



**Roimen & another v Sempeyo (Tribunal Case E271 of 2023)
[2023] KEBPRT 667 (KLR) (24 November 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 667 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E271 OF 2023
J OSODO, CHAIR & GAKUHI CHEGE, MEMBER
NOVEMBER 24, 2023**

BETWEEN

KELOI ROIMEN 1ST APPLICANT

PAUL SALAU NTIYIONE 2ND APPLICANT

AND

JOSEPH TUMPES SEMPEYO RESPONDENT

RULING

A. The Dispute Background

1. The Tenants/Applicants moved this Tribunal vide an undated reference under section 12 (4) of the [Landlord and Tenant \(Shops, Hotels and catering establishment\) Act](#) Cap 301 based on a complaint that the landlord intends to evict them from their business premise situate on LR no Ngong/Ngong/19600 without following due process and without any valid reason contrary to the provisions of Chapter 301 of the Laws of Kenya.
2. The tenants/applicants filed a Notice of Motion dated 13th March, 2023 wherein they sought the following orders; -
 - i. That the tribunal declares the tenancy as controlled.
 - ii. That a temporary injunction does issue against the respondent, his employees, servants, agents and/or any person purporting to act under the landlord or on his behalf from dispossessing, evicting, removing, intimidating or interfering in any way with their peaceful and quiet enjoyment of their possession of the business premise on LR no Ngong/Ngong/19600, situated at Kiserian Township pending the hearing and determination of this suit and/or application.



- iii. That a temporary injunction does further issue against the respondent from letting out or entering the suit premises firstly to cause annoyance to the applicants or any member of their staff and/or employees/tenants during the pendency of this application.
 - iv. That the respondent be restrained from taking rent and/or hold levying distress in respect of the suit property pending the hearing and determination of this application and suit.
 - v. That the OCS KISERIAN Police Station to ensure compliance of these orders.
 - vi. That costs of this application be provided for.
3. The tenants/applicants simultaneously filed a Supporting Affidavit of even date in which they deposed as follows; -
- i. That they have occupied the suit premises being Plot LR no Ngong/Ngong/19600, situate at Kiserian Township, within Kajiado County since 2016 and currently paying rent of ksh50,000 per month. Attached thereto is a copy of Mpesa payment extract annexed as KR-1.
 - ii. That upon occupation of the business premises they embarked on developing it with the promise from the landlord of quiet possession until such a time that the premises are able to recover the capital injection which went into constructing and erecting the structures.
 - iii. That they have not had a valid tenancy agreement as the landlord is yet to sign copies of the proposed tenancy agreement, however, there exists a verbal agreement guaranteeing 4 years of undisturbed possession which is now being violated.
 - iv. That they have since operated their business in the suit premises ever since and have over the period steadily grown and amassed a huge customer base within the area.
4. On 14th March, 2023, the tribunal issued interim orders of injunction against the landlord pending the hearing inter-partes on 26th April, 2023 upon which the court ordered extension of the interim orders.
5. The application is opposed vide a replying affidavit dated 9th June, 2023 wherein the landlord/respondent deposed as follows;
- i. That he confirms letting the business premises on LR no Ngong/Ngong/19600, situate at Kiserian Township to the applicants via a verbal agreement which was later reduced into writing as a tenancy agreement dated 1st March, 2022 for a monthly rent of ksh50,000. A copy of the tenancy agreement is annexed as JTS-1.
 - ii. That he equally entered into a lease agreement with Herbert Kamau and John Nganga Kinyanjui for a portion of the business premises on LR no Ngong/Ngong/19600 adjacent to the premises occupied by the applicants for purposes of running a butchery business. A copy of the tenancy agreement is annexed as JTS-2.
 - iii. That the applicants are therefore deceiving the honorable tribunal by indicating that there was no written tenancy agreement between the parties herein, noting that there is a valid tenancy agreement dated 1st March, 2022 which was duly executed by the parties herein and the same was attested to by Josiah Omosa, an advocate of the High Court of Kenya.
 - iv. That in response to paragraph 3 of the applicant's supporting affidavit, the applicants embarked on erecting structures in the suit premises without seeking the consent of the landlord, in total disregard of Clause 2(e) of the tenancy agreement dated 1st March, 2022 hence the Applicants are not entitled to recover the costs incurred in erecting the said structures.



- v. That the applicants breached Clause 2(m) of the said tenancy agreement by subletting the business premises without his consent to Herbert Kamau and John Nganga Kinyanjui who were running a butchery business adjacent to the suit premises and the applicants have been collecting rent from the said persons.
 - vi. That upon realization of the said ,acts by the applicants which are contrary to the tenancy agreement, the landlord reached out to the occupants whom the applicant had sublet the premises, being Herbert Kamau and John Nganga Kinyanjui, noting that they are still his tenants and entered into a new Lease Agreement with them .
 - vii. That the said tenants being Herbert Kamau and John Nganga Kinyanjui are currently paying their rent directly to the landlord as the lessor in reference to the suit premises.
6. On 6th July, 2023 the tenants/applicants filed a further affidavit in which they deposed that they are strangers to the written tenancy agreement referred to by the landlord in his replying affidavit and deny erecting structures in the suit premises without seeking the respondents' consent.
 7. In the same further affidavit, the applicants have denied collecting rent from Herbert Kamau and John Nganga Kinyanjui who are allegedly running a butchery business adjacent to the suit premises, neither are they aware that the said persons are allegedly paying monthly rent directly to the landlord/ respondent. The applicants also deny being in occupation of the suit premises as alleged by the landlord and are currently paying rent to the landlord in accordance with Cap. 301 of the laws of Kenya.
 8. Both parties filed their submissions on 16th July, 2023.
 9. In view of the contest on the existence of landlord/tenant relationship between the parties herein the tribunal gave directions on 22nd September, 2023 as follows ; -
 - “(a) This tribunal’s rent inspector shall visit the suit premises for purposes of establishing whether the tenants are in occupation thereof and if not, establish the name of the person in occupation of the same and who receives rent from such person(s) and file a report within the next 21 days hereof.
 - (b) The tribunal’s court administrator shall make necessary arrangements for the inspection in liaison with the parties herein who shall be notified of the date and time of the visit.
 - (c) Mention of the matter on 23rd October, 2023”
 10. We shall consider the parties submissions together with the tribunal’s rent inspector’s report while dealing with the issues for determination.

B. List of Issues for Determination

11. The following are the issues for determination;
 - a. Whether there exists a tenant/landlord relationship.
 - b. Whether the tenants are entitled to the orders sought in the application dated 13th March, 2023.
 - c. Who shall bear the costs of the application?



Issue (a) Whether There Exists a Tenant/Landlord Relationship

12. According to the findings filed by the tribunal's rent inspector who inspected the suit premises on 19th October, 2023, it is indicated that the tenants are still operating their business in the premises by the name NYAAT GRILL SPORT BAR, which they have been operating since 2014. The butchery and store on the same plot are separate from the applicants' business premise and are operated by the 2 other tenants being Herbert Kamau and John Kinyanjui who did not appear at the time of the inspection since they are not party to this matter.
13. The report also reveals that the tenants/applicants reported that they had been paying rent to the landlord herein up to March 2023 and that when they brought the matter before this tribunal, they opened a locked account with KCB Ngong A/C no 297681711 in which they deposit ksh38,000 for rent less ksh12,000 for sewage services every month as they await the tribunal's determination in the matter.
14. The Tribunal's jurisdiction is conferred by the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* Cap. 301, Laws of Kenya in respect of controlled tenancies.
15. The term "tenant" is defined under section 2 of Cap. 301, to mean: -

“.....the person for the time being entitled to the tenancy whether or not he is in occupation of the holding and includes a sub-tenant”.
16. The term 'Landlord' is defined in the same legal provision to mean: -

“.....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”.
17. The landlord in his replying affidavit dated 9th June, 2023 swore that he entered into a tenancy agreement which is dated 1st March, 2021 and annexed as JTS-1 even though the tenants deny this allegation stating that the tenancy agreement was a verbal one. Either way, both parties admit to have entered into a tenancy agreement.
18. Section 2 (1) of the Act defines a controlled tenancy to mean 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 —

(i) is for a period not exceeding five years; or

“controlled tenancy” means a tenancy of a shop, hotel or catering establishment—

(ii) contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or

(iii) relates to premises of a class specified under subsection (2) of this section:



Provided that no tenancy to which the Government, the Community or a local authority is a party, whether as landlord or as tenant, shall be a controlled tenancy;”

19. By virtue of the analysis above, this tribunal finds and holds that there exists a landlord/tenant relationship based on the existence of a tenancy agreement between the parties, evidence of rent payment as well as occupation of the suit premises by the tenants/applicants. Therefore, the tenancy is a Controlled Tenancy and this tribunal has jurisdiction to determine the matter.

Issue (b) Whether the Tenants are Entitled to the Orders Sought in the Application Dated 13th March, 2023.

20. We have already held that there exists a landlord/tenant relationship between the parties which is controlled and we find and hold that based on the materials on record, the tenants have a prima facie case with a probability of success.
21. In regard to the principle of irreparable harm and damage, the tenants approached this Tribunal fearing the possibility of an illegal eviction based on claims by the landlord that the tenants had breached the tenancy agreement.
22. The landlord in his Replying Affidavit alleges that the tenants/applicants herein have breached the tenancy agreement by subletting part of the premises to other tenants being Herbert Kamau and John Nganga Kinyanjui and have allegedly been collecting rent from these 2 tenants. He however contradicts his statements by swearing in the same affidavit that he entered into a lease agreement with the 2 tenants. He deposed as follows in paragraphs 6 ; -

“ 6. 6.That I equally entered into a lease agreement with Herbert Kamau and John Nganga Kinyanjui for a portion of the business premises on LR no Ngong/Ngong/19600 adjacent to the premises occupied by the applicants for purposes of running a butchery business. (Annexed hereto and marked JTS-2 is a copy of the Tenancy agreement dated 29th October 2018)”

23. The landlord therefore lacks grounds of termination as he lacks proof that the tenants/applicants herein have breached the terms of the tenancy agreement by subletting part of the suit premises to other tenants.
24. Additionally, the landlord/respondent herein issued a letter dated 22nd February, 2023 to the tenants/applicants with Notice to Vacate the suit premises in which the tenants are granted 1 month to vacate the suit premises.
25. In the case of *Manaver N Alibhai t/a Diani Boutique v 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.”



26. The said letter to vacate the premises is not in the prescribed form to warrant termination of the tenancy herein. We therefore find that the respondent's insistence on the tenants vacating the suit premises contravenes section 4(2) of Cap. 301, Laws of Kenya.
27. A termination of tenancy notice ought to comply with the dictates of Section 4(2) of Cap 301 and it is in this regard that we find the termination letter null and Void.
28. Section 12(4) of Cap. 301, Laws of Kenya gives this Tribunal the following powers: -
- “In addition to any other powers specifically conferred on it by or under the Act, a Tribunal may investigate any complaint relating to a controlled tenancy made to it by the landlord or the tenant and may make such order thereon as it deems fit”.
29. The foregoing section empowers this Tribunal to determine the issues raised by the tenants as well as those raised by the landlord. We therefore find that the landlord is entitled to rental income in respect of the suit premises by the tenants/applicants.

Issue (c) Who is Liable to Pay Costs.

30. As regards costs, the same are in the Tribunal's discretion under section 12(1)(k) of Cap. 301, but always follow the event unless for good reasons otherwise ordered. We have no reason to deny the tenants/applicants costs.

C. Orders

31. In conclusion, the following final orders commend to us;
- a. The application dated 13th March, 2023 is hereby allowed in terms of prayers 2,3,4,5,8 and 9.
 - b. The tenants to release rent due to the landlord/respondent and continue to pay rent as and when it falls due.
 - c. The landlord is granted leave to issue a proper notice of termination of tenancy upon the tenant in the prescribed form under section 4(2) of Cap. 301, Laws of Kenya.
 - d. Tenants' costs are assessed at ksh25,000 which shall be offset against rent.
- It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24TH DAY OF NOVEMBER 2023.

HON. JOYCE AKINYI OSODO

(PANEL CHAIRPERSON)

BUSINESS PREMISES RENT TRIBUNAL

HON GAKUHI CHEGE

MEMBER

In the presence of:

Muyala h/b for Ms. Suchogu for tenant/applicant.

No appearance for Landlord.

