



**Bihi v Omar (Tribunal Case E456 of 2023)
[2024] KEBPRT 1741 (KLR) (16 December 2024) (Judgment)**

Neutral citation: [2024] KEBPRT 1741 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E456 OF 2023
GAKUHI CHEGE, CHAIR & J OSODO, MEMBER
DECEMBER 16, 2024**

BETWEEN

MOHAMED BIHI TENANT

AND

OMARB MOHAMED OMAR LANDLORD

JUDGMENT

A. Dispute Background

1. The tenant moved this Tribunal vide a Reference dated 5th May 2023 pursuant to Section 12(4) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* Cap 301, Laws of Kenya objecting to the Landlord's notice to vacate dated 23rd February 2023. The said notice was expressed to take effect on 23rd March 2023.
2. The notice to vacate does not disclose the grounds upon which the landlord requires the tenant to vacate the business premises and only gives a period of one (1) month.
3. Interim orders were issued on 10th May 2023 in favour of the tenant to protect him from being evicted from the suit premises in the pendency of the reference.
4. On 12th March 2024, both parties were directed to file and exchange their witnesses' statements and documents in compliance with Order 11 of the Civil Procedure Rules.

B. Issues for Determination

5. Based on the materials placed before the Tribunal, the following issues arise for determination: -
 - a. Whether the landlord's notice to vacate dated 23rd February 2023 is valid.
 - b. What is the rent payable by the tenant to the landlord?



- c. Does the tenant owe rent arrears to the landlord?
- d. Who shall bear the costs of the reference?

C. Analysis and Determination

Issue a) Whether the landlord's notice to vacate dated 23rd February 2023 is valid.

6. Section 4(1) & (2) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Cap 301, Laws of Kenya provides as follows: -

“4. Termination of, and alteration of terms and conditions in, controlled tenancy:

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- (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.”

7. Section 4(4) of the same statute further provides as follows: -

“(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.”

8. We have examined the notice to vacate issued by the landlord herein and the same is not in the prescribed form and does not give the tenant the period of two (2) months stipulated under the aforesaid statute.
9. We have seen the decision cited by Counsel for the tenant in the case of Manaver N Alibhai t/a Diani Boutique – vs- South Coast Fitness & Sports Centre Limited Civil Appeal No. 203 of 1994 wherein 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. Guided by the provisions of the relevant statute aforesaid and the foregoing decision, we have no hesitation in holding that the notice to vacate issued to the tenant herein is invalid and of no legal effect.



Issue b) What is the rent payable by the tenant to the landlord?

11. The tenant testified that he has been a tenant of the landlord where he has been operating a restaurant since July 2019 while paying a monthly rent of Kshs 50,000/=. He accuses the landlord of having illegally increased the said monthly rent to Kshs 75,000/= on an undisclosed date. As a result, the landlord sent Auctioneers to recover rent arrears amounting to Kshs 382,600/= by way of distress. Owing to the said distress, he paid the increased rent for some time and then stopped.
12. On the other hand, the landlord testified that he entered into a verbal tenancy agreement with the tenant on or about August 2019 in respect of the suit premises at an agreed monthly rent of Kshs 50,000/=. The rent was subject to an increment of 5% every year.
13. On 11th February 2021, the tenancy terms were reviewed and the tenant agreed to pay Kshs 75,000/= with effect from March 2021 subject to an increment of 5% every year and a written tenancy agreement was executed in the presence of two witnesses. The tenant paid the new rent from March 2021 although he paid less for some months as per the documents exhibited in the landlord's list dated 23rd February 2024.
14. We have perused the said documents and particularly noted that the tenant paid the new rent of Kshs 78,750/= on several occasions e.g 10.03.2022, 13.04.2022, 27.05.2022, 15.06.2022, 13.07.2022 & 11.08.2022 (50,000/= as read together with Kshs 28,750/= paid on 25.08.2022).
15. The tenant upon cross examination confirmed the said payments and admitted that the signature on the lease agreement was his. It is therefore our finding that the tenant voluntarily entered into the lease agreement and cannot claim that he paid the new rent on account of threatened distress for rent by the landlord.
16. The tenancy agreement dated 11th February 2021 was clearly expressed to be for three (3) years with an expiry date of 10th February 2024. The increment was therefore supposed to be for the duration of three (3) years and no more. As such, rent for the 1st year between March 2021 to February 2022 was Kshs 75,000/=:, rent for the 2nd year between March 2022 to February 2023 was Kshs 78,750/= and rent for the 3rd year between March 2023 to February 2024 was Kshs 82,687.50.
17. The landlord is therefore not entitled to apply the increment clause after 10th February 2024 without issuing the tenant with a notice for alteration of the terms of the tenancy under Section 4(2) of Cap. 301.

Issue c) Does the tenant owe rent arrears to the landlord?

18. Based on the above analysis, it is clear that the tenant is indebted to the landlord on account of the fact that he reverted back to payment of Kshs 50,000/= as monthly rent without any justification in contravention of the clear terms of the tenancy agreement aforesaid. The said rent arrears will be calculated on the basis of the aforesaid incremental rates for the relevant periods through mutual consensus of both parties and in the event of a dispute, either party shall be at liberty to apply.

Issue (c) Who shall bear the costs of the reference?

19. 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 have already found that the landlord's notice to vacate is invalid and have also found that the tenant owes rent arrears to the landlord. We therefore exercise our discretion in ordering each party to bear own costs of the reference.



D. Orders

20. In view of the above analysis, the final orders which commend to us are;

- a. The tenants' Reference dated 5th May 2023 is allowed to the extent that the landlord's notice to vacate dated 23rd February 2023 is declared invalid and of no legal effect.
- b. The tenant shall not be evicted from the suit premises unless a fresh notice is issued by the landlord in the prescribed form under Section 4(2) of Cap 301.
- c. The tenant is liable to pay monthly rent of Kshs 75,000/= for the period between March 2021 to February 2022, Kshs 78,750/= for the period between March 2022 to March 2023 and Kshs 82,687.50 for the period between March 2023 to February 2024.
- d. The landlord shall not be entitled to make any further rent increment without issuing notice under Section 4(2) of Cap. 301, Laws of Kenya in the prescribed form.
- e. The rent arrears owing by the tenant to the landlord shall be agreed upon by both parties and in the event of a dispute, either of them shall be at liberty to apply.
- f. Each party shall bear own costs of the reference.

It is so ordered.

JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY THIS 16TH DAY OF DECEMBER 2024.

HON. GAKUHI CHEGE - (PANEL CHAIRPERSON)

HON. JOYCE AKINYI OSODO - (MEMBER)

BUSINESS PREMISES RENT TRIBUNAL

In the presence of: -

Otinga for the tenant

Dayib for the landlord

