



**Maina v Gatuguta & 2 others (Tribunal Case E437 of 2023)
[2023] KEBPRT 640 (KLR) (27 September 2023) (Judgment)**

Neutral citation: [2023] KEBPRT 640 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E437 OF 2023
A MUMA, AG. CHAIR
SEPTEMBER 27, 2023**

BETWEEN

JAMES MUNGA MAINA APPLICANT

AND

JOSEPHINE WANJIKU GATUGUTA 1ST RESPONDENT

HANNAH WAITHERERO GATUGUTA 2ND RESPONDENT

PETFRIEND AUTIONEERS 3RD RESPONDENT

JUDGMENT

a. Parties and Representatives

1. The Applicant James Munga Maina is the Tenant and rented space on the suit property located on Muguga/Gitaru/766. (hereinafter known as the ‘tenant’)
2. The firm of Warui Maina & Company Advocates represent the tenant/applicant in this matter.
3. The 1st & 2nd Respondents are the landlords by virtue of being beneficiaries of the Estate of Francis Gatuguta Gichuhi who owned the suit property. (hereinafter known as the ‘Landlord’)
4. The 3rd Respondent is an auctioneering firm who were instructed by the 1st and 2nd Respondents to issue the tenant with a proclamation notice.
5. The firm of Njathi & Company Advocates represent the landlord/respondents in this matter.

b. The Dispute Background

6. The landlord issued the tenant with a Notice to Terminate tenancy dated 17th April 2023. The grounds upon which the landlord sought to terminate the tenancy are that the tenant had defaulted in payment of rent being ksh 703,700.00.



7. The Tenant in opposition to the said Notice, filed a Reference dated 2nd May 2023 and a Notice of Motion application dated 28th April 2023 under section 12 of the [Landlords and Tenants \(Shops, Hotels and Catering\) Establishments Act](#) Cap 301. The tenant was seeking orders that tribunal restrain the landlord from evicting the applicant.
8. The landlord has filed a Replying Affidavit dated 4th July 2023 seeking to enforce the notice and claiming that the tenant is in arrears.

c. The Tenant's Claim

9. The Tenant has filed a Reference dated 2nd May 2023 and a Notice of Motion Application dated 28th April 2023 seeking that the landlord be restrained from evicting them.

d. The Landlord's Claim

10. The landlord has filed a Replying Affidavit dated 4th July 2023 seeking to enforce the notice and claiming that the tenant is in arrears.

e. List of Issues for Determination

11. The issues raised for determination are as follows;
 - a. Whether the Termination Notice issued by the Landlord and the reasons advanced are valid?
 - b. Whether the tenant is in arrears and if so how much?

f. Analysis and Findings

Whether the Termination Notice Issued by the Landlord and the Reasons Advanced are Valid?

12. The tenant approached this Tribunal seeking orders restraining the landlord from proceeding with the intended termination of tenancy by virtue of the notice issued to the tenant.
13. The landlord issued the tenant with a Notice to terminate tenancy dated 17th April 2023. The same has not been provided before this Court and as such the Tribunal is not aware when it was to take effect. The landlord has only stated in their replying affidavit that the same was for a period of six months.
14. The landlord stated that the grounds upon which they wanted to terminate the tenancy are that the tenant had defaulted in payment of rent being ksh 703.700.00 and that the same had been demanded severally without any action from the tenant.
15. The [Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#) Chapter 301 Laws of Kenya Act at section 4(2) provides that:

A landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the tenant, any term or condition in, or right or service enjoyed by the tenant under, such a tenancy, shall give notice in that behalf to the tenant in the prescribed form.

16. Section 4(4) further provides that:

No tenancy notice shall take effect until such date, not being less than two months after the receipt thereof by the receiving party, as shall be specified therein



17. 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 stated as follows;

“The Act lays down clearly and 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.”

18. In this case the Landlord issued the tenant with a Notice to terminate tenancy on 17th April 2023. As aforementioned earlier, the notice/letter has not been provided before the Tribunal, as a result the Tribunal is not aware when the same was to take effect and cannot establish its validity based on the period. The landlord has only stated in their submissions that the same was a six months’ notice which cannot be verified.
19. I shall now proceed to evaluate the notice based on the second limb being the validity of the reasons advanced for wanting to terminate the tenancy.
20. In the current case the Landlord stated that the grounds for termination were that the tenant had defaulted in rent payment being ksh703,700 .00 as at the time of issuing the notice.
21. The tenant has denied this position and claims that they are not in arrears. They allege that they have been paying rent and are up to date with the same.
22. They further present before the Tribunal that they had entered into an agreement with the landlord in which they would carry out renovations on the premises and the same would be deducted from the rent payable at the rate of ksh 22,000.00 per month.
23. They present that due to this arrangement, normal payment of rent was to resume in August 2023.
24. The landlord does not deny that there was an arrangement for the tenant to carry out repairs, they however state that the said arrangement was supposed to subsist from the months of October 2018 to July 2021 and that according to them normal rent payment was to resume in August 2021 at the rate of ksh 44,000.00
25. The tenant has annexed some copies of cheques as well as Mpesa Statements in an attempt to prove that they do not owe any arrears. The same are scanty and do not show the full payments for the periods claimed by the landlord.
26. The landlord has also narrated the arrears owed but has not provided any statement to show the position.
27. Having perused the file, I observe that the tenant has stated in their Further Affidavit dated 12th July 2023 that during the Covid 19 period specifically from May 2020 up to November 2021 they were not operating and as such they did not recover any money.
28. It is my opinion that the aforementioned period is what is causing the contention in the amount of arrears owed. I additionally take note that there are some amounts that the tenant made during the said period as evidenced by the cheques annexed.



29. I therefore proceed to calculate the arrears owed as follows;

Amount to be paid during the Covid period (May 2020 to November 2021 at the rate of ksh 22,000):	ksh 22,000.00 x 19months= Total =ksh 418,000.00
Amount actually paid during the Covid period as evidenced by the annexed cheques	ksh 30,000(Nov 2020) ksh 30,000(Jan 2021) ksh 50,000(June 2021) ksh 50,000(Sep 2021) Total =ksh 160,000.00
Balance owed during Covid Period (assuming a 50% rebate was given for covid)	ksh 418,000.00- ksh 160,000.00 Total = ksh 258,000.00
<p>Amount assumed to have been recovered between Oct 2018 to April 2020- ksh 22,000x19 Total = ksh 418,000</p> <p>Amount assumed to have been recovered between Dec 2021 to December 2022 -ksh 22,000x13 Total =ksh 286,000.00</p> <p>Amount assumed to have been recovered between Dec 2022 and August 2023 -ksh 22,000x9 Total=ksh 198,000.00</p> <p>Total amount recovered as at August 2023=ksh 902,000.00</p>	
Amount recovered in excess	ksh 902,000.00(amount recovered) -ksh 762,000 (amount incurred in renovation) Total=ksh 140,000
Amount owed to the landlord	ksh 140,000 (amount recovered in excess) ksh 258,000 (amount remaining during covid period) Total=ksh 398,000.00

30. I take note that I mistakenly erred in the above math calculation when I read the ruling out which error came to my attention after and I have since amended the same. Based on the above figure I therefore proceed to order as follows;

g. Orders

- The upshot is that the Tenant's Application dated 28th April 2023 is hereby partially allowed in the following terms;
- The tenant shall defray the arrears of ksh 398,000.00 within 4 months in installments of ksh 100,000.00 per month.



- c. The tenant shall keep paying rent at the agreed rate of ksh 44,000.00 as and when it falls due failure to which the landlord shall be at liberty to distress for rent and proceed to evict and break in without any further reference to this tribunal. OCS Kingero Police to Assist in Compliance.
- d. The reference is settled on similar terms
- e. No orders as to costs.

HON A. MUMA

AG CHAIR/MEMBER

BUSINESS PREMISES RENT TRIBUNAL

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY BY HON A. MUMA THIS 27TH DAY OF SEPTEMBER 2023 IN PRESENCE OF MS. NGATHO FOR THE TENANT/APPLICANT AND IN THE PRESENCE OF NJAGI FOR THE LANDLORD/RESPONDENT.

HON A. MUMA

AG CHAIR/MEMBER

BUSINESS PREMISES RENT TRIBUNAL

