



**Masinde v Koech (Tribunal Case E074 of 2023)
[2023] KEBPRT 671 (KLR) (31 October 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 671 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E074 OF 2023
J OSODO, CHAIR & GAKUHI CHEGE, MEMBER
OCTOBER 31, 2023**

BETWEEN

VICTORIA MASINDE LANDLORD

AND

HILDA CHEBET KOECH TENANT

RULING

A. Introduction

1. The applicant/landlord filed a Reference and Application dated May 4, 2023. The Application is seeking the following orders: -
 - a) That service of the Application be dispensed within in the first instance and the said Application be certified urgent and ex-parte ipso facto.
 - b) That the respondent/tenant be compelled to pay Kshs. 24,000 outstanding arrears and if this is defaulted, the applicant/landlord be granted leave to levy distress to recover the outstanding rent arrears by appointing a licensed auctioneer whose jurisdiction the premises are situated.
 - c) That the Tribunal be pleased to grant an order directing the Respondent to vacate the premises and if in default, be evicted therefrom by the OCS Webuye Police Station.
 - d) That costs of the Application be borne by the respondent.
2. The tenant/respondent on the other hand filed a Replying Affidavit dated July 13, 2023 requesting the court not to grant the aforementioned orders since they were going to pay the rent arrears before July 19, 2023.
3. The matter came up for hearing on August 16, 2023 and it was agreed that the landlord would be granted 7 days to file and serve submissions.



4. The applicant/landlord filed her submissions on the 28th of August 2023 where she stated that rent arrears were cleared by the tenant/respondent. Furthermore, she stated that the notice filed did not specifically plead for termination of tenancy but she would ensure to issue a proper notice. Lastly, she also stated that she would issue a proper notice for rent increment as per the tenancy agreement and prayed for costs amounting to Ksh 20,000.

B. Background

5. The two parties entered into a tenancy agreement dated 1st September, 2022. It was for one kiosk at Roza Stalls situated in Webuye. This agreement would commence on November 1, 2022 and would run till November 30, 2023 at a gross monthly rent of Kshs. 5,000 only. This was subsidized from the initial pre-COVID rate of Kshs. 6,000 which was payable in advance via direct deposits to the applicant's bank account. The agreement also stated that the applicant may increase the rent to six months after the commencement of the agreement to Ksh 6,000. Lastly, the rent was to be paid before the 8th day of the month.
6. It is the case of the landlord/applicant that the respondent was to pay a monthly rent of Kshs. 6,000. The landlord claims that in the years 2020 to October 2022, the respondent was very problematic and difficult when it came to matters of paying rent.
7. Furthermore, due to this nature, the landlord had to come up with an agreement that ran for one year. The tenant tended to pay her rent in piecemeal before she completely defaulted in paying the same in January 2023. The landlord followed up with the tenant when she noticed the rent arrears kept increasing but the arrears were not cleared. As of May 2023, the respondent had arrears that amounted to Kshs 24,000.
8. The tenant on the other hand avers that she had been paying a monthly rent of Kshs 5,000 and not Kshs. 6,000 as the applicant/landlord had claimed. She also states that the arrears owing by her were not from January 2023 and that she has always been paying rent on time since 2020. Moreover, the tenant claims that the arrears owing to her were Ksh 20,000 and not Kshs 24,000 from the month of April to July 2023.
9. The tenant also asserted that the reason for the rent arrears came about as a result of her children's school fees which have now been sorted. She insists that she would have cleared these arrears by July 19, 2023.
10. In the landlord/applicant's Submissions, she states that the rent arrears had been cleared.

C. Issues For Determination

11. The issues that arise for determination in our view are the following:
 - a. Whether the landlord/applicant is entitled to the reliefs sought in the application dated May 4, 2023.
 - b. Whether the costs should be borne by the respondent.



D. Analysis Of Issues

Issue (a) Whether the Landlord/applicant is entitled to the reliefs sought in the application dated May 4, 2023.

12. The landlord in his application dated May 4, 2023 seeks that the tenant be compelled to pay Ksh 24,000 outstanding arrears and that the tenant be ordered to deliver vacant possession of the business premises.
13. Upon perusal of the court documents and Submissions, we note that the tenant cleared the correct and agreed rent arrears of Ksh 20,000 as evidenced by receipts of rent payment attached to the tenant's replying affidavit dated July 13, 2023. The same is confirmed by the landlord in his Submissions dated August 28, 2023.
14. In regard to the issue of vacant possession, the applicant should issue a proper notice as per the law. From the evidence of the parties, it is clear that the present relationship falls within the definition of a controlled tenancy. 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.
15. In Manaver N Alibhai T/A Diani Boutique vs 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.”

16. Also, in Nandlal Jivraj Shah & 2 others (all trading as Jivaco Agencies v Kingfisher Properties Limited [2015] eKLR, the court of appeal stated;

“The procedure of terminating a controlled tenancy is contained in the Act. Under section 4(1) thereof, termination of controlled tenancies can only be undertaken under the purview of the Act 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 on that behalf to the tenant in the prescribed form.
” (Emphasis provided)

17. Furthermore, the landlord must show a good reason why she wants to terminate the said tenancy. These grounds are provided for under section 7 of the same Act. They include:-

- “ a) where, under the tenancy under which the tenant holds for the time being, the tenant has any obligations in respect of the repair and maintenance of the premises comprised in such tenancy, that the tenancy ought to be terminated in view of the state of repair of the premises, being a state resulting from the tenant's failure to comply with the said obligations;
- b) that the tenant has defaulted in paying rent for a period of two months after such rent has become due or payable or has persistently delayed in paying rent which has become due or payable;
- c) that the tenant has committed other substantial breaches of his obligations under the tenancy, or for any other reason connected with the tenant's use or management of the premises comprised in the tenancy;
- d) that the landlord has offered and is willing to provide or secure the provision of alternative accommodation for the tenant, that the terms on which the alternative accommodation is available are reasonable having regard to the terms of the tenancy and to all other relevant circumstances, and that the accommodation and the time at which it will be available are suitable for the tenant's requirements (including the requirement to preserve goodwill) having regard to the nature and class of his retail trade or business or enterprise and to the situation and extent of, and facilities afforded by, the premises comprised in the tenancy;
- e) that the tenancy was created by the subletting of part only of the premises comprised in a superior tenancy of which the landlord is the owner of interest in reversion expectant on the termination of that superior tenancy, and that the aggregate of the rents reasonably obtainable on separate lettings of such premises in parts would be substantially less than the rent reasonably obtainable on a letting of such premises as a whole, and that on the termination of the tenancy the landlord requires possession of such premises as a whole for the purpose of letting or otherwise disposing of the same as a whole;
- f) that on the termination of the tenancy, the landlord intends to demolish or reconstruct the premises comprised in the tenancy, or a substantial part thereof, or to carry out substantial work of construction on such premises or part thereof, and that he could not reasonably do so without obtaining possession of such premises;
- g. subject as hereinafter provided, that on the termination of the tenancy the landlord himself intends to occupy for a period of not less than one year the



premises comprised in the tenancy for the purposes, or partly for the purposes, of a business to be carried on by him therein, or at his residence.”

18. Therefore, the landlord in issuing proper notice to the Respondent must adhere to the above provisions which she has not done in the present case. It therefore follows that no order for vacant possession can inure in her favour before this Tribunal.
19. In regard to payment of rent arrears, the application herein is overtaken by events as the same were cleared and we have no reason to grant the orders sought.

Issue (b) Whether costs should be borne by the Respondent.

20. In *Samuel Kipkrori Ngeno & another – vs- Local Authorities Pension Trust (Registered Trustees) & another* (2013) eKLR 12, the court stated in paragraph 9 as follows:

“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?”

21. The tenant failed to pay rent as and when the same fell due and payable in accordance with the tenancy agreement which led to institution of the current proceedings. The landlord was entitled to bring the proceedings in the said circumstances.
22. Costs are at the discretion of the tribunal under section 12(1)(k) of Cap 301, Laws of Kenya, unless for good reasons otherwise ordered. In the instant case we have already found that the tenant delayed in paying rent which led to the institution of this suit. We therefore have no reason to deny the landlord herein costs.

E. Orders

23. Given the above, the final orders which commend to us are;
 - a) The application dated May 4, 2023 is hereby marked as overtaken by subsequent events.
 - b) The landlord shall be at liberty to issue a proper notice of termination of tenancy or a proper notice for rent increment according to Cap 301 of the Laws of Kenya.
 - c) The landlord is awarded costs of Kshs. 10,000 against the tenant.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 31ST OCTOBER 2023

HON. JOYCE AKINYI OSODO

(PANEL CHAIRPERSON)

BUSINESS PREMISES RENT TRIBUNAL

HON GAKUHI CHEGE

(MEMBER)

