



**Estates v Opango (Tribunal Case E039 of 2023)
[2023] KEBPRT 673 (KLR) (1 November 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 673 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E039 OF 2023
J OSODO, CHAIR & GAKUHI CHEGE, MEMBER
NOVEMBER 1, 2023**

BETWEEN

CHRISCA REAL ESTATES TENANT

AND

FRANCO OPANGO LANDLORD

RULING

A. The Dispute Background

1. The tenant moved this tribunal *vide* a reference under section 12 (4) of [Cap 301](#) dated June 6, 2023 with a complaint relating to Kisumu Municipality/ Block 7/183 wherein he stated that the landlord had issued him with an illegal notice of termination, had unlawfully closed the business premises door in an attempt to unlawfully evict him and that he is still in possession but fears that his goods and tools of trade which are locked inside would be stolen.
2. The Tenant simultaneously filed a Notice of Motion of even date seeking the following orders;
 - i. That this application be certified urgent.
 - ii. That pending the hearing and determination of this application and the main complaint herein, the respondent, his agents and or servants be prohibited and/or restrained from terminating the applicant's tenancy, locking the premises, evicting the applicant or in any way interfering with the applicant's possession of the demised premises located at Kisumu Municipality/ Block 7/183.
 - iii. That the respondent does forthwith open the applicant's premises failure to which the applicant to break open the same in order to gain access.
 - iv. That the O.C.S Kisumu Police Station/ O.C.S Migori Police station to maintain Law and order.



3. On 8th June, 2023, the tribunal issued a temporary injunction against the landlord pending the hearing and determination of the application and reference.
4. The application herein is supported by an affidavit dated 6th July, 2023 wherein it is deposed as follows: -
 - i. That the applicant is indeed a tenant of the respondent at the premises located at Kisumu Municipality/ Block 7/183 known as Opanga House in Kisumu Town for many years and that the tenancy agreement was a verbal one, hence, controlled.
 - ii. That the day before the filing of this application, the respondent served the applicant with a backdated letter dated April 11, 2023 giving the applicant 2 months' notice terminating the applicant's tenancy which is annexed as LNW-1.
 - iii. That the notice is not in the prescribed form as required by the law and hence illegal.
 - iv. That the two-month illegal notice was to terminate the tenancy on June 11, 2023 but the landlord had moved to unlawfully lock the demised premises hence denying the applicant access to the same.
 - v. That the landlord was planning to unlawfully evict the applicant who stood to suffer irreparable harm in the event he is evicted from the suit premises.
5. The application is opposed through a replying affidavit dated June 30, 2023 wherein the landlord deposes as follows: -
 - i. That he is indeed the landlord of the demised premises and that the tenant herein was misleading the court.
 - ii. That the applicant was one of the tenants who occupied Office Space No. 1 of the first floor of the commercial property, commonly referred to as Opanga house.
 - iii. That according to the verbal agreement entered into between the Applicant and the landlord, the applicant was to rent an office space whose rent was the sum of Ksh. 18,000 which was to be paid on/before the 5th day of every month- of occupation.
 - iv. Furthermore, the renting of the space was subject to payment of one-month deposit as security, which is refundable at the end of the tenancy.
 - v. That according to the agreement, either party could terminate the tenancy after issuance of a 1-month (30 days) notice, which correlates with the 1-month deposit acting as security for rent payment.
 - vi. That since 2017 to date, the tenant has failed to honor the terms of his tenancy agreement, which is exhibited by his failure to pay rent when the same is due. Bundle of documents proving failure of rent payment are annexed as FO-1.
 - vii. That by April 11, 2023, the tenant/applicant had rent arrears amounting to Ksh. 43,000 which encompasses Ksh. 7,000 rent arrears for February 2023, Ksh. 18,000 rent arrears for March 2023 and Ksh. 18,000 being rent arrears for April 2023.
 - viii. That owing to the applicant/tenant's failure to pay his rent arrears, the landlord/respondent issued him with an eviction notice dated 11th April, 2023, which was served upon him in person but declined to sign.



- ix. That upon failure by the tenant herein to offer vacant possession of the premises, the landlord proceeded to lock the premises in compliance with the eviction notice.
6. The court on June 18, 2023 directed that the application be disposed of by way of written submissions. Both parties complied with the respondent/landlord filing his written submissions dated June 30, 2023 and the tenant/applicant filing his on August 7, 2023. We shall consider the submissions while dealing with the issues for determination.

B. List Of Issues For Determination

7. The following are the issues for determination;
- Whether the termination notice issued by the landlord is valid.
 - Whether the tenant/applicant is entitled to the orders sought in the application dated June 6, 2023.
 - Who bears the costs of the application?

Issue (a) Whether The Termination Notice Issued By The Landlord Is Valid.

8. The tenant/applicant was served with a backdated letter to terminate tenancy dated April 11, 2023 annexed as LNW-1 on the 5th of June, 2023 in which it was stated that the last day of the tenancy was May 31, 2023. The letter gives the tenant less than 2 months' notice to vacate the demised premises.
9. 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.”

10. In the instant case, the letter to terminate tenancy issued by the respondent to the tenant is not in the prescribed form to warrant termination of the tenancy herein. We therefore find that the respondent's insistence on the tenant vacating the suit premises contravenes section 4(2) of Cap. 301, Laws of Kenya.
11. 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 letter to terminate tenancy dated 11th April, 2023 Null and Void ab initio.

Issue (b) Whether The Tenant/applicant Is Entitled To The Orders Sought In The Application Dated 6th June, 2023.

12. A perusal of the landlord's submissions reveals that the tenant herein had failed to honor the terms of his tenancy agreement which is exhibited by his failure to pay rent when the same falls due and payable. A bundle of documents proving failure of rent payment are annexed as FO-1.
13. We note that the landlord has a right to rental income from his investment.



14. In the case of *Samuel Kipkori Ngeno and another v Local Authorities Pension Trust (Registered Trustees) & another* (2013) eKLR at paragraphs 9 and 12, the superior court held as follows:-

“9. A tenant’s first and main obligation is to pay rent as and when it becomes due for the landlord has the right to an income from his investment. Why would a tenant allow himself to fall into such huge arrears of rent”.

“12. The temporary injunction sought in the present application is an equitable remedy at the court’s discretion. He who comes to equity must come with clean hands. A tenant who is in huge arrears of rent is underserving of the court’s discretion. The court cannot be refuge of a tenant who fails to meet his principal obligation of paying rent as and when it becomes due”.

15. The foregoing case provides sufficient guidance in dismissing the current application as the tenant/applicant has not denied the allegations of default in rent payment, neither has he shown any proof of payment of the alleged rent arrears and is therefore unable to establish all the tenets upon which an injunction should be granted. We find and hold that he is underserving of this Tribunal’s protection.

16. In addition, 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”.

17. The foregoing section empowers this Tribunal to determine the issues raised by the tenant as well as those raised by the landlord. We therefore find that the landlord is entitled to recover any rent in arrears in respect of the suit premises from the tenant and in default to use lawful means to recover the same.

Issue (c) Who Bears The Costs Of The Application?

18. 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 shall order each party to bear own costs in view of the fact that both are wrong in failing to follow the provisions of *Cap. 301*, Laws of Kenya in so far as payment of rent and termination of tenancy is concerned.

C. Orders

19. In conclusion, the following final orders commend to us;
- a. The application and reference dated June 6, 2023 are hereby dismissed.
 - b. The interim orders issued on June 8, 2023 are hereby discharged and/or vacated forthwith.
 - c. The Notice of Termination of tenancy dated April 11, 2023 is declared defective and is hereby dismissed.
 - d. 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.
 - e. The tenant is liable to pay rent arrears owing to the landlord and in default of payment thereof, the landlord shall be at liberty to use legal means to recover the same including and not limited to levying distress.
 - f. Both parties shall meet their own costs.



It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 1ST NOVEMBER 2023

HON. JOYCE AKINYI OSODO

(PANEL CHAIRPERSON)

BUSINESS PREMISES RENT TRIBUNAL

.....

HON GAKUHI CHEGE

(MEMBER)

In the presence of:

Akinyi for the Tenant/applicant

