



**Waswa v Wamukota; Wanunda (Interested Party) (Tribunal Case
E115 of 2023) [2024] KEBPRT 860 (KLR) (19 June 2024) (Judgment)**

Neutral citation: [2024] KEBPRT 860 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E115 OF 2023
N WAHOME, CHAIR & JOYCE MURIGI, MEMBER
JUNE 19, 2024**

BETWEEN

ERICK WASWA TENANT

AND

VIOLET NASIMIYU WAMUKOTA LANDLORD

AND

SAMMY NYONGESA WANUNDA INTERESTED PARTY

JUDGMENT

1. The Tenant/Applicant moved this court by his reference dated 27th July 2024. The same was anchored on Section 6 of the *landlord and Tenant (Shops, Hotels and Catering Establishments Act* (Cap. 301) hereafter “the Act”. The reference was proved by the Landlady’s notice of termination of Tenancy dated 6th June 2023. The same was to take effect on the 1st September 2023.
2. The grounds for the termination were that:-

“Tenant has refused to pay Rent, he has rent arrears of Kshs.10,000/-. Efforts to recover the arrears has failed. I request the Rent Tribunal court and OCS Bungoma Police Station to order the Tenant to pay all the Rent arrears and vacate the Business Premises”.
3. By an application dated 27th September 2023, one Sammy Nyongesa Wanunda had sought to be enjoined as an interested party. He grounded the application on the fact that the landlady was married to a clan where he was the chairman. He therefore wanted to be enjoined in these proceedings to protect her interests as a member of the clan. On the 3rd November 2023 the said application was dismissed for want of attendance by the Applicant and for reasons that it had no merit.



4. The matter was set down for hearing by way of oral evidence. The Tenant testified as TW1 and called his wife Florence Nafula Wandera as a witness. She testified as TW2. The evidence of the Tenant was that:-
 - i. The landlord unlawfully locked up his business premises from where he was operating a posho mill business on the 19th May 2023.
 - ii. This court issued orders for the premises to be re-opened but at the time of his testimony in court they were still locked up.
 - iii. The termination notice served on him by the Landlord was short and unlawful.
 - iv. He had paid rent as per his exhibit no. 6 and had also paid further rent through one Everlyine Sindani the area acting chief.
 - v. His records on rent payment and on his earnings were locked up at the premises.
 - vi. He was constructing/erecting a building on a neighbouring plot from where he wanted to operate his business.
 - vii. He needed the premises back to continue with his business.
5. On her part, the landlady testified as LLW1. Her evidence was to the effect that:-
 - i. She was not aware that the area chief had received any rent on her behalf and that she had not authorized the same.
 - ii. Never locked up the demised premises and it is the Tenant who locked up the same and disappeared after she demanded for rent payment.
 - iii. When the court ordered that the premises be opened, she sought with the intervention of the chief but the Tenant still refused to come back.
 - iv. At the time of her testimony on the 3/5/2024, the Tenant owed her Kshs.20,000/-.
 - v. The Tenant never co-operated with her was rude to her and looked down on her.
 - vi. The termination notice though dated 6/6/2023, was only served on the 16/7/2023.
 - vii. The Tenant had committed to leave the premises by August, 2023.
 - viii. Had sought the assistance of the Assistant County commissioner (ACC) and the chief to have the Tenant go back to the premises and pay rents in arrears but he ignored them.
6. We have perused the parties pleadings, considered the oral evidence thereof and the parties respective submissions dated the 13/5/2024 and 16/5/2024 we are of the view that the issues for determination are the following;
 - A. Whether the Termination notice dated 6/6/2023 is lawful.
 - B. Whether the Tenant is in rent arrears and how much.
 - C. Whether there is a Landlord/Tenant relationship between the parties that require protection of this court.



Issue No. A- Whether the Termination Notice dated 6th June 2023 is lawful.

7. There is no dispute that the termination notice dated 6/6/2023 was only served on the 15/7/2023 as per the Affidavit of service sworn by one Daniel Fwamba Muyekho on the 24/7/2023. Plainly, the said notice is not compliant with Section 4(4) of the Act. The same 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”.

8. The said notice is therefore invalid in the face of the law. In the case of Fredrick Mutua Mulinge T/ A Kitui Uniform – vs- Kitui Teachers Housing Co-operative Society Ltd (2017) eKLR the court under the same circumstances held that:-

“It is clear from the foregoing authorities that the tenancy notice dated 28th June 2024 was null and void for failing to give the appellant two months notice as required under the Act and as such was of no legal effect”.

Issued No. B- Whether the Tenant is in Rent arrears and for how much.

9. The Tenant claimed to have paid rent in advance for between January 2023 and August, 2023. According to Tw2 who is his wife, he was then to vacate the demised premises by the end of August, 2023. He also claimed to have paid some of the rents through the office of the Acting area chief one Everlyne Sindani.

10. However, no documents were produced to support such payment and the said chief was not called as a witness. There was no evidence that there was any difficulty in presenting the said chief to court to testify. It is also unlikely that a government officer can receive any monies without any documentation. In any event, the landlady denied having authorized the said chief to collect rent on her behalf or having received any such rent from the said chief.

11. It was the contention of the landlord that she even reported the Tenant to the Assistant County Commissioner (ACC) and the chief with a view to having him vacate the demised premises which he had locked up and pay rent but which summons he ignored.

12. From the foregoing it is our determination that through her exhibit no. 1, the Landlady has been able to demonstrate that the Tenant owes her Kshs.22,000/- to include the month of June, 2024. It was upon the Tenant to demonstrate that it is the Landlord who closed down the demised premises and that he had also been paying rent as required. In our view, he failed to discharge this responsibility on a balance of probabilities.

13. Section 107 of the Evidence Act provides that:-

“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”.

14. This also applies to the question of the alleged profits made by the Tenant and the alleged losses suffered. No iota of evidence was offered to that effect and the claim must meet the same fate of failure.

In any event, we are not convinced that it is the landlady who locked out the Tenant from the demised premises. It is most probable that he locked the same and left after demands for payment of rent became too persistent for his comfort as alleged by the landlady.



Issue No. C- Whether there is a Landlord/Tenant relationship between the parties that require protection of this court.

15. We have made a finding that the Tenant locked up the premises and left. The Tenant's wife in her evidence, as was the Tenant, asserted that they were putting up a building adjacent to the demised premises with a view to moving their business into the building. This demonstrates a clear intention of not resuming occupation of the demised premises. They only changed tune after this court loudly wondered whether it had jurisdiction to then oversee this matter in view of such evidence. It is then that they purported interest in regaining possession of the demised premises.
16. In our view and from the evidence on record, the Tenancy relationship in this matter has constructively been terminated. It is our view that the justice of this case dictates that both parties be allowed to define their individual future separate from each other.

Issue No. D- Who should bear the costs of this suit.

17. The Landlady issued a defective notice which we have declared unlawful. The Tenant on his part has not paid rent since August, 2022 to date. This is therefore a case where both parties are directed to bear individual costs.
18. The upshot of all these is that the orders that commend to us are the following:-
 - i. That the notice of termination of tenancy dated 6th June 2023 is unlawful and of no legal effect.
 - ii. That the Landlord/Tenant Relationship has been constructively terminated.
 - iii. That the Tenant shall collect all his items from the demised premises immediately and in any event on/or before 30th June 2024 and in default the landlady to remove and store the same at the Tenant's costs.
 - iv. That the Tenant shall pay to the Landlady the rents in arrears at Kshs.22,000/- immediately and in default the Landlady shall be at liberty to levy distress in recovery of the same.
 - v. That each party shall bear own costs of this suit.

Those are the orders of the court.

JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF JUNE, 2024.

HON. NDEGWA WAHOME MBS - PANEL CHAIRPERSON

HON. JOYCE MURIGI - MEMBER

BUSINESS PREMISES RENT TRIBUNAL

Ruling delivered in the presence of Mr. Shifwoka for the Landlord M/S Wesonga for the Tenant absent.

HON. NDEGWA WAHOME, MBS - PANEL CHAIRPERSON

HON. JOYCE MURIGI - MEMBER

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