



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 3 OF 2002

REUBEN MULI MUSYOKI t/a KONZA MERCHANTS.....APPELLANT

AND

WAYUA MUTISYA KINOTHYA)

QUENTINE WAMBUA MUTISYA).....RESPONDENTS

(Appeal from a judgment and decree of the High Court of Kenya at Machakos (Mwera, J.) dated 28.11.2001 in H.C.C.C. NO. 203 OF 1998)

JUDGMENT OF THE COURT

This is an appeal from the judgment of the High Court of Kenya at Machakos (Mwera, J.) delivered on 28th November, 2001, by which the appellant herein *Reuben Muli Musyoki t/a Konza Merchants* was ordered to vacate the respondents' business premises known as plot No. 909/217, Machakos and to pay the respondents mesne profits and general damages together with the costs of the suit.

By a plaint dated 4th August, 1998, the respondents, who were the plaintiffs in the suit, averred that by a lease Agreement dated 1st October, 1996, the respondents leased part of their business premises to the appellant for a period of three (3) years at a monthly rent of shs.10,000/= revisable. In breach of the lease Agreement the appellant had hopelessly fallen into serious arrears of rent to the tune of shs.210,000/=. On 30th April, 1998, the respondents through their advocates served the appellant with a Notice to Terminate the tenancy under **sections 4(2) and 7(2)** of the Landlord and Tenant (Shops, Hotels & Catering Establishments) Act Cap 301 Laws of Kenya, hereinafter referred to as the Act. The respondents further averred in the plaint that the appellant acknowledged receipt of the Notice to Terminate his tenancy but indicated that he had no intention of complying with it. Under the provisions of section 6 of the Act the appellant was mandated to file a reference at the relevant Tribunal but did not do so and therefore his tenancy had terminated under section 10 of the Act. The respondents contend that the appellant's continued occupation of the suit premises after 1st July, 1998, was illegal. They, therefore, sought the orders which were granted by the learned Judge.

In a somewhat frail defence the appellant averred that the suit was bad in law and was not maintainable. Though the appellant admitted service upon him of the Notice to Terminate his tenancy he maintained that the Notice was fatally defective and of no effect in law.

The trial was concluded on 25th October, 2001. In a reserved judgment the learned Judge held: -

“Having heard both sides and examined the evidence from both sides and particularly the

notice to terminate, this court has the following to say. This case is not bad in law at all. The plaintiffs seek eviction orders for default in rent payment and this court has jurisdiction to hear and determine that. In the lower court is a prayer rents that were outstanding and that too is validly there – save that the arrears have grown to over Shs.500,000/= if the defendant’s admission that so far this land had gone to over Shs.800,000/=.

The notice to terminate was properly served on the defendant. It was dated 29.4.98. It was to last two months and be effective from 1.7.98. The defendant’s lawyer Mr. Matata on 27.5.98 acknowledged the notice and told the plaintiff’s lawyers that the defendant did not wish to comply with the notice. This court did not believe the defendant any little bit when he denied the service of this notice and instead made to introduce Exh. D1. He was not only being cheeky but also sly.

His lawyer had done the proper thing for him. The defendant on receipt of the notice and wishing not to comply, he ought to have filed a reference with the tribunal. None was filed and an application to have time enlarged for the same was thrown out (Exh. P8) on 23.2.99. The defendant continues to remain in the premises improperly after he failed to pay rents and the lease expired anyway. This court is of the view that an order of eviction is warranted here and it issues.

The plaintiffs have been put to great loss and damage and this shall be rectified by payment of mesne profits from the time the lease expired to date.”

When the hearing of the appeal commenced, this Court was informed from the bar that the appellant has since the delivery of the judgment been evicted from the suit premises and had not paid arrears of rent amounting to about Shs.816,000/=. However, the appellant’s main argument before us is that the learned judge misdirected himself in not finding that the Notice to Terminate the tenancy was not properly served and therefore a reference to the relevant Tribunal was unnecessary in view of the manifest invalidity of the Notice.

The Act upon which the appellant places much reliance protects the tenant, such as the appellant, against violation of that basic tenet of the rule of law, namely, that no one shall be forcibly evicted from his property except under a due process of law. But, unfortunately, the appellant himself had abused and ignored the provisions of the law and was not deserving of any protection from either the Tribunal or the superior court. He disregarded the Notice and sat back on a flimsy excuse. His conduct displeased the learned Judge who said: -

“This court did not believe the defendant any little bit when he denied service of this Notice. He was not only being cheeky but also sly.”

It is trite law that though an appellate court is in as good a position to evaluate the evidence as the trial judge and should form its own independent opinion, the assessment of the trial judge as regards the credibility of witnesses whom he heard and saw should not be lightly disturbed on appeal. This is the position here. We are unable to find fault with the learned judge on the demeanour of the appellant who had failed to disprove service of the Notice to Terminate his tenancy.

As the Notice to Terminate tenancy cannot be deemed invalid in the circumstances it must follow that it took effect from 1st July, 1998 and the appellant’s occupation of the suit premises amounted to a tortious act of trespass.

Accordingly, we do not find any merit in this appeal which is hereby ordered dismissed with costs.

Dated and delivered at Nairobi this 20th day of February, 2004.

P.K. TUNOI

.....

JUDGE OF APPEAL

E.M. GITHINJI

.....

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....

AG. JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR