



**Gathira & 2 others v Macharia & another (Tribunal Case E017 & E089 of 2023
(Consolidated)) [2023] KEBPRT 371 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEBPRT 371 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E017 & E089 OF 2023 (CONSOLIDATED)
GAKUHI CHEGE, VICE CHAIR
MAY 31, 2023**

BETWEEN

**REUBEN GATHIRA 1ST TENANT
MORRIS MURIITHI 2ND TENANT
DOREEN MBOGORIA 3RD TENANT**

AND

**SIMON MACHARIA 1ST LANDLORD
GEORGE GAKURU 2ND LANDLORD**

JUDGMENT

1. Through a reference dated 5th January 2022, the 1st tenant (Reuben Gathira) moved this Tribunal under Section 12(4) of Cap. 301, Laws of Kenya claiming that the landlords were planning to evict him and his co-tenants from the suit premises despite being in no rent arrears.
2. The tenants simultaneously filed a motion of even date seeking for restraining orders against the landlords from evicting them from the suit premises or in any manner interfering with their tenancy therein.
3. The tenants contend that they had been dutifully paying rent without fail and did not have rent arrears. The application is supported by the affidavit of even date sworn by the 1st tenant wherein it is deposed that the landlords' advocates on record wrote a letter dated 30th November 2022 to the 1st tenant to vacate and remove his printing machine from the suit premises within 7 days on or before 8th December 2022.
4. It is deposed that the said notice came after conclusion of another case in BPRT 526 of 2022 on 22nd November 2022. The tenants fearing eviction came back to the Tribunal seeking protection from the threatened eviction.



5. The tenants have annexed a partnership agreement dated 28th November 2021 entered into between the three (3) tenants herein on one hand and John Kimangu on the other hand in respect of the printing machine in the suit premises. They have also annexed rent payment Mpesa messages to JIMLY PROPERTIES LTD for the months of November and December 2022.
6. Earlier on 28th November 2022, the 1st landlord had served a tenancy notice upon all the three (3) tenants seeking to terminate their tenancies with effect from 1st February 2023 on the grounds of non-payment of rent and need to use the premises for personal business.
7. Being opposed to the said notice, the tenants filed their joint reference under Section 6(1) of Cap. 301, Laws of Kenya on 27th January 2023 vide Nairobi BPRT No.E089 of 2023. The said case was on 3rd February 2023 consolidated for hearing and disposal with the instant case. Parties were directed to file and exchange witnesses statements and documents in the consolidated case.
8. The parties complied with the directions with the tenants complying on 24th February 2023 by each filing their witness' statements of even date while the 1st landlord filed his own witness statement together with two other witnesses statements by Susan Wangari Macharia and Vincent Mutune Muthama. He also filed a list and bundle of documents dated 27th February 2023.
9. The matter proceeded by way of Viva voce evidence with the parties and their witnesses adopting their witness statements as their evidence in Chief and thereafter being subjected to cross-examination. I shall only rehash the said evidence in so far as the issue of termination of tenancy and the application for restraining orders is concerned.
10. I am required to determine the following issues in this case:-
 - a. Whether the landlords' tenancy notice dated 28th November 2022 ought to be approved or dismissed.
 - b. Whether the tenants' application dated 5th January 2023 ought to be allowed or dismissed.
 - c. Who is liable to pay costs of the consolidated case?.
11. According to the 1st landlord, he took possession of the suit premises in the year 2009 as a tenant of one Kiriga Githuka. In the year 2018, the 2nd tenant requested the landlord to be allowed to utilize a small space upstairs to do his work. It was agreed that the 2nd tenant would pay Kshs.8,000/- and Kshs.2000/- per month as token rent and electricity respectively.
12. After sometime, the 3rd tenant joined the 2nd tenant and continued making payment on behalf of the latter. The landlord fell sick during Covid pandemic and stayed away from the suit premises allowing the 2nd tenant to use his office space. The 1st applicant was employed by the landlord as a machine operator. The machines were on the ground floor until when the landlord removed them.
13. In the year 2021 around May, the landlord sold the machine to the 1st Applicant through a written agreement. He was allowed to continue using the machine in the suit premises. He was to pay some unagreed amount for use of the space.
14. Owing to the 1st Applicant's vandalism upon the landlord's machines, he was issued with a three (3) months notice to vacate the suit premises. In August, the landlord informed the building management of intention to remove his machines from the suit premises and he requested the 1st Applicant to take advantage of the arrangement which involved demolition of walls and removal of the door of the premises. This was done overnight and the landlord changed the locks to the premises.



15. The landlord was arrested the following day and was also sued vide BPRT Case No. 526 of 2022 and was ordered to return the machine which orders he complied with. It is after that when the 1st Applicant was served with a letter to remove his machine and the 2nd and 3rd Applicants with notices to terminate their tenancies in the suit premises.
16. It is the landlords' case that the 1st Applicant is not a tenant in the premises and ought not have filed the instant reference as such tenant. The landlord seeks for the 2nd and 3rd applicants to be ordered to vacate from the suit premises.
17. The landlord contends that the tenants had not paid rent for a period of over 10 months as at February 2023 having last paid rent in June 2022 which he returned hoping they would vacate and allow him to use the suit premises. It is the landlord's case that the tenants are in the premises illegally as he is not allowed to sublet and only intended to assist a friend in distress.
18. Pw2 was Susan Wangari Macharia. She supported the evidence tendered by the landlord on the relationship of the parties herein. Her evidence comprises of a repetition of what the landlord stated before court.
19. Pw3 was Vincent Mutune Muthama who repeated the evidence tendered by the landlord on the relationship between he landlord and the Applicants herein. I need not repeat his evidence.
20. Dw1 was Reuben Gathira (1st Tenant/Applicant) who testified that he was not an employee of the landlord as he joined him as a partner after the latter's business went down with the departure of one Vincent. He admits having been the machine operator at the suit premises. The machine was later sold by the landlord to him with contributions made by the other two Applicants who were already in the suit premises.
21. As a result, all continued operating both in the space downstairs and upstairs in the suit premises paying a monthly rent of Kshs.15,000/- to the landlord. They paid rent up to June 2022 when he refused to accept rent and returned it to them. A meeting was held with the agent of the head landlord where the tenants discovered that the 1st Respondent had not been remitting rent to the head landlord. The tenants were allowed to start paying rent directly as per receipts produced in court.
22. On 25th September 2022, the landlord broke into the tenant's premises despite orders of this Tribunal. The matter was reported to Kamukunji Police Station and the landlord was arrested and charged with a criminal offence at Makadara Law Courts.
23. On 28th November 2022, the landlord issued a notice of termination of tenancy upon the tenants citing non-payment of rent although he is the one who returned the rent to them. By then, the management agent had started receiving rent directly from the tenants. There were no rent arrears.
24. DW2 was Morris Muriithi (2nd applicant) who testified that he went into the suit premises in the year 2018 under invitation of the 1st Respondent who offered to let him a bigger space than where he was operating from. The witness being a designer agreed to move into the suit premises at a monthly rent of Kshs.10,000/-. He was later joined by the 3rd applicant in the office upstairs.
25. He confirms having contributed to the purchase of the printing machine sold to the 1st Applicant by the landlord. They continued thereafter to use both spaces (downstairs and upstairs) paying rent to the landlord. The landlord refused to accept rent in June 2022 and returned it. The rest of his evidence corroborates what DW1 stated in court.
26. The 3rd Tenant's evidence (Dw3, Doreen Mbogori) is on all fours similar to that of the other two tenants and I need not repeat it herein.



27. I have looked at all the evidence tendered by both parties and I am convinced that the tenants are not in any rent arrears and the ground of termination of tenancy cited by the landlord to that effect fails. He admitted having refused to accept rent and even having returned the same in the hope that they would vacate the suit premises. After the said refusal, the tenants went ahead and agreed with the building management agent to pay the rent directly as evidenced by receipts filed in the Tribunal. A party cannot therefore be allowed to benefit from his/her own wrongs.
28. The second ground of the landlord is that he intends to use the suit premises for his own personal business. It was clear that the landlord had a key to the business premises but was not conducting any business in the premises. The nature of business intended to be carried out by the landlord is not disclosed. No evidence was tendered to prove that the landlord genuinely intended to use the premises for his own business. Coupled with all previous attempts to evict the tenants from the suit premises which was subject matter of litigation before this Tribunal, I am afraid that the said reason does not add up. The landlord has been unable to prove the notice to terminate tenancy on a balance of probabilities.
29. As regards the relief for injunction sought by the tenants, I find that they have demonstrated all the principles in the case of *Giella – vs- Cassman Brown & Co. Ltd* (1973) EA 358 as all the attempts by the landlord to evict them are illegal, null and void. Equity will protect a tenant from illegal eviction from a suit premises as was held in the case of *Aikman & Others – VS- Muchoki & Others* (1982) eKLR at page 4/6 where it was held as follows:-
- “.....the court ought never to condone and allow to continue a flouting of the law. Those who flout the law by infringing the rightful title of others and brazenly admit it, ought to be restrained by injunction”...Equity will not assist law breakers”.
30. I am therefore ready to exercise my discretion by issuance of an injunction to restrain the landlord from evicting the tenants from the suit premises or in any other manner interfering with their quiet use and possession of the suit premises.
31. As regards costs, the same are in the Tribunal’s discretion under Section 12(1) (k) of Cap. 301, Laws of Kenya but always follow the event unless for good reasons otherwise ordered. I have no good reason to deny the tenants costs.
32. In conclusion, the final orders which commend to me in this matter are:-
- a. The landlord’s notice to terminate tenancy dated 28th November 2022 is hereby dismissed.
 - b. The tenants’ application for injunction dated 5th January 2022 is hereby allowed and the landlord is restrained by himself, servants agents or any other person claiming through him from evicting the tenants or in any other manner interfering with their quiet use and possession of the suit premises known as Room No. 8, Botagi Building situate on **L.R NO. 209/785/24**, Sheikh Karume Road without adhering to the provisions of Cap. 301, Laws of Kenya.
 - c. The OCS, Kamukunji Police Station shall ensure compliance with the orders aforesaid.
 - d. For avoidance of doubt, the landlord shall not be entitled to issue any other similar notice upon the tenants for 12 months as stipulated under Section 9(3) of Cap. 301, Laws of Kenya.
 - e. The tenants are awarded costs of Kshs.25,000/- against the 1st Landlord/Respondent.
33. It is so ordered.

RULING DATED, SIGNED & VIRTUALLY DELIVERED THIS 31ST DAY OF MAY 2023.



HON. GAKUHI CHEGE

VICE CHAIR

BUSINESS PREMISES RENT TRIBUNAL

Ruling delivered in the presence of:

Miss Wacheke Thindigua for the Landlord

Kamau for the Tenants

