REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

Civil Appeal 134 of 2000

1. SHIPIRA CHOLA

2. KHAMIS MSABAH ABEID

3. LEONARD KABIRU

4. TERESIA MWANGEMI ..... APPELLANTS

- Versus -

JAMES SAMUEL PETER M1RIE ..... RESPONDENT

JUDGMENT

This is an appeal from the ruling of the Chairman of the Business Premises Rent Tribunal given on the 24th November 2000 in Business Premises Rent Tribunal Case No. 99 of 2000. That case had been consolidated BPRT Case Nos. 93, 97, and 98 all of 2003 in which the appellants herein were the Tenants who had made references to the Tribunal. The appeal contained 7 grounds of appeal but during the hearing before me counsel for the appellant condensed and argued them together as two grounds. I shall revert to them shortly.

The facts giving rise to this appeal are briefly these. The Appellants are tenants of the Respondent in the business premises situate in Mombasa and known as L.R. No. Mombasa/Block XVII/338. By notices dated the 22nd June 2000 the Respondent through his lawyer gave the appellants notice requiring them to give up possession of the premises with effect from the 1st day of September 2000. The Appellants made references to the Tribunal. During the hearing on 13.11.2000 the cases were consolidated and heard together. Before evidence could be tendered counsel for the Appellants raised a preliminary point arguing that the notices were all defective for failure to indicate what the Respondent wanted. He therefore prayed that the references be allowed with costs. Counsel for the Respondent on the other hand argued that the notices were valid as they were clear that the Respondent's intention was to terminate the tenancies and that the notices had been given under Section 4 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (the Act). He further argued that the notices followed the one given in the Act. The Chairman of the Tribunal reserved his ruling and delivered it the following day. He held that the notices were valid as they met the test laid down in the case Auto Engineering Ltd. -Vs- M. Gonelea & Co. Ltd. [19791 KLR 248. Quoting from that case he held that the language used in the notices sufficiently conveyed to the minds of the Appellants what the Respondent intended to do and

why he wanted vacant possession. The Respondent wanted to carry out a reconstruction of the premises which he could not do without obtaining possession of the premises. He therefore dismissed the preliminary objection and ordered the case to proceed. The Respondent testified and called two witnesses.

In his evidence the Respondent said the reconstruction would cost between Sh. 4 million to Sh. 4.5 million. He produced a letter from his advocate Mr. D.K. Thuo showing that he had invested, in the name of that advocate, Sh. 5.5 million in Treasury Bills. He also produced a building plan approved by the Council and a letter authorizing him to start the reconstruction. His two witnesses were his architect and structural engineer who testified on the reconstruction works to be carried out which they said could not be done without obtaining possession.

The Appellants did not testify or call any evidence. Their advocate however submitted that the Respondent had not proved that he had the intention to restart reconstruction. He repeated his earlier submissions on the validity of the notice. After listening to the submissions the Tribunal dismissed the appellant's references and ordered them to vacate the premises on or before the 31^{s1} December 2000. The appellants then appealed and, 1 am told, they obtained an order of stay of execution and they are still in the premises.

As I said earlier counsel for the Appellants argued this appeal on two grounds. The first ground was that the notices were defective and the second one was that the Respondent had failed to prove that he had the intention to reconstruct the premises. I will first deal with the second ground of appeal which is whether or not the Respondent had the intention of reconstructing the premises.

This being the first appeal and on the authority of the decisions in R.G. Patel Vs Lalji Makanji [19571 E.A 314 and Peters Vs Sunday Post Ltd. [19581 EA 424 my function and duty as an appellate court is to subject the evidence to fresh and exhaustive review and draw inferences and conclusions making allowance only for the fact that I have not had the advantage of seeing and hearing the witnesses.

What does "intention" in this context mean" In Cunliffee -Vs-Goodman [1950] 1 ALL E.R. 720 Asqwith CJ. said this regarding this intention:

"An intention to my mind connotes a state of affairs which the party 'intending' -1 will call him Mr. X does more than merely contemplate. It connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about by his own act of volution".

This holding was quoted with approval by the late Chanan Singh J. in the case of Standard Bank Ltd. -Vs- Kenya Crafts [19731 E.A. 421. In the same case the Judge also quoted with approval the judgment of Lord Denning L.J. in the case Fisher -Vs- Taylors Furnishing Stores [1956] 2 ALL E.R. 78 in which Lord Denning at page 80, stated:-

"... the court must be satisfied that the intention to reconstruct is genuine and not colourable, that it is a firm and settled intention, not likely to be changed; that the reconstruction is of a substantial part of the premises, indeed so substantial that it cannot be thought to be a device to get possession, that the work is so extensive that it is necessary to get possession of the holding in order to do it; and that it is intended to do the work at once and not after a time. Unless the court were to insist strictly on these requirements, tenants might be deprived of the protection which Parliament intended them to have. It must be remembered that, if the landlord, having got possession, honestly changes his mind and does not do any work of reconstruction, the tenant has no remedy. Hence the necessity for a firm and settled

intention."

The "intention" to reconstruct therefore means that the Respondent should not only be capable financially but should also demonstrate a settled intention to start reconstruction work as soon as he gets possession of the premises. I find that the Respondent in this case demonstrated before the Tribunal that he had the financial capacity to reconstruct. His plans had also been approved by the Municipal Council of Mombasa. He had employed an architect and structural engineer. But did he actually intend to carry out the reconstruction work" In cross examination this is what he told the tribunal:-

" I have not yet picked a construction company to do the work.... I cannot begin the construction work tomorrow morning. It is my architect who shall assist me to get a good contractor. I can begin construction after getting a contractor. I can begin construction in a months' time." (The underlining is mine).

Clearly this is not someone who intends to do the "work at once and not after a time." I am alive to the fact that appellate court should not lightly differ with a finding of fact by a court of first instance and as a general rule should not interfere with such finding unless it can be shown that the trial court has drawn a wrong inference from the proved facts or has misdirected himself on the facts or has failed to take into account same material facts. In its judgment the only reference the Tribunal made to this aspect of the evidence is when it was considering the Appellant Advocate's submissions. It said:-

"The tenants did not give evidence in these matters. Their counsel has submitted that the notices are not valid. He has also submitted that the landlord is not prepared to do the construction since he has not entered into a construction contract."

I find that the Tribunal did not take into account the earlier quoted aspect of the Respondent's evidence. If it had perhaps its ruling could have been different. I find that the Respondent did not have a settled intention to start the reconstruction soon after obtaining possession.

As the first ground challenges the validity of the notices, I will set them out in full. They read as follows:-"1. J.S.P. MIRIE of..... P.O. BOX 83409, MOMBASA

The Landlord of the above-mentioned premises, hereby giveyou notice altering terms of your tenancy with effect from 1st day of SEPTEMBER..... 2000.

1. The alterations which I propose are:

NOT APPLICABLE

2. The ground on which 1 seek the alteration are:

I intend to reconstruct the premises comprised in the tenancy and that 1 would not reasonably do so without obtaining possession of such premises

3. I require you, with one month after receipt of this notice, tonotify me in writing whether or not you agree to comply withthe notice as from that date.

This notice is given under the Provisions of Section 4 (2) of the Landlord and Tenant (Shops. Hotel and Catering Establishments Act. 1965."

Counsel for the Appellant submitted that the notices were vague and did not state whether or not the Respondent wanted to terminate or alter the terms of the tenancy. He therefore submitted that they should have been dismissed.

In his first ruling on the validity of the notices the tribunal Chairman stated thus:-

"Before one reaches paragraph 2, the notices are not clear on what the landlord wants. If however one reads the notices in their entirety there can be no doubt it is vacant possession that is required".

This far I agree with the chairman that read in their entirety the notices clearly show what the intention of the Respondent was. He wanted possession of the premises as he said, to be able to carry out reconstruction work which he could not do while the appellants were still in possession. But did the Respondent want to terminate the tenancies"

In cross examination this is what he said:-

"Prior to giving the notices I didn't approach the tenants to discuss the construction. The tenants didn't know what 1 wanted to do. My notices ask for possession so that I can do the construction. I can return the shops to the tenants after the reconstruction. The construction is estimated to take between 3 to 4 weeks. I am however not sure on the duration.

I have not yet picked a construction company to do the work. This shall depend on the outcome of this case. I am ready to do the construction. I shall have no problem getting a contractor." Emphasis supplied Paragraph 2 of the notices which I have reproduced in full herein above clearly shows the intention of the Respondent. I find from the notices and the Respondents evidence that he did not want to terminate the tenancies altogether. He wanted the tenancy altered in such a way that the Appellants could give him possession of the premises so that he could carry out reconstruction works which he could not reasonably do without obtaining possession. He wanted the possession for a period of 3 to 4 weeks or for the period the reconstruction could take after which he could return the shops to the appellants. But this is not what the tribunal gave him. The final order of the tribunal terminated the tenancies. It

read:-

"I am satisfied that the landlord intends to reconstruct the premises and [I| therefore proceed to approve the notices. The notices references are dismissed with costs to the landlord. The tenants are ordered to vacate and handover vacant possession to the landlord on or before 31st December 2000."

This order does not make mention of the Appellants going back to the premises. It therefore completely terminated their tenancies.

While submitting that the notices were defective Mr. Master, counsel for the appellants, cited the case of Lall -Vs- Jeypee Investments Ltd. 1972 E.A. 512. Whereas I agree with him on the ratio decidendi in that case, which was that the tenancy notices must be in strict conformity with the provisions of the Act, the issue in that case was whether the notice conformed with the provisions of Section 4(5) of Act. We are not dealing with those provisions in this case. So that authority does not avail him much support in this case.

After carefully perusing the notices and evaluating the evidence tendered before the tribunal I find that on the face of them the notices were valid. They sought the alteration of the tenancies by giving

possession of the premises to the Respondent for a limited period of about 3 to 4 weeks for purposes of reconstructing the premises after which the Respondent as he stated in his evidence, he would return them to the Appellants. Instead of doing that the tribunal completely terminated the tenancies. For these reasons and the ones I have already given about the intention to re-construct I allow this appeal and set aside the tribunal ruling of the Tribunal. The Respondent shall pay the costs of this appeal and those in the tribunal.

Dated this *.15th.* day of December, 2003.

D.K. Maraga

Ag. JUDGE