



Wachi v Njiri (Tribunal Case E181 of 2023) [2024] KEBPRT 991 (KLR) (19 July 2024) (Ruling)

Neutral citation: [2024] KEBPRT 991 (KLR)

REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E181 OF 2023
GAKUHI CHEGE, CHAIR & J OSODO, MEMBER
JULY 19, 2024

BETWEEN

ALICE NYAMBU WACHI LANDLORD

AND

CHARLES KIGO NJIRI TENANT

RULING

1. The landlord moved this Tribunal by way of a Reference dated 21st July 2023 under Section 12(4) of Cap 301 seeking for orders directing the tenant to settle outstanding rent arrears of Kshs 774,000/= at the rate of Kshs 30,000/= per month. She also sought for an order of vacant possession to enable her carry out her own business in the suit premises and for the OCS, Voi Police Station to ensure compliance. She also sought for costs of the Reference.
2. The landlord simultaneously filed a motion under certificate of urgency replicating the prayers sought in the Reference. The application is supported by her affidavit sworn on 21st July 2023 wherein she deposes that the respondent is her tenant in a business premises located at Chaani within Mombasa County occupying two shops at a monthly rent of Kshs 30,000/= since April 2020.
3. The tenant is accused of not paying rent on time which had caused an accumulation of Kshs 774,000/= . Despite numerous reminders and communication, he has ignored to pay the full rent as per the tenancy agreement. It is for that reason that the landlord sought for an order of vacant possession to avoid further accumulation of the arrears.
4. The application was considered ex-parte and the landlord was directed to serve it for hearing inter-partes on 6th September 2023. Upon being served, the tenant filed a preliminary objection citing the doctrine of Res Judicata under Section 7 of the Civil Procedure Act on account of the orders made in BPRT case No. E100 OF 2023 which was said to be pending before this Tribunal. The tenant also based the preliminary objection on the doctrine of Res Subjudice under Section 6 of the Civil Procedure Act.



5. The tenant further attacks the landlord's case on the basis that there was no notice served upon her to increase rent under Section 4(2) of Cap 301 from Kshs 20,000/= to Kshs 30,000/= neither was there any notice for termination of her tenancy as prescribed under the said statute.
6. The landlord filed grounds of opposition dated 21st October 2023 to the notice of preliminary objection stating that the same was not on a pure point of law as it required facts and evidence to be adduced to ascertain the claim. The landlord denies that BPRT No. E100 of 2023 was pending before the Tribunal stating that the same was finalized and the file closed. According to the landlord, the cause of action in the two cases were different. She further contends that the Civil Procedure Act, Cap 21 does not apply to this matter as the Tribunal has its own procedure of conducting matters before it.
7. In yet another application dated 7th November 2023, the landlord moved the Tribunal under certificate of urgency seeking for an order that the tenant deposits as security the amount claimed towards unpaid rent arrears as per the Complaint filed herein. She also sought for an order to restrain the tenant from vacating the suit premises until he offers security for the claimed rent arrears.
8. The application is predicated upon the grounds set out on the face thereof and the supporting affidavit of even date sworn by the landlord wherein the tenant is accused of trying to move his properties out of the suit premises after the Tribunal directed him to file evidence of payment of rent. This was confirmed after the landlord confronted the tenant.
9. In a replying affidavit sworn on 28th September 2023, the tenant deposes that he rented two vacant portions of land measuring 10 X 5 and 7 X 15 meters respectively where he established a hardware shop. The initial rent was Kshs 13,000/= which was agreed upon verbally. He reiterates that the landlord's case is Res Judicata and Res Subjudice on account of an order issued on 23rd June 2023 in BPRT No. E100 of 2023 attached to the affidavit as annexure "CKW1"
 - a. He denies owing the landlord the sum of Kshs 774,000/= and deposes that it is the landlord who owes him Kshs 69,900/= for barbed wire and chain link taken by him on credit from the tenant's shop as per annexure marked "CKN2".
 - b. The tenant deposes that the previous rent of Kshs 18,000/= was increased to Kshs 20,000/= from August 2020. He attaches Mpesa statements as annexure "CKW3" in support of his claim of payment of rent. He accuses the landlord of intention to use unlawful means to evict him from the suit premises. He also accuses the landlord of unlawful increment of rent from Kshs 20,000/= to Kshs 30,000/= without issuing any notice.
 - c. The landlord filed a supplementary affidavit sworn on 9th November 2023 in which she deposes that the rent payable for the suit premises is Kshs 30,000/= and not Kshs 20,000/= as contended by the tenant. The tenant is accused of not paying the agreed rent at any one time as he was always pleading for time to do so on the ground that he was servicing a huge loan. The landlord narrates all the payments made by the tenant and concludes that he owed Kshs 835,000/= as per the statement marked "A" annexed to the affidavit.
 - d. On 11th April 2024, Counsel for both parties agreed that BPRT No. E100 of 2023 had been settled and the consolidation order earlier made in the matter was issued in error. The said concession rendered the tenant's notice of preliminary objection otiose.
 - e. On 13th February 2024, both parties were directed to file and exchange rent account statements. However, only the landlord complied with the direction.
10. We are required to determine the following issues in this matter;



- a. Whether the tenant owes any rent arrears to the landlord and if so, how much?
 - b. Whether the landlord is entitled to the reliefs sought in the reference and applications dated 21st July 2023 and 7th November 2023.
 - c. Who is liable to pay costs of the suit?
11. In considering the first issue, it is imperative to determine how much rent is payable in respect of the suit premises. According to the landlord, the monthly rent payable for the suit premises is Kshs 30,000/= . On the other hand, the tenant maintains that from the month of August 2020, the monthly rent payable for the same is Kshs 20,000/= . The tenant's Mpesa statements relied upon by both the landlord and the tenant shows a consistent payment of Kshs 20,000/= per month save on 4 occasions when the tenant made a payment of Kshs 22,000/= which is not explained.
 12. It is to be noted that the landlord has not exhibited any demands for higher rent nor any evidence of payment of Kshs 30,000/= towards rent by the tenant to prove his claim that the said amount is payable for the suit premises. Equally, there is no written tenancy agreement between the two parties as the one exhibited by the landlord is unexecuted. We therefore find and hold that the only probable monthly rent is the sum of Kshs 20,000/= which is consistently shown on the Mpesa statements.
 13. We have looked at the landlord's rent account statement showing the disputed and the undisputed rent as well as rent payments made for the premises from January 2020 to April 2024 and we find the calculations accurate as the same are supported by the filtered Mpesa statements annexed thereto. The landlord has also reduced the sum of Kshs 54,900/= for goods taken on credit and Kshs 15,000/= awarded as costs in BPRT No. E100 of 2023 to leave the balance of the rent arrears at Kshs 467,200 -59,400- 15000=392,800.
 14. The landlord is also entitled to the rent for the months of May, June and July 2024 amounting to Kshs 60,000/= to make altogether Kshs 452,800/= . We shall award the said amount to the landlord against the tenant.
 - a. In the premises, the landlord's reference and applications dated 21st July 2023 and 7th November 2023 are merited in regard to the claim for rent arrears. However, in absence of any notice to terminate the tenant's tenancy, we cannot grant the prayer for vacant possession.
 - b. As costs always follow the event, the landlord shall be awarded costs of the suit in exercise of our discretion under Section 12(1)(k) of Cap. 301, Laws of Kenya.
 - c. In conclusion, the following final orders commend to us in this matter under Section 12(4) of Cap 301, Laws of Kenya;
 - a) The landlord's reference and applications dated 21st July 2023 and 7th November 2023 are allowed in so far as the claim for rent arrears is concerned with variation of the amount as set out below.
 - (b) The tenant/respondent is hereby ordered to settle the sum of Kshs 45,800/= within the next Thirty (30) days hereof failing which the landlord shall be at liberty to use lawful means including distress for rent without paying any additional court fees.
 - (c) The tenant shall provide a suitable security for the rent arrears to be approved by the landlord in the event of a desire to voluntarily vacate the suit premises.
 - (d) The costs of the suit assessed at Kshs 30,000/= are awarded to the landlord.



(e) This matter is marked as settled in terms.

It is so ordered.

DATED, SIGNED & VIRTUALLY DELIVERED THIS 19TH DAY OF JULY 2024

HON. GAKUHI CHEGE

PANEL CHAIRPERSON

HON. JOYCE A OSODO

PANEL MEMBER

In the presence of;

Lotuk for the landlord

Nzilani holding brief for Nganga for respondent

