



Benard Oyugi t/a Jobenpha School v Kimani (Suing as the Guardian of Samuel Kimani Karoki) (Environment and Land Appeal E035 of 2022) [2024] KEELC 1613 (KLR) (20 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1613 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E035 OF 2022
EK WABWOTO, J
MARCH 20, 2024**

BETWEEN

BENARD OYUGI T/A JOBENPHA SCHOOL APPELLANT

AND

KENNETH KAUNDA KIMANI (SUING AS THE GUARDIAN OF SAMUEL KIMANI KAROKI) RESPONDENT

JUDGMENT

1. The appeal herein is against the Ruling of the Business Premises Rent Tribunal (hereinafter referred to as the Tribunal) delivered on 28th March 2022 wherein the Tribunal dismissed the Appellant's application dated 3rd February 2020.
2. The Appellant being aggrieved by the said decision, instituted this Appeal vide a Memorandum of Appeal dated 26th April, 2022 setting out the following grounds:-
 1. The Honourable Chairman erred in law and fact in failing to consider that there was delay in filing the reference thereby dismissing the tenant's application dated 23rd February, 2020.
 2. The Honourable Chairman erred in law and fact in holding that there was delay in filing the application for extension of time to file a reference from 24th June 2019 to 5th September, 2020 thereby declining to grant the application
 3. The Honourable Chairman erred in law and fact in holding that the tenant had no sufficient reason for the delay and/or failure to file a reference to challenge the termination notice.
 4. The Honourable Chairman erred in law and fact in failing to consider that the tenant was a community school whose infrastructure had been improved greatly by donors and that the



order declining to extend time to file the reference out of time will affect the children, parents and donors immensely.

5. The Honourable Chairman erred in law and fact in failing to hold that the delay was not deliberate but inadvertence on the part of the appellant which is excusable.
3. The appellant thus prayed that:-
 - i. The orders of 28th March, 2022 be set aside and its place there be an order allowing the application.
 - ii. There be an order allowing filing of the reference out of time.
 - iii. Costs of this appeal be provided for.
4. At the hearing of the appeal, the parties took directions to have the same canvassed by way of written submissions. The Appellant filed written submissions dated 1st November, 2023 and the Respondent filed written submissions dated 28th November, 2023.
5. The Appellant submitted on the following issues:-
 - i. The Honourable Chairman had ignored the reasons for the delay thereby arriving at an unfair termination.
 - ii. Was there delay, was it too inordinate that the Chairman could not excuse the tenant for the same and grant leave.
 - iii. Was there sufficient reason for the delay in filing a reference to challenge the termination notice.
6. It was submitted that the tenant had averred in the affidavit in support that he had filed a Notice of objection to the Notice of termination within the 30 days as provided for in law by the 24th June 2019 while the notice was to take effect on the 1st August, 2019. The tenant was of the mistaken view that the objection was sufficient not knowing that a reference was required to be filed before the expiry of the notice to terminate by the 1st August, 2019.
7. The Honourable Chairman held that ignorance of the law was not an excuse which in this particular case ought to have been excused.
8. The tenant stated on oath that he did not know that he was to file a reference within the 60 days before the notice takes effect. Upon discovery of the same he came to the tribunal immediately seeking leave to regularize.
9. The failure of his advocate to inform him of the requirement of the law should not be visited on him or the school. He should be excused in the prevailing circumstances because the Landlord went on as usual taking monthly rent when they fell due without even indicating the impending termination. The Honourable Chairman erred in not considering the reasons for the delay and give the tenant a chance to challenge the notice out of time.
10. On whether the delay was inordinate, it was submitted that the delay was not inordinate. The termination was to take effect on the 1st August, 2019 yet the tenant had issued an objection to termination on the 24th June, 2019. The application for leave order Section 691) of the Act was filed on the 3rd February, 2020 a period of about 6 months from the date 1st August, 2019 when the notice took effect. It was argued that indeed the appellant was not compliant with the law as he never challenged the notice within 60 days but he had partly complied by filing the intention to challenge the notice on the 24th June, 2019. The tenant upon realization of the defect applied for leave to file the reference



out of time. The time taken of about 6 months is a delay but we submit that the delay was not so inordinate as to reject the request for leave. It was further submitted that the tenant was on that period of delay engaged in negotiations with the landlord on a possible purchase and that the landlord was busy accepting the rent oblivious of the failure to comply on the part of tenant who had signified his objection to the termination. Reliance was made to the case of *Cecilia Wanja Waweru versus Jackson Wainaina Muiruri & Another* [2014]eKLR.

11. On whether there was sufficient reason to warrant the grant of leave to file a reference out of time. It was submitted that the Tribunal had erred in not addressing itself on the sufficient reasons provided. It was submitted that the nature of the engagement of the parties was unique in that the tenant was given a vacant plot with instructions to put up structures befitting usage as a school which school had accomplished and improved from time to time. As a school, it has children from the local informal settlement who rely entirely on the school. The parties had engaged on a possible sale of the school through they had not been successful. The school had had a unique school calendar which requires consideration when issuing the notices of termination or otherwise and that had the Tribunal addressed itself to this it could have arrived at a different finding.
12. The Appellant concluded its submissions by urging this court to grant the Appellant a chance to challenge the termination in the interest of justice. Reliance was placed to the case of *Shashi Kant C. Patel vs Oriental Commercial Bank* [2005]eKLR and *Inland Beach Enterprises Ltd. Versus Sammy Chege & 15 Others*[2012]eKLR.
13. The Respondent submitted that the notice to terminate the tenancy is found at page 3 of the Record of Appeal. The said notice is dated 28th May, 2019. The Respondent required the Appellant to vacate the suit premises being plot numbers 35 and 36 situated within Embakasi. The Appellant was required to vacate the suit premises by 1st August, 2019. The reasons for the termination were given as construction of illegal structures and persistently delaying in payment of rent.
14. The Appellant objected to the Notice of Termination through his Advocates' letter dated 24th June, 2019. The said objection was at page 4 of the Record of Appeal. It was submitted that it was not in dispute that the tenancy relationship between the parties herein was a controlled one. The provisions of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* (Cap. 301) thus governed the relationship between the parties herein. Section 4(5) of Cap. 301 requires a receiving party to notify the requesting party within month after the receipt of the notice, whether or not he agrees to comply with the notice.
15. The Appellant did notify the Respondent within thirty days as required by statute. Section 6(1) of Cap. 301 requires a receiving party to refer the matter to the tribunal before the date upon such notice is to take effect. There is a provision that a Tribunal may, for sufficient reason and on such conditions as it may think fit, permit such a reference notwithstanding that the receiving party has not complied with any of the requirements of the section.
16. It was contended that the Appellant did not find it necessary to file a reference in time and only moved the Tribunal vide the application dated 3rd February, 2020. This was about six months after the notice to terminate had been issued to the Appellant. It was argued that the Appellant was awoken from his slumber by the filing of BPRT No. 727 of 2019 by the Respondent seeking vacant possession. The Appellant decided to file a new reference instead of filing the application in BPRT No. 727 of 2019.
17. It was argued that in respect to the application dated 3rd February, 2020, the Appellant sought leave to file a reference out of time and set out eleven grounds appearing on the face of the application. At paragraph (g) in the grounds set out in the application, the Appellant cited inadvertence which is



excusable. It was argued that the reason cited would not entitle the Appellant leave as provided under Section 6(1) of Cap. 301 as there was no sufficient reason adduced. The Respondent argued that the Appellant was not only guilty of laches but engaged in a classic case of abuse of the court process by filing parallel proceedings.

18. It was argued that the Tribunal made a finding and correctly so that the duration taken by the Appellant was unreasonable long in the circumstances having earlier noted that the Appellant was all along represented by counsel. The case of Kisumu HCCA No. 137 of 2012 Aero Electronics vs Dimit Investment Ltd was cited in support.
19. It was argued that the Appellant did not produce any evidence to demonstrate that he used the suit property as a school and that even assuming that the suit premises were being used as a school or there were improvements carried out using donor funds, the court remains a court of law and derives justice not sympathy.
20. The Court has considered the Record of Appeal. The Court has also considered the Appellants written submissions in this Appeal and the itemized grounds of appeal. In determining the issues raised in the Appeal this court is cognizant of its duty on a first appeal as set out in the case of *Selle & Another – vs- Associated Motor Boat Co. Ltd & others* (1968) EA 123 cited with approval in *China Z. Hogxing Construction Company Ltd –Vs- Ann Akeru Sophia* (2020) eKLR.
21. As has also been restated in the case of *United India Insurance Co. Ltd V East African Underwriters (Kenya) Ltd* (1985) E.A a court sitting on Appeal will not interfere with a discretionary decision appealed from simply on the ground that the court, if sitting at first instance, would or might have given different weight to that given by the court to the various factors in the case. This court sitting on Appeal is only entitled to interfere if one or more of the following matters are established; first, that the court misdirected himself in law; secondly, that the court misapprehended the facts; thirdly, that the court took account of considerations of which he should not have taken account; fourthly, that the court failed to take account of considerations of which he should have taken account, or fifthly, that the court’s decision, albeit a discretionary one, is plainly wrong.
22. The court is of the view that the main issue for determination is whether the Tribunal erred in law and fact in failing to grant leave to the Appellant to file reference and challenge the termination notice out of time.
23. In the instant case, the Tribunal held that the period of about eight months taken before the current application was filed to be unreasonable long in the circumstances and declined to grant leave to file reference out of time. The Appellant submitted that the Tribunal failed to consider a number of reasons including the fact that parties were negotiating prior to filing of the application.
24. Section 6(1) of Cap 301 provides: -

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

Provided that Tribunal may for sufficient reason and on such conditions as if may think fit permit such a reference notwithstanding that the receiving party has not complied with one of the requirements of this Section.”



25. The Tribunal from the above provisions, had discretion to permit a reference which has not complied with the condition's on being shown sufficient reason to permit a reference to be filed out of time.
26. In the instant case, the reasons given by the Appellant for the delay can't be considered as correct reasons to have warranted the grant of leave. The mere fact that parties are negotiating and more so where counsel was aware of the existing timelines does not and cannot constitute sufficient cause for non-compliance with the applicable timelines.
27. In view of the foregoing, it is the finding of this court that the appeal has no merit and that the Tribunal properly exercised its discretion and as such this court finds no reason to interfere with the same. The appeal is dismissed with an order that each party bears own costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF MARCH, 2024.

E.K. WABWOTO

JUDGE

In the presence of:-

Mr. Monasi for the Appellant

Mr. Kamwaro for the Respondent

Court Assistant: Caroline Nafuna

