



**Musimbi v Anwar (Tribunal Case E029 of 2024)
[2024] KEBPRT 859 (KLR) (26 June 2024) (Judgment)**

Neutral citation: [2024] KEBPRT 859 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E029 OF 2024
N WAHOME, CHAIR & JOYCE MURIGI, MEMBER
JUNE 26, 2024**

BETWEEN

BENSON MUSIMBI TENANT

AND

MOHAMED ANWAR LANDLORD

JUDGMENT

1. The Tenant originated these proceedings by the Reference dated 6th February 2024. The same is said to be founded on Section 12(4) of the [*Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act*](#) (Cap. 301) “hereinafter the Act”.
2. The Tenant’s complaint was to the effect that:-

“The Landlord has issued me with an illegal notice terminating my tenancy attached herein. I request the Rent Tribunal Court and OCS Bungoma Police Station do order the Landlord to use the right procedure of terminating my tenancy and stop harassing me with threats of eviction”.
3. The Tenant further filed witness statements for himself and his wife Zehura Namsenda Ochola both dated 20th February 2024, supplementary Affidavit sworn on the 28th February 2024 and finally the further affidavit sworn on the 2nd April 2024. The Tenant also rendered oral evidence and called his wife Zuhura Ochola as a witness and who testified as Tw2.
4. Mr. Benson Musimbi the Tenant made oral submissions in support of his case and rested his presentation. The tenor of his evidence was that he was a protected tenant.
 - i. The Landlord had issued him with an illegal termination notice of the tenancy.



- ii. He had not been allowed quiet possession as the landlord has continuously harassed him by intimidating him, disconnecting electricity and water and locking up the premises.
 - iii. He had lost goods mainly eggs and milk worth approximately Kshs.40,000/- which goods had been bought from loans.
 - iv. Needed the protection of this court for his tenancy, be compensated for the losses suffered and awarded the costs of the suit.
5. On his part, the landlord filed his witness statement and that of Geoffrey Wasike both dated the 29th February, 2024. The case for the landlord was that:-
- i. He had no tenancy agreement with the Tenant but had only allowed him a temporary stay at the premises for one (1) month and which was thereafter extended to three (3) months.
 - ii. He had never disconnected water which was being used commonly by all the Tenants nor the electricity which was the sole responsibility of the Tenant as he enjoyed a separate meter and had a token service.
 - iii. The Tenant was enjoying quiet possession of the premises during the time he claims that the same had been locked down.
 - iv. He doubted that the Tenant had suffered any losses as claimed and that he was not responsible for the same if at all.
 - v. Was owed the rents for the months of January, 2024 to the date of testimony in court and sought for payment of the same.
 - vi. Prayed that the Tenant be ordered to deliver vacant possession of the demised premises.
6. The Landlord through his counsel Mr. Anwar also rendered oral submissions in support of his defence. In principal he submitted that he was not required by the law to issue the conventional termination notice as known to the law as there did not exist a landlord and Tenant relationship between the parties. He also contended that no evidence was offered by the Tenant to prove that utilities at the premises had been disconnected or that the landlord had locked up the premises.
7. Having perused the evidence of the parties in its entity, the issues that arise for determination in our view are the following:-
- A. Whether the Tenant's reference has merit.
 - B. Whether the landlord's termination notice is lawful.
 - C. Who should bear the costs of the suit.

Issued No. A- Whether the Tenant's reference has merit.

8. The Tenant's reference was too-prolonged. It mainly questioned the termination notice by the landlord vide a whatsapp message (s) and also verbally as he claimed. It was his contention that the said purported notices were not compliant with the law. Secondly he sought compensation for losses suffered as a result of alleged lockdown of his premises by the landlord or his agent and disconnection of power and water.



9. The landlord denied the Tenant's claims and it was upon the Tenant to prove the same on a balance of probabilities. Section 107 of the [Evidence Act](#) provides that:-

“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”.
10. The High court in the case of [Kanyungu Njogu v Daniel Kimani Maingi](#) [2000] eKLR gave the following guidelines to help assess success of a party in executing the principle of a proof on a balance of probabilities. It held that:-

“The burden of proof in civil cases on the balance of probability is defined as when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other”.
11. Therefore on the alleged disconnection of water and electricity, we are not convinced that the water could have been disconnected when it was for common use by all the Tenants including by the carwash business. Further on the purported disconnection of power, we find that the Tenant has not been able to disconnect the evidence of the landlord and his witness to the effect that the individual power management was the sole responsibility of the concerned Tenant. That for them, their duty was initially to avail the inter face to allow for the loading of the token and which they provided. Later on they provided the Tenant with a meter and own interface which he operated independently. We have no reason not to believe this otherwise coherent position offered by the landlord and his witness.
12. The Tenant also claimed that the landlord had locked the premises between January and March 2024. In other evidence he claimed the lockdown was for two weeks. On his part, the landlord offered that he had never locked up the premises but had always insisted that the Tenant delivers vacant possession. This is evident from the parties messages exchanged on their respective phones.
13. We are therefore of the view and so decide that it is unlikely that the allegations of the unlawful lockdown were factual and will disregard the same.
14. We also note that the Tenant in his reference which was dated and filed on the 6th February 2024, did not indicate that the premises had been closed by the Landlord. He only complained of threats to evict him by the former. He also did not claim any damages for any losses. This only came later in his statements and Affidavits filed in the court. If the premises had been locked when he filed the reference, he should have stated as much.
15. The Tenant did not plead any losses in his reference. This claim also came much later. It is trite law that special damages must be pleaded and strictly proved. In the case of [Hahn v Singh](#), Civil Appeal No. 42 of 1983 (185) KLR 716 the court of Appeal held that:-

“special damages must not only be specifically claimed (pleaded) but also strictly proved..... for they are not the direct natural or probable consequence of the act complained and may not be informed from the act. The degree of certainty and particularly of proof required depends on the circumstances and nature of the acts themselves”.
16. We therefore do not find any merit in the Tenant's grievances about the purported locking up of his business, disconnection of water and electricity and also the alleged losses thereof.



IssueNo. B-Whether the Landlord's notice of termination is lawful.

17. By a message sent by the landlord to the Tenant on the 17th November 2023, he required the later to evacuate from the demised premises. It simply read:-

“Morning Boss, the notice period is over, kindly handover the shop once done. Good day”.

From the message it is not clear what the notice period was, when the same was given and in what form.

18. In his evidence in court, the Landlord stated that there had not been established a landlord and Tenant relationship between the parties. That he had merely granted to 3 months. To him, he did not therefore require to give the statutory notice for termination of the tenancy.
19. On his part, the Tenant denied that he was to be at the premises initially for one (1) month and later for three (3) months as claimed by the landlord. He asserted that he was a protected Tenant and that the notice issued to him was not lawful. We tend to believe the Tenant on this, in view of even the landlords evidence in court.
20. Though the landlord had required the Tenant to vacate the premises in November 2023 as can be deduced from the notice to the tenant dated 27/11/2023, he testified that he had granted a separate meter and an interface gadget to the Tenant's wife in December, 2023. We doubt that it would have been logical for a tenant who was to have left the premises in November, 2023 or in January, 2024 as later claimed by the landlord, to gain be allocated an independent meter from the communal one in December 2023.
21. In any event, the conduct and actions of the parties in relation to each other did establish a landlord and Tenant relationship. Section 2(1) defines a landlord and Tenant as follows:-

“Landlord in relationship to a tenancy, means the person for the time being entitled as between himself and the Tenant, to the rents and profits of the premises payable under the terms of the tenancy” and

“Tenant in relation to a tenancy means the person for the time being entitled to the tenancy whether or not he is in occupation of the holding and includes a sub-tenancy”.

22. It is our view also that the landlord and Tenant relationship between the parties is a controlled tenancy. Section 2(1) of the [Act](#) defines a controlled tenancy as follows:-

“controlled tenancy means a tenancy of a shop, hotel or catering establishment:-

- a. Which has not been reduced into writing, or
 - b. Which has been reduced into writing and which
 - c. Is for a period not exceeding five (5) years”.
23. The relationship between the parties from the evidence on record was not in writing and was for a period of not more than 5 years. It then follows that a tenancy for even one (1) month as alleged by the landlord, also falls under the definition of a controlled Tenancy.



24. There is therefore required strict compliance with the law to bring such a tenancy to an end. Section 4(2) of the Act provides that:-

“A landlord who wishes to terminate a controlled tenancy, or alter, to the detriment of the tenant, any term or condition in, or right or service enjoyed by the tenant under such a tenancy, shall give notice in that behalf to the tenant in the prescribed form”.

25. The notice to be given must also not be less than 2 months. Section 4(4) of the Act provides that:-

“No tenancy notice 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”.

26. Importantly also, the termination notice must incorporate a ground or grounds on which the termination is sought. Section 7 of the Act has listed those grounds. It states that:-

“Grounds on which landlord may seek to terminate tenancy”.

And continues to provide the same as listed under Sections 7(1) (a) to (g) thereof.

27. None compliance with the Act as above required renders any purported notice of termination redundant, unlawful and of no legal effect. The Court of Appeal in the case of Manaver N. Alibhai T/ A Diani Boutique v South Coast Fitness and Sports Centre Ltd Civil Appeal No. 203 of 1994 Mombasa held that:-

“The Act lays down clearly and in detail, the procedure for the termination of a controlled tenancy. Section 4(1) of the Act states in very clear language that a controlled tenancy shall not terminate or be terminated, and no term or condition in, or right or service enjoyed by the Tenant of any such tenancy shall be altered, otherwise than in accordance with specified provisions of the Act. These provisions include the giving of a notice in the prescribed form. The notice shall not take effect earlier than 2 months from the date of receipt thereof by the tenant. The notice must also specify the grounds on which termination is sought. The prescribed notice in form A also requires the landlord to ask the tenant to notify him in writing whether or not the tenant agrees to comply with the notice”.

28. From the above, it is clear that the purported notice given to the Tenant was unlawful and therefore of no legal effect.

Issue No. C- Who should bear the costs of the reference.

29. The tenant has succeeded in challenging the legitimacy of the termination notice on the other hand, he has failed to establish that the landlord has interfered with his quiet possession of the premises by locking the same up and disconnecting water and electricity. He has also failed in his claim for damages. We therefore direct that each party will bear own costs.
30. Having established that the landlord never locked the premises nor denied the Tenant access to the same. We find that the Tenant was required to abide his cardinal obligations by paying the rents as they fell due. In that regard we find that the Tenant is required to pay the rents for the month of January, 2024 to date.
31. In the final analysis, the orders that commend to us are the following:-



- i. That the purported notice to terminate the Tenancy herein is unlawful and therefore of no legal effect nor consequence”.
- ii. That the Tenant shall pay all the rents in arrears effective the month of January, 2024 to date within the next 30 days of the date hereof and in default the landlord shall be at liberty to levy distress in recovery of the same.
- iii. That the Tenant shall be allowed quiet possession of the premises unless otherwise disturbed in strict compliance with the law.
- iv. That each party shall bear won costs of the reference.

JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF JUNE, 2024.

HON. NDEGWA WAHOME, MBS HON. JOYCE MURIGI

PANEL CHAIRPERSON MEMBER

BUSINESS PREMISES RENT TRIBUNAL

Judgement delivered in the presence of Mr. Anwar for the Landlord and Mr. Musimbi Tenant in person.

HON. NDEGWA WAHOME, MBS HON. JOYCE MURIGI

PANEL CHAIRPERSON MEMBER

BUSINESS PREMISES RENT TRIBUNAL

26TH JUNE 2024

