



Homeplus Realtors Limited & another v Wangui & 2 others (Tribunal Case E295 of 2023 & E778 of 2022 (Consolidated)) [2023] KEBPRT 367 (KLR) (17 March 2023) (Judgment)

Neutral citation: [2023] KEBPRT 367 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E295 OF 2023 & E778 OF 2022 (CONSOLIDATED)
A MUMA, VICE CHAIR
MARCH 17, 2023**

BETWEEN

HOMEPLUS REALTORS LIMITED AGENT

AND

MAINA GIKONYO & OTHERS LANDLORD

AND

JANE MURINGI WANGUI 1ST TENANT

MUGAMBI IMANYARA 2ND TENANT

AND

HOMEPLUS REALTORS LIMITED RESPONDENT

JUDGMENT

A. Parties and Representatives

1. The 1st Applicant Homeplus Realtors is the appointed estate agent acting under the instructions of the 2nd Applicant in respect to management and running of all that property known as Land Reference No. 209/2632 and 4355 commonly known as Garden Chambers. (hereinafter known as the ‘agent’)
2. The 2nd Applicant Maina Gikonyo is the Landlord and the proprietor of the Suit Property. (hereinafter known as the ‘Landlord’)
3. The firm of Kimandu & Ndegwa Company Advocates represent the Applicants in this matter.
4. The respondent Jane Muringi Wangui is the tenant and rented space on the suit property from the applicants. (hereinafter known as the ‘tenant’)



B. The Dispute Background

5. The landlord served the tenant with a notice to terminate tenancy dated 21st June 2022 requiring that the tenant vacate the premises by 1st September 2022 on the grounds that the tenant had defaulted in payment of rent for a period of two months.
6. The Tenant in opposition of the notice by the landlord, filed a Reference dated 31st August 2022 under section 6 of the [Landlords and Tenants \(Shops, Hotels and Catering\) Establishments Act](#) Cap 301.
7. The Agent and the Landlord also filed a Reference and an Application dated 17th March 2023. They were seeking orders to be allowed to take immediate vacant possession of the premises.

C. Agent& Landlord's Claim

8. The Agent and the Landlord have filed a Reference and a Notice of Motion Application dated 17th March 2023 seeking to be allowed to take back vacant possession of the premises.

D. Tenant's Claim

9. The Tenant has filed a Reference dated 31st August 2022 opposing a Notice to Terminate Tenancy issued on them by the Landlord.
10. The Tenant has also filed a Replying Affidavit in response to the Landlord and the Agent's application. He avers that the same is an abuse of Court Process and is not merited.

E. List of Issues for Determination

11. The issues raised for determination are as follows;
 - a. Whether the Notice issued by the Landlord to terminate tenancy is valid?
 - b. Whether there is a Landlord Tenant relationship?

F. Analysis and Findings

Whether the Notice issued by the Landlord to terminate tenancy is valid?

12. The tenant approached this tribunal by way of the reference dated 31st August 2022 in opposition to the landlord's notice to terminate tenancy dated 21st June 2022.
13. The landlord has indicated that the grounds upon which they seek to terminate the tenancy are that the tenant has defaulted in paying rent for a period of more than two months.
14. The Landlord has also filed a Reference and an Application in support of their Notice and further seeking to be allowed to take vacant possession of the premises.
15. The tenant has disputed the same and stated that they are up to date with payments of rent, having entered into an agreement with the 2nd Respondent for them to clear the arrears owed to the landlord and thereafter take over possession of the premises. The tenant avers that the same was done with the consent of the landlord.
16. The landlord in support of their case has annexed proof before this Tribunal that due to the tenant's default the landlord had instituted a suit before the Magistrates Court vide Case No. E1892 of 2021 wherein their application was allowed and the landlord got orders on 14th December 2021 allowing them to distress for rent.



17. The landlord thereafter executed the orders by instructing the firm of Joseph D.B.K Kimani T/A Pyramid Auctioneers to proclaim the tenant's goods. The same was not successful since the auctioneers claim that the premises were vacant which necessitated the landlord to put their padlocks to prevent vandalism.
18. It is as a result of this and the fact that thereafter the tenant continued to be in arrears that the landlord resulted to issuing the tenant with the Notice to Terminate tenancy dated 21st June 2022.
19. Section 4 of Cap 301 as follows;

“ 4

- (1) Notwithstanding the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall 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 the following provisions of this Act.
 - (2) 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.”
 - (4) 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....
20. The above provision requires that any Notice must accord the tenant a period of not less than two months within which to vacate and must provide reasons for the termination.
21. The notice issued by the landlord satisfied these requirements. The Notice was issued on 21st June 2022 and was to take effect on 1st September 2022 and it also provided reasons for termination being that the tenant has defaulted in paying rent.
22. Section 4(5) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments)* also provides that;

A tenancy notice shall not be effective for any of the purposes of this Act unless it specifies the grounds upon which the requesting party seeks the termination, alteration or reassessment concerned and requires the receiving party to notify the requesting party in writing, within one month after the date of receipt of the notice, whether or not he agrees to comply with the notice.
23. In the present case, having perused the file, I take note of the fact that the reference by the tenant opposing the Notice was filed on 31st August 2022. This is after the notice was issued in June 2022. By virtue of this, the tenant did not comply with the requirements of the above cited provision.
24. They did not respond to the notice within a month and additionally, they did not file an application seeking for extension of time or that they be allowed to file the reference out of time.



Whether there was a Landlord Tenant relationship?

25. In addition to the above this Tribunal in an attempt to establish the current situation in the premises has carried out two inspections/site visits. The first inspection was carried out on 16th May 2023. The tenant's advocates were not present but they informed the inspector that there were no goods belonging to the tenant in the premises. The report indicates that the room was empty and dark indicating it had not been occupied for a while.
26. The advocate for the tenant raised a concern relating to the impartiality of the officer who conducted the first inspection. The Tribunal then ordered for another site visit by a different inspector. The same was conducted on 22nd May 2023. The report indicates the following outcomes;
- a. The premises were initially locked but the same were opened by the caretaker.
 - b. The 2nd Respondent does not have access to the premises.
 - c. The 2nd Respondent claims that the 1st Respondent vacated the premises in 2020 due to rent arrears.
 - d. The landlord's advocate claims that the landlord has not been receiving rent and that the premises have been vacant.
 - e. The tenant is not in possession of the premises and no business was being carried out.
27. Based on the report it is evident to this Tribunal that the relationship between the parties was indeed terminated by virtue of the fact that the tenant is not in possession of the premises. I am then persuaded to agree with the landlord that the tenant abandoned the premises hence the reason their goods were not in the premises when the auctioneers sought to distress.
28. This averment is also contained in an email from Gituma Otieno Advocates to the tribunal that 'there is no dispute as to who is in possession of the premises, it is the landlord and there is nothing which belongs to our client in the suit premises'... This was mentioned when they made an inquiry regarding the new dates of the inspection which they found arbitrary as they were not available this was done since the earlier inspection fell on a public holiday and it is customary of the tribunal to give new dates to parties for a new inspection and or hearings when the same fall on a public holiday. However, be as it may a new second inspection was done with another inspector which this court has relied upon.
29. In light of the foregoing, I therefore proceed to order as follows;

G. Orders

- a. The upshot is that the Landlord's Application dated 17th March 2023 is hereby allowed in Terms of prayers 2 and 3.
- b. Each party shall bear their own Costs.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY BY HON A. MUMA THIS 9TH DAY OF JUNE 2023 IN THE PRESENCE OF NDEGWA FOR THE LANDLORD AND OTIENO FOR THE TENANT.

HON A. MUMA

VICE CHAIR

BUSINESS PREMISES RENT TRIBUNAL

