



**Muthana v Maina (Tribunal Case E071 of 2023)  
[2024] KEBPRT 689 (KLR) (23 April 2024) (Judgment)**

Neutral citation: [2024] KEBPRT 689 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E071 OF 2023  
N WAHOME, MEMBER  
APRIL 23, 2024**

**BETWEEN**

**SARAH WANGUI MUTHANA ..... LANDLORD**

**AND**

**DAVID NDUNGÚ MAINA ..... TENANT**

**JUDGMENT**

1. The proceedings herein were triggered by the notice of termination of tenancy dated 29.12.2022. the same was to take effect on the 1.3.2023. The ground cited by the Landlord for the termination was that;-  
  
“failure to pay rent arrears of June, July, August, September, October, November and December, 2022, Kshs. 70,000/=, water bill of Kshs. 5,000/= and electricity bill of Kshs. 18,000/= all totaling to Kshs. 83,000/=.”
2. In response to the notice of termination, the Tenant filed the following documents in response;-
  - i. The replying affidavit in response to the Reference sworn on the 5.11.2023;
  - ii. The notice of motion Application dated 6.1.2023 filed under certificate of urgency and plaint of the same date.
  - iii. The Reference dated 5.1.2023.
  - iv. The supplementary affidavit sworn on the 26.5.2023.
  - v. The trial bundle dated 29.9.2023; and
  - vi. The submissions dated 15.3.2024.



3. The Landlady on her part only filed the replying affidavit sworn on the 28.2.2023 which was in response to the Tenant's Application dated 6.1.2023. Despite being afforded several opportunities to file a response to the Plaint and Reference the same was not taken up. She also did not comply with order 11 of the Civil Procedure Rules as consented to by both parties nor appear for the hearing of this matter.
4. In brief, the cases for both parties starting with that of the Tenant is that;-
  - i. He was not in any rent arrears and did not have any unpaid bills for water nor electricity.
  - ii. The Landlady was jealous of his business and wanted to set up a rival business.
  - iii. The notice of termination on the guise of rent arrears was merely a ploy to unfairly evict him.
  - iv. That the notice of termination be declared unlawful.
5. The evidence of the Landlady as can be deduced from the Replying affidavit dated 28.2.2023 is that;
  - i. The Tenant had not paid rent for a total of nine (9) months.
  - ii. The persons the Tenant purported to have paid rent to were crooks and were not her agents.
6. It is important to note that this court ruled on the Application dated the 6.1.2023 on the 19.9.2023. In the Ruling, the court confirmed that the Tenant had established a prima facie case and upheld the Application.
7. Having perused all the pleadings herein, it is my view that the issues for determination are the following;-
  - A: Whether the notice of termination of tenancy dated 29.12.2023 is lawful.
  - B: Who should bear costs of this suit
8. On the issue of whether the notice of termination of tenancy dated 29.12.2023 is lawful, I note that the only ground is none payment of rent for seven (7) months. That is June, July, August, September, October, November and December, 2023. Section 7(1)(b) of the Landlord and Tenants (shops, Hotels and Catering Establishments Act (Cap 301) hereinafter the Act provides that one of the grounds for termination of tenancy is that;-

“The Tenant has defaulted in paying rent for a period of two months after such rent has become due or payable or has persistently delayed in paying rent which has become due or payable.”
9. The Landlady claimed non-payment of rent for a period of seven (7) months' but never provided an iota of evidence in support of the same. No demand notices for such rent were presented to court nor a rent book to demonstrate the same.
10. Section 3(3) of the Act provides that;-

“The Landlord of a controlled tenancy shall keep a rent book in the prescribed form of which he shall provide a copy for the Tenant and in which shall be maintained a record, authenticated in the prescribed manner of the particulars of the parties to the tenancy and the premises comprised therein and the details of all payments of rent and all repairs carried out to the premises.”



11. The Landlady did also not testify in court in support of the termination notice dated 29.12.2023 or file any responses to the Reference and plaint by the Tenant dated 6.1.2023.
12. It was incumbent on the Landlord to provide evidence that indeed the Tenant had rent arrears for of a total of seven (7) months. Section 107 of the [Evidence Act](#) provides that;-

“whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exists.”

13. The Landlady never employed any effort to prove that the Tenant owed any rent on the demised premises. This should have been done if she filed pleadings in court or even testified in the hearing which she never did.
14. However, on his part, the Tenant produced TW-Exhibit No. 3 a bundle of receipts showing payment of rent to the Landlady, this evidence is not controverted and satisfies the principle in Civil proceedings of proving his case on a balance of probabilities.

In the case of; Trust Bank Limited vs Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCC No. 1243 of 2001, the court held that;-

“It is trite law that wherein a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein, the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.”

15. Over and above the failure to file any pleadings or offer any evidence in court, the Landlady did also not take up the opportunity afforded to cross-examine the Tenant on his evidence.

In the case of; Karuru Munyororo vs Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988, it was held that;-

“The plaintiff on a balance of probabilities has proved that she was entitled to the orders sought in the plaint and in the absence of the defendants and/or their counsel to cross-examine her in the evidence, the plaintiff’s evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon.”

16. It is thus my determination that the notice of termination of tenancy dated 29.12.2023 is not grounded in law and the same is found to be unlawful and of no effect.
17. On who should bear the costs of this suit, I am guided by the proviso to Section 27 of the [Civil Procedure Act](#) which provides that;-

“Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

18. In the final analysis, I make the following orders;-
- i. That the notice of termination of tenancy dated 29.12.2023 is unlawful and of no legal effect.
  - ii. That the Tenant shall enjoy quiet occupation of the demised premises.



- iii. The Landlady shall pay costs of the Reference and the Application assessed at Kshs. 30,000/=. The same to be offset from rent payable to her.

Those are the orders of the court.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23<sup>RD</sup> DAY OF APRIL, 2024.**

**HON. NDEGWA WAHOME, MBS**

**MEMBER**

**BUSINESS PREMISES RENT TRIBUNAL**

Delivered in the presence of Mr. Ochieng holding brief for Mr. Jaoko for the Tenant/Applicant, in the absence of the Landlord/Respondent and Counsel

