REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELCA NO. 1 OF 2015

(FORMERLY NYERI HCCA NO.136 OF 2013)

ALEXANDER WAINAINA ..... APPELLANT

-VERSUS-

NJUGUNA GATHAARA ..... RESPONDENT

(Being an appeal from judgment and decree of the Chairman Restriction Tribunal, Nyeri (The Hon. Mr. Hillary Korir) made on the 2nd day of April, 2013 in Nyeri Rent Restriction Case No. 34 of 2011)

JUDGMENT

Introduction

1. By a plaint dated **11th November 2005,** the appellant herein instituted a suit in the Rent Restriction Tribunal at Nyeri to wit, Rent Restriction Case No.34 of 2011 seeking judgment againt the Respondent herein for:-

a. Recovery of rent arrears of Kshs.6,000/=;

b. Mesne profits @ Kshs. 1000/= per month;

c. Vacant possession;

d. Cost of the suit;

e. Any other relief.

2. The case was that the respondent had failed, neglected, refused and/or ignored to pay the monthly rent of Kshs.1000/= for a period of six (6) months. The appellant also claimed that the respondent is a troublesome tenant who does not cooperate with other tenants on any issue.

3. The appellant complained that attempts to get the respondent to meet his rent paying obligations and to vacate the suit premises had been in vain.

4. When the matter came up for hearing on 25th August, 2011, the appellant informed the Tribunal that the respondent was in rent arrears. Terming the respondent' conduct of failing to pay rent whenever due a habit, the appellant informed the Tribunal that previously, the respondent had failed to pay rent forcing him to take him to the District Officer's office whereat he agreed to vacate the suit premises by 31st October, 2011.

5. On his part, the respondent admitted that he owed the appellant rent but explained that the appellant had refused to receive it.

6. Concerning the rent arrears, the appellant informed the Tribunal that he was ready to pay by 30th September, 2011.

7. On account of the respondent's admission, the Tribunal entered judgment on admission in favour of the appellant and against the defendant for Kshs.6,000/= and ordered the respondent to pay the rent arrears to the appellant on or before 10th September, 2011.

8. The Tribunal also directed the respondent, who had not yet filed his statement of defence, to file a defence on the claim for vacant possession. Consequently, the respondent filed his statement of defence, dated 8th of September 2011, in which he denied all the allegations made against him and put the appellant to strict proof of the allegations.

9. In response, the appellant filed a response to defence and further affidavit reiterating that the appellant was in breach of his contractual obligations.

10. On 9th November 2011, the court was informed that the respondent had paid the rent arrears through Mpesa and that the only issue that remained was that of vacant possession and costs.

11. The Tribunal observed that there was need for independent witnesses to testify on the alleged nuisance caused by the respondent and adjourned the matter in order to give time to the parties to avail witnesses, if any. It also ordered the respondent to continue paying rent through M-pesa.

12. When the matter came up for hearing, counsel for the appellant informed the Tribunal that the appellant had filed a further affidavit which they required time to serve to the respondent.

13. Subsequently, the respondent was served with the further affidavit which detailed the allegations levelled against him.

14. In a rejoinder, the respondent vide the replying affidavit he swore on 14th May 2011, acknowleged having received notices to vacate the suit premises from the appellant's estate agents and advocates. He also acknowledged that the dispute hereto was taken before provincial administration officers to settle but termed those proceedings bad in law for want of jurisdiction by those persons or institutions to handle the dispute preferred before them.

15. The respondent further denied having been in rent arrears or having been compelled by the Tribunal to meet his rent paying obligation to the appellant.

16. Terming the allegations made against him untrue and malicious, the respondent put the appellant to strict proof of the allegations.

17. When the matter came for directions on 2nd November 2012, parties to the dispute agreed to have

the dispute determined by way of written submissions.

18. In the submissions filed on behalf of the appellant, it is *inter alia* contended that the respondent's statement of defence does not sufficiently address the issues raised in the appellant's pleadings.

19. Pointing out that the appellant was successful on the claim for refusal to pay rent, counsel for the appellant submitted that under **Section 14(1)(a)** of the Rent Restrictions Act, Chapter 296 Laws of Kenya (hereinafter referred to as the Act) the respondent's refusal to pay rent is one of the conditions that warrants issuance of an order of recovery of premises or ejectment of a tenant from premises.

20. Arguing that the entry of judgment on admission for the rent arrears of Kshs. 6000/= was enough evidence that the respondent was in breach of his contractual obligations, it is submitted the entry of judgment on admission concerning the arrears of rent is inconsistent with the final determination that the appellant had failed to proof his case to the required standard.

21. Upon consideration of the case presented before the Tribunal, the Tribunal Chairman Hon. Hillary K. Korir, rendered judgment in the following terms:

"The plaintiff filed this suit against the defendant seeking for

a. Recovery of rent arrears of Kshs. 6,0000/-

b. Mesne profits at Kshs. 1000/= and

c. Vacant possession.

The defendant filed his defence on 8th November 2011 vide which he denied the plaintiff's claims in total and prayed for dismissal of the suit. When the matter was due for *inter partes* hearing, both parties agreed that the tribunal could proceed to render judgment on the basis of written submissions by both parties.

The gist of the plaintiff's submissions was that the defendant had always been irregular in payment of rent besides being a nuisance and of criminal immoral tendencies. For these reasons the plaintiff prayed for vacant possession.

The defendant submitted that the plaintiff is a

nuisance, disrespectful and harrasing not only to him alone but also to other tenants. He stated that he is up to date in rent payment which was acknowledged by the plaintiff and should continue to enjoy protection provided he paid rent.

Having perused through both parties' submissions, the tribunal finds that the plaintiff has not proved his case to the standard required in law. Moreover, nuisance, fraud, criminal and immoral tendencies alluded to by the plaintiff are very serious issues that must be proved specifically. No such proof was provided. Accordingly, the suit is hereby ordered dismissed and each party ordered to bear his costs of the suit."

22. Aggrieved by the aforementioned decision, the appellant appealed to this court on grounds that the learned Chairman of the Tribunal erred by:-

i. Finding that he had not proved the allegations in his plaint to the standard required in law;

ii. Finding that the uncontroverted pleadings and affidavit evidence to the effect that the respondent had refused to pay rent, forcing the appellant to seek assistance from office to office to compel the respondent to pay the rent and vacate the premises was not proved to the standard required by law;

iii. Failing to find that he was entitled to recovery of possession of the premises or the ejectment of the respondent therefrom as some rent lawfully due from the respondent had not been paid;

iv. Not finding that non-payment of rent is a repudiatory breach of the tenancy agreement both under the Rent Restriction Act and at common law;

v. Not finding that mere denial is not a sufficient defence and it behooved the respondent to show that he had a good defence;

vi. admitting evidence in the respondent's submission's which had not been adduced either in the statement of defence or in the replying affidavit dated 23rd May, 2012;

vii. Failing to find that a tenancy contract is not a contract in perpetuity and that finding otherwise would be converting the contract into a contract of slavery, making the conduct of tenancy business uncertain and difficult;

viii. Failing to find that the notices to quit issued by the appellant and shown as exhibits AWM 1 and AWM 4 of the appellant's further affidavit before the Hon. Tribunal sworn on 15th December 2012 were sufficient notices under section 15 of the Rent Restriction Act.

ix. Construing his role under the law as to protect the respondent even when the respondent is in clear breach of the tenancy and the law.

x. Failing to find that the continued subsistence of the tenancy directly infringed upon the appellant's right to enjoyment of his property under the constitution.

23. For the foregoing reasons, the appellant seeks the following orders:

(a) The judgment of the learned chairman of the Tribunal delivered on 2nd April 2013 dismissing his claim be set aside.

(b) The respondent be ordered to deliver vacant possession of the demised premises to the appellant.

(c) The respondent be ordered to pay any outstanding rent as at the day of the judgment of this Honourable Court and

(d) Costs of the appeal and the suit at the Tribunal be awarded to him.

24. The appeal was disposed of by way of written submissions.

Appellant's submissions

25. On behalf of the appellant, it is reiterated that the court erred by holding that the appellant had not proved his case to the standard required by law. In that regard, it is pointed out that the Tribunal agreed with the appellant's claim that the respondent had defaulted in his rent paying obligation and entered judgment on admission in respect thereof and submitted that proof of none payment of rent and judgment on admission in respect thereof was enough reason to repudiate the tenancy agreement.

26. By entering judgment on admission against the respondent, the Tribunal is said to have made a definitive findings on the provisions of **Section 14(1)(a)** of Rent Restrictions Act (RRA), Cap 296 Laws of Kenya, which provides as follows:

"No order for recovery of possession of any premises or for the ejectment of a tenant therefrom shall be made unless-

a. Some rent lawfully due from the tenant has not been paid, or some other obligation of the tenancy (whether under the contract of tenancy or under this Act) so far as is consistent with the provisions of this Act has been broken or not performed; or ..."

27. It is contended that by failing to pay rent for 6 months, the tenant had repudiated the tenancy contract that existed between him and the appellant and as such, liable to deliver vacant possession of the suit premises.

28. It is reiterated that the notice issued to the respondent and which was annexed to the appellant's further affidavit and marked **AWM-1** was valid and effective under **Section 15** of the RRA which provides as follows:

"where notice to quit is required to be given in respect of the premises it shall be in writing, and where the required period of notice is not elsewhere specified in this Act, it shall be not less than one month's notice ending at the end of a tenancy month:

Provided that the tribunal shall construe notices to quit liberally and without undue regard to technicalities."

29. According to counsel for the appellant, a person who refuses to pay lawful rent for six months and ignored lawful notices cannot be a person worthy of protection of the court. In that regard, it is submitted that this being a court of equity, it cannot allow a party to benefit from the fruits of their own illegality.

30. It is reiterated that the relationship between the appellant and the respondent had become so frosty that it was extremely prejudicial to the appellant's right as the owner of the suit premises.

31. Based on the decision in the case of **De Fransesco vs. Barnum (1980)45 Ch.D cited in the case of Communication Workers Union of Kenya v. Telkom (K) Ltd and 2 others (2006) eKLR** where the Chancery Court stated:

"I should be very unwilling to extend decisions the effect of which is to compel persons who are not desirous of maintaining continuous personal relations with one another to continue those personal relations...the courts are bound to be jealous lest they turn contracts of service into contracts of slavery; and ... I should lean against the extension of the doctrine of specific performance and injunction in such a manner;" it is submitted that by sustaining the tenancy, the learned Chairman of the Tribunal converted a contract of personal service into a contract of slavery.

32. Terming the appellant's right to the suit premises constitutional, counsel for the appellant submitted that they cannot be taken lightly and that they can only be departed from in the circumstances ordained by the constitution.

33. Arguing that no court should protect a tenant found to have been in gross transgression of the tenancy agreement in the name of being a protected tenant, counsel for the appellant has submitted that in the circumstances of this case, the appellant is entitled to seek the ejectment of the respondent on account of the breaches of the tenancy agreement.

34. Maintaining that the appellant has made up a case for being granted the prayers sought in this appeal, the appellant urges the court to allow the appeal as prayed.

Respondent's submissions

35. In his submissions, the respondent contends that the grounds of appeal relate to standard of proof in civil matters and in that regard, submits that the appellant failed to proof the various averments in the plaint.

36. Concerning the contention that entry of judgment on admission against him was enough evidence that he had refused to pay rent for six months, the respondent explained that the learned chairman of the Tribunal agreed with his explanation that the appellant had refused to receive rent from him.

37. Pointing out that he paid the rent due from him to the appellant as ordered by the Tribunal and that he continued paying rent, he explains that the appellant again refused to accept rent from him from the month of February 2016 forcing him to continue paying rent by M-pesa.

38. Terming the appellant a diabolical nuisance, the respondent urges the court to dismiss the appeal and reprimand the appellant for being in contempt of court. The respondent further urges the court to order the appellant to pay costs of the appeal and the case appealed from.

The duty of this court on a first appeal

39. This being a first appeal, it is my duty to examine and re-evaluate the evidence. In this regard see the case of **Mwanasokoni v Kenya Bus Services Limited (Mombasa) Civil Appeal No. 35 of 1985 (ur) where Hancox, JA**, speaking for the court, stated; ***"….Although this Court of Appeal will not lightly differ from the Judge at first instance on a finding of fact it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary."***

40. Also see the case of **Peters v Sunday Post Ltd (1958) EA 424,** where **Sir Kenneth O'Connor, P** (as he then was) stated:

"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 witness.

But the jurisdiction "(to review the evidence) should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion.

Accordingly only when the finding of fact challenged on appeal is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong

principles in reaching the finding he did, will this court interfere with it. See Ephantus Mwangi & Another v Wambugu, (1983/84) 2 KCA 100 at page 118."

41. In the circumstances of this case, the case at the Tribunal was determined on the basis of the pleadings filed by the respective parties and the submissions made in respect thereof.

42. From the grounds of appeal and the submissions made for and against the appeal, the sole issue for determination is whether the Tribunal erred by holding **that the plaintiff had not proved his case to the standard required in law.**

43. As pointed out hereinabove, the foregoing determination is said to have been inconsistent with the Tribunal's initial finding that the respondent was in arrears of rent and the entry of judgment on admission in that regard.

44. Concerning that contention, whereas the entry of judgment on admission against the respondent has a bearing on the question as to whether the respondent was indebted to the appellant to the tune of **Kshs. 6000/=** being 6 months' rent, issues abound as to whether the respondent had refused, failed, neglected and ignored to pay the rent. I say this because when the issue was raised before the Tribunal, the respondent admitted having been indebted to the appellant to the tune of the pleaded amount but explained that the appellant had refused to accept the rent.

45. The court record shows that upon admission of indebtness by the respondent, the Tribunal entered judgment on admission but pended the issue as to whether the appellant was entitled to the order of vacant possession for determination after the respondent filed his statement of defence.

46. In his statement of defence, the respondent denied having failed, neglected, refused and/or ignored to pay his monthly rent and put the appellant to strict proof of those claims.

47. After the appellant filed a further affidavit reiterating the averments contained in his plaint and providing documentary proof in respect thereof, the respondent filed a replying affidavit in which he denied the allegations made against him and put the appellant to strict proof in respect thereof.

48. In his further affidavit referred to herein above, the appellant *inter alia* provided evidence of the protracted dispute with the appellant over the suit premises.

49. Upon review of the documents annexed to the appellant's further affidavit, I note that they merely address the dispute between the appellant and the respondent over the respondent's occupation of the suit premises. It is noteworthy that none of the documents relied on contains a determination to the effect that the respondent was indeed in arrears of rent or that the respondent was a nuisance to the other tenants. All what the documents show is that there was a dispute between the respondent and the appellant over the suit premises.

50. Whilst those documents suggest that the respondent was at some point in time in arrears of rent, which on account of the order of the District Officer he paid and promised to move out of the suit premises, the Tribunal appears to have been satisfied by the explanation offered by the respondent that the only reason he was in arrears of rent is that the appellant refused to accept rent from him.

51. That finding, raises the issue as to whether the appellant could lawfully rely on the alleged none payment of rent which he had himself occasioned to back his bid to eject the respondent out of the suit premises, my view is that he cannot.

52. I say that because the law does not contemplate a situation where the alleged ground for ejectment of a tenant is created by the landlord as was the case herein. It is noteworthy that in the circumstances of this case, despite having entered judgment in admission against the respondent, the Tribunal chairman directed the respondent to file his statement of defence in order for him to determine whether or not the appellant had made up a case for ejectment of the respondent.

53. In his statement of defence and replying affidavit, the respondent categorically denied having been in arrears of rent and explained that his attempts to meet his rent paying obligations were thwarted by the appellant by refusing to accept rent from him. Whilst such allegations could thwart the appellant's bid to rely on the alleged none payment of rent, the appellant did not sufficiently address that claim or allegation in his reply to defence and further affidavit.

54. As was observed in the case of **Peters v. Sunday Post Limited** (supra), an appellate court will not differ with the trial court on issues of fact(s) unless *the finding was based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the finding he did.*

55. In the circumstances of this case, I am not satisfied that the trial court's finding either based on no evidence or a misapprehension of the evidence or the Tribunal chairman acted on wrong principle in reaching the impugned determination. As pointed out above, the appellant did not discharge the duty imposed on him of proving that the reason the respondent was in arrears of rent was not his alleged refusal to receive rent. Moreover, he failed to prove that the respondent was a nuisance, yet his case against the respondent was premised on the above grounds.

56. The upshot of the foregoing is that the appeal has no merit. Consequently, I dismiss it with costs to the respondent.

Dated, signed and delivered at Nyeri this 14th day of December, 2017.

L N WAITHAKA

JUDGE

Coram:

N/A for the appellants

N/A for the respondents

Court assistant - Esther