



**Matheka v Monga (Tribunal Case E123 of 2024)
[2024] KEBPRT 1223 (KLR) (29 August 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 1223 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E123 OF 2024
J OSODO, CHAIR & GAKUHI CHEGE, MEMBER
AUGUST 29, 2024**

BETWEEN

CAROLYN MATHEKA APPLICANT

AND

MUNGA NDORE MONGA RESPONDENT

RULING

A. Dispute Background

1. The tenant/applicant moved this Tribunal vide a Reference under Section 12(4) of the [Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#) Cap 301 dated 6th May 2024 with a complaint that the respondent had issued her with a defective notice dated 5th April 2024 to vacate the suit premises, that the respondent had forcefully tried to evict the tenant on 19th March 2024 without any reason and went ahead to cut the metal door to the suit premises and as a result the tenant found 3 shaving machines and blow-dryer missing.
2. The tenant/applicant filed a notice of motion under a certificate of urgency dated 6th May 2024 in which she sought for the following orders; -
 - i. That the application be certified urgent.
 - ii. That an order be issued restraining the respondent from evicting or interfering with the tenant's tenancy pending the hearing and determination of the complaint.
 - iii. That the termination notice dated 5th April 2024 be declared defective, unlawful and void.
 - iv. That she be paid a sum of KES.52,000 used to fix the door and paying the guard for 8 days at the rate of KES.2,000 per day.



- v. That she be paid compensation for the 3 shaving machines and blow drier found missing due to actions of the landlord.
 - vi. That she be paid compensation for the loss of business for the time the business was out of operation due to landlord's unlawful action.
 - vii. That the O.C.S Ukunda Police Station to ensure compliance.
 - viii. That the costs of the application be borne by the respondent.
3. The application is supported by an affidavit of even date in which the applicant deposes as follows; -
- i. That the landlord issued a defective notice to terminate tenancy dated 5th April 2024.
 - ii. That prior to the notice herein, the landlord/respondent without any reason on 19th March 2024 attempted to evict the tenant by going to the suit premises, removed/cut off the security door and left the door unsecured in the absence of the tenant and upon arrival, the tenant found some tools of trade missing, including 3 shaving machines and blow drier.
 - iii. That the action above caused the tenant to hire a guard to protect the suit premises, paying KES. 2,000 per day totaling to KES.16,000.
 - iv. That the applicant reported the matter to Ukunda Police station who commenced investigation and forwarded the file to the DPP for possible criminal prosecution.
 - v. That when the respondent/landlord was told by the O.C.S Ukunda Police station to fix the door, the landlord said he had sold it, forcing the tenant to replace it at her own cost of KES. 36,000 in order to secure her tools of trade.
4. This court granted interim orders of injunction dated 8th May 2024 pending hearing of the application inter-partes.
5. The application is opposed vide a replying affidavit dated 29th May 2024 wherein the landlord/respondent deposes as follows; -
- i. That the application is totally incompetent and an abuse of the court process.
 - ii. That the applicant had defaulted in rent payment with respect to the suit premises for 7 months in 2023.
 - iii. That on several occasions, the landlord's agents one Coast View Agencies, confronted the tenant on her default in settling rent arrears, however the tenant always gave false promises.
 - iv. That the receipts annexed by the tenant to her supporting affidavit are a fabrication. That the said agents could not issue receipts for January to March when the tenant had arrears for previous months.
 - v. That in an attempt to evade payment of rent arrears, the applicant presented false accusations before the police in Diani Police station and accused the landlord of breaking the door to the suit premises and stealing items.
 - vi. That the police in their wisdom found no merits in the applicant's accusations against the respondent hence no charges were preferred.
 - vii. That based on the tenant's offensive conduct, which affected the landlord-tenant relationship, the landlord proceeded to issue the eviction notice.



- viii. That the applicant ought to have responded to the notice prior to filing the reference herein.
 - ix. That the applicant has not provided any evidence regarding the allegations that she incurred costs of replacing the alleged broken door and hiring of a guard.
6. At a court hearing on 6th June 2024, the tribunal ordered that the application be disposed of by way of written submissions and the applicant/tenant was granted leave to file a further affidavit.
 7. The tenant/applicant filed a supplementary affidavit dated 19th June 2024 wherein she deposes as follows; -
 - i. That the landlord is a person who always practice impunity without regard to the law and that this is not the first time for the tenant to be in court due to the landlord's harassment and unlawful action.
 - ii. That sometime in June 2023, the landlord unlawfully in a move to illegally enforce a verbal notice, disconnected the tenant's electricity supply and the tenant was forced to file an application dated 17th June 2023 subject of BPRT No. E142 of 2023 for remedy. A copy of the order is annexed and marked "A".
 - iii. That the allegations that the tenant has not paid rent and the receipts are fabricated are untrue.
 - iv. That after finalization of BPRT No. 142 of 2023 in which the tenant was awarded costs of KES. 15,000, the parties sat down in the presence of a villager Chairman known as "Mzee wa Mtaa" and calculated all the rent arrears which the landlord had refused to accept in an attempt to enforce the said verbal notice and the total thereof in the sum of KES. 35,000 was paid on 13th December 2023 where the landlord acknowledged receipt of the same by signing an acknowledgment note and directed that the rent paid be remitted to the agent, one Coast View Agencies.
 - v. That the landlord welded and removed the door to the suit premises. Copies of the acknowledgement signed by the landlord and the village elder, receipts of purchase of the new door and of the shaving machines and blow-drier, and picture of removed door are annexed as "B".
 - vi. That the respondent cannot speak on behalf of the investigating officer and nothing has been presented to this court to show that the investigations are complete.
 8. Both parties complied by filing their written submissions. The tenant filed hers dated 19th June 2024 and the landlord filed his dated 26th June 2024. We shall consider both submissions while dealing with the issues for determination.

B. Issues for determination

9. The following are the issues for determination; -
 - a. Whether the notice to terminate tenancy dated 5th April 2024 is valid and lawful.
 - b. Whether the tenant/applicant is entitled to the orders sought in the application dated 6th May 2024.
 - c. Who shall bear the costs of the application?



Issue (a) Whether the notice to terminate tenancy dated 5th April 2024 is valid and lawful.

10. The landlords herein issued a notice to vacate dated 5th April 2024 which is annexed to the applicant's supporting affidavit.
11. In the case of Manaver N Alibhai t/a Diani Boutique – vs- South Coast Fitness & Sports Centre Limited Civil Appeal No. 203 of 1994 it was held as follows: -

“The Act lays down clearly 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 ground upon 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.”

12. In the instant case, we have perused the impugned notice to terminate tenancy and we note that the same is not in the prescribed form according to Cap 301 laws of Kenya.
13. We therefore find that the respondent's/landlord's insistence on the tenant vacating the suit premises contravenes Section 4(2) of Cap. 301, Laws of Kenya and it is in this regard that we find that the Notice to Vacate the suit premises dated 5th April 2024 is null and void ab initio.

Issue (b) Whether the tenant/applicant is entitled to the orders sought in the application dated 6th May 2024.

14. The tenant/applicant approached this tribunal seeking for orders to restrain the landlord from evicting or interfering with her tenancy in any manner as well as compensation for costs incurred due to the landlord's illegal actions.
15. We have already established that the notice to terminate tenancy dated 5th April 2024 is unlawful and illegal, therefore the tenant's plea for restraining orders against eviction or interference shall be granted as prayed.
16. The landlord avers in his written submissions that the tenant was in rent arrears which caused him to issue the impugned notice to terminate tenancy. The tenant on the other hand tendered evidence of rent payment to the landlord's agent for the months of January to March 2024 which the landlord disputes and claims that the said receipts are forged.
17. Upon perusal of filed documents in this matter, we find that the landlord has not filed any rent account statements to demonstrate the tenant's rent arrears. There being no proof on the landlord's side, the tribunal shall order that the tenant continues to pay rent as and when the same falls due.
18. On the issue of compensation, the tenant in her written submissions refers the court to pictures showing her shop without a door which are annexed to her supplementary affidavit.
19. The tenant states that as a result of the landlord's action above mentioned, the tenant lost her items to wit, 3 shaving machines and blow drier worth KES. 32,800 as per the attached receipts, and also spent KES. 36,000 for buying and fixing a new door to secure her items.



20. The landlord on the other hand in his written submissions states that the tenant has not presented any evidence regarding the allegations that the respondent broke the door to the suit premises and the losses allegedly incurred as a result thereof.
21. In addition, the landlord states that the receipts annexed to the applicant's supplementary affidavit only shows purchase of the items and do not constitute evidence of theft of the items in question. Furthermore, the landlord avers that the receipt with respect to the purchase and fixing of the door is not a confirmation that the door in question was for the suit premises and that the tenant has annexed unclear photos showing the alleged broken door.
22. We have perused the photographs annexed to the tenant's supplementary affidavit and we agree with the landlord that they are not clear. Consequently, there is not enough proof on the issue of the broken door therefore this tribunal is unable to issue orders with regard to compensation of the alleged broken door.
23. On the issue of the missing items, we have perused the said receipts of the items, however there is not enough proof to demonstrate that the said items were stolen from the suit premises. The said receipts are purchase receipts of the items which does not amount to sufficient evidence that the items were lost as a result of the alleged breaking of the door to the suit premises.
24. The tenant has also not shown any evidence of paying a guard for 8 days at the rate of KES. 2,000 per day for the period after the landlord had allegedly broken the door to the suit premises.
25. It is trite law that "he who alleges must prove". Based on the above analysis, the tribunal is unable to grant the orders of compensation that the tenant has sought in the application.

Issue (c) Who shall bear the costs of the application?

26. Under Section 12(1)(k) of Cap. 301, Laws of Kenya, costs of any suit before this Tribunal are in its discretion but always follow the event unless for good reasons otherwise ordered. We shall order costs of the application to the tenant/applicant.

C. Orders

27. In conclusion, the following final orders commend to us; -
 - a. The notice to terminate tenancy dated 5th April 2024 is declared defective and unlawful.
 - b. The application dated 6th May 2024 is allowed in terms of prayers 2, 3 and 7.
 - c. The tenant shall continue to pay rent as and when the same falls due and payable.
 - d. The landlords are at liberty to issue a proper notice to terminate tenancy in the prescribed form in accordance with Section 4(2) of Cap 301 Laws of Kenya.
 - e. Costs of KES. 25,000 to the tenant to be offset against the rent account.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 29TH DAY of AUGUST 2024.

HON. JOYCE AKINYI OSODO - (PANEL CHAIRPERSON)

BUSINESS PREMISES RENT TRIBUNAL

HON GAKUHI CHEGE - (PANEL MEMBER)



In the presence of:

Tenant present in person.

No appearance for the Landlord

