.....RESPONDENT

JUDGMENT

(Being an appeal arising from the decision and judgment of the Business Premises Rent

Tribunal Case No. 41C of 2013 – Kisii delivered by Mbichi Mboroki, Chairman on 16th January 2015)

1. The appellant herein Janet Oburu Odhiambo was a tenant operating a hospital canteen in the respondent's premises since 25th September 1991. On the 8th April 2013, the respondent received a letter from the Minister of Public Health and Sanitation signed by the medical officer of Health Migori District directing the respondent to relocate the tuberculosis clinic to a more spacious and well ventilated room. The respondent communicated to the appellant of its intention to convert the canteen premises as its tuberculosis clinic and gave the appellant 3 months notice to that effect. In addition, the respondent issued the appellant with a statutory notice under the provisions of Section 4 (2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Chapter 301 Laws of Kenya dated 14th June 2013 to terminate the tenancy which notice was to take effect as from 1st September, 2013.

2. The respondent by the statutory notice preferred two reasons for seeking termination of the tenancy namely;

1. The respondent required the premises for own use.

2. The appellant had defaulted in rent payment for the previous 20 months amounting to kshs. 80,000/=.

The appellant responded to the statutory notice issued to her by filing a reference at the Business Premises Rent Tribunal under section 6 of the Act.

3. Hearing at the tribunal;

At the tribunal, the respondent's representative who was also respondent's human resource officer one, Mr. Otema Ali Nandi told the tribunal that the respondent needed room to build a tuberculosis clinic as the current tuberculosis clinic had been declared unsuitable by the public health officers. To support his

allegations he produced a letter from the Ministry of Health dated 8th April 2013 which was marked as exhibit No. 1. He further stated that the current premises occupied by the appellant would be more suitable for the establishment of a tuberculosis clinic. He indicated the respondent had offered the appellant an alternative site for the canteen which the appellant declined to take.

4. Apart from the fact that the respondent required the premises for own use, the respondent testified that the tenant did not pay rent regularly and that as at the time she was served with the notice to terminate the tenancy she was in arrears of rent of kshs. 80,0000 being equivalent rent for 20 months at a monthly rate of kshs. 4,000/=.

5. Janet Oburu Odhiambo the tenant testified on her behalf. She told the tribunal that she had been a tenant of the respondent since 1991 operating a canteen at the respondent's premises and that the current structure she was using as a canteen had been built by the respondent in 1994. She further stated that she had been allocated the canteen through a tendering process and that there had been no problem between her and respondent until 2004 when she was given a notice which was subsequently settled. She further revealed that she had, had other cases with the respondent and detailed them as follows:-

a. BPRTC 12(B) of 2005, 13 of 2005, 12 of 2006, reference No. 35 of 2010 and also BPRTC 38 of 2012.

The appellant averred that the respondent was determined to have her evicted from the premises and cited High Court Case No. 442 of 2013 in which she was reinstated into the premises. Although the tenant admitted at the hearing before the Tribunal that she owed the landlord kshs. 48,000/= in rent arrears she countered that the landlord owed her a lot of money in costs. The tenant stated she was not willing to vacate the premises and prayed for the respondent's notice to be dismissed.

6. The Business Premises Rent Tribunal considered the above evidence adduced before it and made the following findings:-

1. Tribunal Case No. 38 of 2012 was in respect of a complaint filed under section 12 (4) of Cap 301. The provisions of section 9 (3) (b) relied on by the advocate for the tenant to challenge the competency of the landlord's notice dated 14th June 2013 applies only to references filed under Section 6 of the Act. The Tribunal therefore rules that the landlord was not required to wait for the expiry of one year to serve the notice dated 14th June, 2013. The notice dated 14th June 2013 is competent in law.

2. That there is no evidence of malice on the part of the landlord against the tenant. The tenant admitted that she has been offered an alternative site to relocate her business.

3. The landlord in all the cases heard in the tribunal has always demonstrated a firm intention to use the premises occupied by the tenant for the establishment of the T.B Clinic

4. The tenant was at the time the notice was served in arrears of rent of kshs. 80,000 which she paid on 3rd September 2013.

5. The tenant admitted that at the time of the hearing that she cleared the land/respondent arrears of rent of kshs. 48,000.

6. The tenant has not given justifiable reasons for non-payment or provisions delay in paying rents which have become due and payable.

7. The tenant has not demonstrated by way of documentary proof that the landlord owed her any money in respect of goods or services rented by the tenant.

7. In the end, the business rent tribunal made the following orders:

1. **The tenants reference dated 26th June 2013 and filed in the tribunal on 26th June 2013 is dismissed.**

2. **The landlord's notice dated 14th June 2013 is allowed.**

3. **The tenant shall vacate and deliver vacant possession of the premises in her occupation on or before 1st April, 2015 in default an eviction order to issue.**

4. **The tenant shall pay the landlord costs of the reference to be agreed between the parties or assessed by the tribunal.**

8. The above judgment of the Tribunal has triggered the present appeal by the appellant before this court. In her memorandum of appeal dated 29th January 2015, the appellant has appealed against the decision of the Business Premises Rent Tribunal on the following grounds:

1. **That the learned trial chairman erred in law and in fact in not finding that the notice to terminate was premature and hence illegal in the circumstances of the case.**

2. **That the learned trial chairman erred in law and in fact in not finding that the landlord owed the tenant more than the accrued rent for which the tenant was entitled to a set-off.**

3. **That given the multiplicity of notice issued over the years and the multiplicity of reasons for termination and given that the law is for the protection of the tenant the chairman erred in law and in fact in not finding that the current notice was tainted with malice and a desire to victimize at whatever cost.**

4. **That the chairman decided the reference against the weight of evidence on record.**

9. The parties have filed written submissions to canvass the appeal as directed by the court. I have perused and considered the record of appeal, the grounds of appeal and the submissions by the parties and this being a first appeal, I am conscious of the court's duty and obligation to evaluate, re-assess and reanalyze the evidence on the record to determine whether the conclusions reached by the learned chairman of the tribunal were justified on the basis of the evidence presented. See **Selle –vs- Associated Motor Board Co. [1968] E. A 123, Jabane –vs- Olenya [1986] KLR 661, 664, Ephantas Mwangi –vs- Duncan Mwangi Wambugu [1982-88] 1 KAR 278 and Mwanasokoni –vs- Kenya Bus Services [1982-88] 1KAR 870.** The issues for determination in this appeal are:

a. **Whether the notice to terminate the appellant's tenancy was premature hence and illegal in the circumstances of the case?**

b. **Whether the appellant was defaulting in payment of rent and therefore in rent arrears.**

c. **Whether the decision of the tribunal was against the weight of the evidence.**

10. With regard to whether the notice for termination was given prematurely, the tribunal while noting that both the appellant and respondent had previously filed other cases with the tribunal namely case No. 12 'B' 2005, 13 of 2005, 12 of 2006 reference No. 35 of 2010 and BPRTC No. 38 of 2012 further noted that BPRTC 38 of 2012 which would have a bearing to the notice, if it was a reference was infact a complaint and not a reference. The tribunal in its judgment noted that the Tribunal Case No. 38 of 2012 was in respect of a complaint filed under Section 12 (4) of Cap 301 and hence the provisions of Section 9 (3) (b) relied on by the advocate for the tenant to challenge the competency of the landlord's notice dated 14th June 2013 applied only to reference filed under section 6 of the Act.

11. Section 12(4) of the Landlord and Tenant (shops, hotels and catering establishments) Act provides thus:-

12 (4) In addition to any other powers specifically conferred by or under this Act, a tribunal may investigate any complaint relating to a controlled tenancy made to it by the landlord or the tenant and may make such order thereon as it deems fit.....”

Section 6 (1) of the Act provides for the making of a reference pursuant to a notice served under section 4 of the Act and provides:-

6 (1) “A receiving party who wishes to oppose a tenancy notice, and who has notified the requesting party under section 4 (5) of this Act that he does not agree to comply with the tenancy notice, may, before the date upon which such notice is to take effect refer the matter to a tribunal, whereupon such notice shall be of no effect until and subject to the determination of the reference by the tribunal.”

Whereas Section 9 (3) of the Act provides:-

“Where a tribunal has made a determination upon a reference, no further tenancy notice shall be given in respect of their premises concerned, which is based on any of the matters affected by the determination:

a. In the case of an assessment of rent until after the expiration of two years or

b. In any other case, until after the expiration of twelve months.

after the date of the determination unless the tribunal at the time of the determination, specifies some shorter period.”

12. The tribunal made a finding that tribunal case No. 38 of 2012 was in respect of a complaint filed under Section 12 (4) of Cap 301 and that the provisions of Section 9 (3) (b) relied on by the advocate for the tenant to challenge the competency of the landlord’s notice dated 14th June, 2013 would be inapplicable. I am in agreement with the chairman of the tribunal on this finding. A complaint under Section 12 (4) is not a reference and Section 9 (3) of the Act would have no application to determinations made pursuant thereto.

13. In the case of **Choitram –vs- Mystery Model Hair Saloon [1972] EA, 525**, Simpson J. defined a “complaint” as follows:

“I am of the opinion, however that the term “complaint is intended only to cover complaints of a minor character such complaints would include complaints by a tenant of the turning off of water obstruction of access and other acts of harassment by the landlord calling for appropriate orders for their rectification or cessation...”.

My understanding of Sections 6 (1) and 12 (4) is that the Tribunal has distinct jurisdictions to determine a reference under Sections 6 (1) and investigate a complaint under Section 12 (4).

14. The jurisdiction is clearly defined by the statute and shall be exercised strictly as provided by the Act. Whether a determination of the tribunal is appellable or not depends on whether the cause of action filed before the tribunal by either the landlord or tenant, was so filed and/or determined as a reference or as a complaint. This is because Section 15 (1) of the relevant Act provides as follows:-

“Any party to a reference aggrieved by any determination or order of a tribunal made therein may within thirty days after the date of such determination or order appeal to the High Court...”.

The learned chairman of the Tribunal was correct in holding that a complaint filed under section 12(4) of the Act is not a reference in terms of section 6 of the Act and therefore the limitations set by Section 9 (3) of the Act are not applicable.

15. Having made the determination that Section 9 (3) (b) of the Act was not applicable in regard to the notice served by the landlord on the tenant that should be sufficient to dispose of this appeal. However, as the issue was argued whether or not the tenant had defaulted in rent payments thereby accruing rent arrears, it is my view that on the basis of the evidence that was adduced before the tribunal, the tribunal was justified in holding that the tenant had accrued rent arrears and that she had not furnished any evidence to demonstrate that the landlord owed her any monies against which she would have been entitled to offset the rent in arrears. The finding and holding by the tribunal chairman that the 2 grounds upon which the landlord sought to terminate the tenant's tenancy had been proved on a balance of probabilities was well founded and I find no basis to interfere with that finding.

16. In the result I find no merit in the appellant's appeal and the same is dismissed with costs to the respondent. The order staying execution of judgment of the tribunal is hereby vacated.

Judgment dated, signed and delivered at Kisii this 6th day of May, 2016.

J. M MUTUNGI

JUDGE

In the presence of:

..... for the appellant

..... for the respondent

J. M. MUTUNGI

JUDGE