**Zavery v Maluki (Environment and Land Appeal E036 of 2023)**
**[2024] KEELC 1809 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1809 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ENVIRONMENT AND LAND APPEAL E036 OF 2023**

**EK WABWOTO, J**

**MARCH 20, 2024**

**BETWEEN**

**MAAD ZAVERY ..... APPELLANT**

**AND**

**KENNY MUTHOKA MALUKI ..... RESPONDENT**

***(Appeal against the ruling of Hon. Gakuhi Chege, Vice Chair of the Business Premises Rent Tribunal delivered on 17th March, 2023 in respect to Business Premises Rent Tribunal Case No. E1189 of 2022)***

## JUDGMENT

1. This appeal is against the ruling of Hon. Gakuhi Chege, Vice Chair of the Business Premises Rent Tribunal delivered on 17th March, 2023 in respect to Business Premises Rent Tribunal Case No. E1189 of 2022. The Tribunal issued the following orders;

    a. That there exists a Landlord/Tenant relationship between the Applicant and the Respondent over the business premises situate on L.R. No. 2/Kitui Municipality which is controlled under Section 2(7) of Cap 301 Laws of Kenya.

    b. That the notice of termination of tenancy dated 9th September, 2022 served the tenant by the Land Lord in null and void as it offends Section 4(4) of Cap 301 Law of Kenya and is hereby struck at.

    c. That this Tribunal has jurisdiction to adjudicate and determine this matter as it is not functus officio.

    d. That the tenant is entitled to an order of injunction against the landlord restraining him from evicting or interfering with his peaceful occupation and use of the suit premises without adhering to the Providers of CAP 301 Laws of Kenya.

e. That no other termination notice will issue in the next twelve (12) months in line with Sections 9(3) of Cap 301.

f. The tenant is awarded costs assessed at Kshs. 30,000/- against the Landlord which shall be deducted from the rent account.

2. Being aggrieved by those orders, the Appellant filed this appeal vide a Memorandum of Appeal dated 11th April, 2023. The following were raised as grounds of appeal:-

1. The Learned Vice Chair erred in Law and fact by finding that their existed a subsisting Landlord-Tenant relationship between the Appellant and Respondent.

2. The Learned Tribunal erred in law and fact by disregarding and re-writing the express terms of the lease agreement entered between and Appellant and Respondent.

3. The Honourable Vice Chair erred in law and fact by delving into matters that were neither pleaded or raised by the parties in reaching its determination.

4. The Learned Vice Chair erred in imposing an unconscionable Landlord-Tenant relationship between the Appellant and Respondent for a period of one (1) year.

5. The Esteemed Tribunal erred in law and fact in deeming the Notice to vacate issued to the Respondent as improper.

6. The Learned Vice Chair erred in applying the provisions of Section 4 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*.

7. The Learned Trial Magistrate erred in law and in fact by dismissing the consent that had been entered between the parties to compromise the application dated 13th October, 2022.

3. The appellant thus sought the following orders:-

a. The Appeal herein be allowed.

b. The Ruling and Orders of the Lower Court made on 17th March, 2023 be set aside and this Honourable Court be pleased to substitute it with the following orders:-

i. That notices to terminate tenancy and vacate dated 9th September, 2022 be upheld.

ii. That the Respondent be ordered to pay rent for the period 10th October, 2022 till vacation of the premises at the sum of Kshs. 30,250 per month.

iii. That the Respondent be ordered to immediately vacate the premises.

iv. That Officer commanding Station-Kitui Central Police Station be ordered to assist with execution of Order (ii) above.

c. That costs of the Tribunal and Appeal be granted to the Appellant.

4. The Appeal was not contested by the Respondent. During the hearing of the Appeal the Appellant requested the court to adopt and consider the Appellant's submissions that were filed and submitted before the Tribunal.

5. Despite the fact that the Respondent never participated in this Appeal not filed any written submissions this court has a duty to consider the Record of Appeal analyse and revaluate the evidence tendered before the Tribunal.

6. 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 Zhongxing Construction Company Ltd vs Ann Akuru Sophia (2020) eKLR, in the following terms:

> " I accept Counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this curt is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif vs Ali Mohamed Sholan (1995). 22 E.A.C.A, 270)."

7. In the same case of China Zhongxing Construction Company Ltd vs Ann Akuru Sophia (2020) eKLR, the court noted that the Court of Appeal for East Africa took the same position in Peters vs Sunday Post Limited (1958) EA 424 where Sir Kenneth O'Connor stated as follows:

> " It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their lordships in the House of Lords in Watt V Thoma (1) (1974) A.C. 484.
>
> "My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not say that a judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is

denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

8. In view of the citations propounded above, three complementary principles ensue; first, on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions; second, in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and third, it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

9. 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.

10. This court sitting of 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.

11. From the foregoing, the mandate of this court in the present instance is to evaluate the factual details of the case as presented in the trial court, analyze them and arrive at an independent conclusion.

12. Having considered the Record of Appeal and the grounds of Appeal raised herein, the court is of the view that the following are the silent issues for determination herein: -

    i. Whether the Tribunal erred in finding that there existed a subsisting landlord tenant relationship between the parties.

    ii. Whether the Tribunal erred in law in deeming the Notice to vacate issued herein as invalid in law.

    iii. Whether the Tribunal erred in law and fact in arriving at its decision.

    iv. What are the appropriate reliefs to issue herein.

13. The Court shall now proceed to analyse the said issues sequentially.

14. Ground 1 of the Memorandum of Appeal was to the effect that the Tribunal erred in law and fact by finding that their existed a subsisting Landlord and Tenant relationship between the parties.

15. The Appellant in the submissions filed before the Tribunal had argued that the lease agreement terminated due to effluxion of time and has since not been reviewed and hence therefore, there was no tenancy between the parties and as such the tenant was an alien on the property. The tenant on the other had argued that even if the written agreement had expired, that was not a justifiable cause to terminate the tenancy since by conduct they had always reviewed it by continuing in business as if the tenancy is in time.

16. The evidence that was presented before the Tribunal revealed that the parties herein was established vide a tenancy agreement entered into on 1st October, 2015 over plot No. 2/Kitui Municipality for a period of 5 years subject to reward on agreed terms.

17. Section 2(1) (a) Cap 301 defines a controlled tenancy as follows:

i. Which has not been reduced into writing; or

ii. Which has been reduced to writing and which-

a. is for a period not exceeding five years; or

b. contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or

c. Relates to premises of a class specified under subsection (2) of this section.

18. The purpose for the enactment of Cap 301 is that it is:

> " An Act of Parliament to make provision with respect to certain premises for the protection of tenants of such premises from eviction or from exploitation and for matters connected therewith and incidental thereto."

19. Being guided by the foregoing it is evident that the tenancy relationship herein was a controlled tenancy and since the said agreement expired by effluxion of time on 31st July, 2020 and further that the same was not reviewed in writing but the tenant continued to occupy the suit as and when the same fell due, the decision of the Tribunal in finding that there existed a subsisting Landlord Tenant relationship cannot be faulted by this court.

20. On the second issue as to whether the Tribunal erred in law in deeming the notice to vacate issued herein as valid in law was the appellant's contention before the Tribunal that the notice issued herein complied within Section 4(2) of Cap 301 and that the tenant was free to raise any objectives in respect to the same.

21. This Court has considered the record of appeal and further perused the said notice dated 9th September, 2022 and was expressed to take effect on 9th October, 2022 which is a period of only one (1) month.

Section 4(4) of Cap 301 stipulates as follows:-

> ''No tenancy shall take effect until such date, not being less than two months after the receipt thereof by the receiving party as shall be specified therein.....''
>
> It is evident that the notice issued herein by the Respondent was contrary to the law and as such it remained null and void. Similarly, Tribunal Court be faulted for holding as such.

22. In view of the foregoing, and further upon considering the entire record of appeal, it is finding of this court that there was no fault on the Tribunal's decision rendered on 17th March, 2023. Consequently, the entire appeal lacks merit and is hereby dismissed in its entirety.

23. On the issue of costs, costs are the discretion of the court and in any event to a party who is successfully. In this case, the Respondent never participated nor contested the appeal and, in the circumstances, this court orders each party to bear own costs of the appeal.

24. In conclusion, it is the finding of this court that the entire appeal lacks merit. The same is hereby dismissed in its entirety with no orders as to cost

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

**E.K. WABWOTO**

**JUDGE**