



**Wandera v Mapesa (Tribunal Case E113 of 2024)
[2024] KEBPRT 1452 (KLR) (4 October 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 1452 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E113 OF 2024
GAKUHI CHEGE, CHAIR
OCTOBER 4, 2024**

BETWEEN

CHRISPINUS OUMA WANDERA APPLICANT

AND

VINCENT PAMBA MAPESA RESPONDENT

RULING

A. Dispute background

1. The Applicant moved this Tribunal vide a Reference dated 27th June 2024 under Section 12(4) of the [Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#) Cap 301 with a complaint that in the month of May 2024, the Respondent closed his business premises and ordered him to remove all his belongings.
2. Having refused to remove the belongings, the Respondent reported the matter to the “areas Liguru” and Chief who arbitrated the matter and an agreement was reached. The agreement is marked as annexure “COW-1”. Before fulfilling the conditions of the said agreement, the landlord refused to accept monthly rent of Kshs 6,000/= and the tenant saw no need to remove his property fearing that the former had a hidden agenda. The Respondent thereafter served the Applicant with a defective notice to terminate his tenancy. The notice is marked as annexure COW-2.
3. The Applicant also filed a motion dated 27th June 2024 seeking for an order for reopening of the suit premises pending hearing of the matter inter-partes. The application is predicated on the grounds that there was no notice to terminate the tenancy and the Respondent’s action of closing the suit premises was unlawful. The Applicant swore an affidavit of even date reiterating the averments made in his reference. He further deposes that the Respondent did not serve notice in the prescribed form stating that the notice served vide a letter marked COW-2 is defective.
4. Interim orders were given on 1st July 2024 pending hearing inter-partes on 30th July 2024.



5. The Respondent entered appearance on 15th July 2024 and filed a replying affidavit sworn on even date wherein he deposes that he purchased the suit premises from one Francis Onyapara Omuse through a sale agreement dated 22nd June 2023 which is attached thereto as annexure VP-2.
6. He deposes that there exists no tenancy agreement between him and the Applicant capable of being enforced by this Tribunal. As such, he contends that there was no legal obligation to serve the Applicant with notice in the prescribed form.
7. It is the Respondent's contention that the Applicant has never paid rent to him and any previous tenancy with the seller of the property was not carried over to him as the new owner.
8. Through an agreement entered into on 17th June 2024 attached to the Applicant's supporting affidavit as annexure Cow-1, the Applicant voluntarily agreed to remove his items from the building to allow for its renovation with effect from 24th June 2024 which term he breached by failing to move out.
9. The Respondent denies having refused to accept rent stating that it was a condition precedent that he would not receive such money before renovating the building as agreed.
10. The Respondent seeks to be paid damages by the Applicant for refusing to vacate the premises as agreed thereby preventing the intended renovation thereof in breach of the respondent's constitutional right to ownership and enjoyment of private property under Article 40 of *the Constitution* of Kenya, 2010.
11. The Applicant is accused of breaching the agreement and rushing to this court for assistance with unclean hands. The Respondent therefore seeks for dismissal of this case for being frivolous, vexatious and an abuse of court process.
12. The matter was directed to be canvassed through written submissions with the Respondent filing his submissions dated 9th August 2024 and the Applicant's dated 13th August 2024.

B. Issues for determination

13. The following issues arise for determination; -
 - a. Whether the Applicant is entitled to the reliefs sought in his reference dated 27th June 2024.
 - b. Whether the Respondent is entitled to damages and vacant possession of the suit premises.
 - c. Who shall bear the costs of the suit?

Issue a) Whether the Applicant is entitled to the reliefs sought in his reference dated 27th June 2024.
14. The Applicant moved this Tribunal vide a Reference dated 27th June 2024 under Section 12(4) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* Cap 301 with a complaint that in the month of May 2024, the Respondent closed his business premises and ordered him to remove all his belongings.
15. Having refused to remove the belongings, the Respondent reported the matter the "areas Liguru" and Chief who arbitrated the matter and an agreement was reached. The agreement is marked as annexure COW-1. Before fulfilling the conditions of the said agreement, the landlord refused to accept monthly rent of Kshs 6,000/= and the tenant saw no need to remove his property fearing that the former had a hidden agenda. The Respondent thereafter served the Applicant with a defective notice to terminate his tenancy. The notice is marked as annexure COW-2.



16. The Respondent entered appearance on 15th July 2024 and filed a replying affidavit sworn on even date wherein he deposes that he purchased the suit premises from one Francis Onyapara Omuse through a sale agreement dated 22nd June 2023 which is attached thereto as annexure VP-2.
17. He deposes that there exists no tenancy agreement between him and the Applicant capable of being enforced by this Tribunal. As such, she contends that there was no legal obligation to serve the Applicant with notice in the prescribed form.
18. It is the Respondent's contention that the Applicant has never paid rent to him and any previous tenancy with the seller of the property was not carried over to him as the new owner.
19. Through an agreement entered on 17th June 2024 attached to the Applicant's supporting affidavit as annexure COW-1, the Applicant voluntarily agreed to remove his items from the suit premises to allow its renovation with effect from 24th June 2024 which term he breached by failing to move out.
20. The Respondent denies having refused to accept rent stating that it was a condition precedent that he would not receive such money before renovating the building as agreed.
21. The Applicant seeks to be paid damages by the Applicant for refusing to vacate the premises as agreed thereby preventing the intended renovation thereof in breach of the Respondent's constitutional right to ownership and enjoyment of private property under Article 40 of *the Constitution* of Kenya, 2010.
22. The Applicant is accused of breaching the agreement and rushing to this court for assistance with unclean hands. The Respondent therefore seeks for dismissal of this case for being frivolous, vexatious and an abuse of court process.
23. The parties herein voluntarily entered into a written agreement in which the Applicant agreed to vacate the suit premises to allow for its renovation. In the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR, the Court of Appeal had the following to state in regard to interpretation of such contract; -

“A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.

As was stated by Shah JA in the case of *Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000)* (unreported):

“It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain”.

24. The Applicant has not in any way alluded to the vitiating factors cited in the foregoing decision. Having agreed to vacate the suit premises to allow for its renovation, this Tribunal is enjoined to enforce the agreement.



25. We also wish to rely on the decision in the case of *Jiwaji and Others -Vs- Jiwaji and Another* (1968) EA 547 at page 554 where it was held as follows: -

“.....Where there is no ambiguity in an agreement, it must be construed according to the clear words actually used by the parties, and it would be quite wrong to adopt a different construction or to imply a term to the contrary effect.”

26. The Applicant cannot turnaround and demand to be served with a notice in the prescribed form contrary to the terms of the agreement entered into with the Respondent on 17th June 2024 which had very clear terms. The Applicant was required to enter into a new tenancy contract with the Respondent after the renovation of the suit premises. His refusal to move and thereafter filing this suit is a clear abuse of the court process.

27. We are not persuaded that there exists a controlled tenancy between the parties herein after the agreement of 17th June 2024 came into effect. The letter dated 24th June 2024 was not a termination of tenancy notice but a notice of breach of the agreement dated 17th June 2024. It was not necessary to issue a termination notice in the prescribed form under Section 4(2) of Cap 301 after the tenancy came to an end on the basis of the impugned agreement.

28. We therefore find and hold that the Applicant is disentitled to the reliefs sought in the reference. In view of the foregoing analysis, the interim orders for the reopening of the suit premises were made in error and the applicant ought to comply with the agreement entered into with the Respondent on 17th June 2024.

ISSUE (b) Whether the Respondent is entitled to damages and vacant possession of the suit premises.

29. Section 12(4) of Cap 301, pursuant to which the instant reference was brought provides as follows;

4. In addition to any other powers specifically conferred on it by or under this Act, a Tribunal may investigate any complaint relating to a controlled tenancy made to it by the landlord or the tenant, and may make such order thereon as it deems fit.”

30. Through his replying affidavit, the Respondent has applied for payment of damages on account of continued wrongful occupation of the suit premises by the Applicant. Such damages can only be in the nature of mesne profits.

31. Section 2 of the *Civil Procedure Act*, Cap 21, defines mesne profits as follows;

“mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession.”

32. The two parties had agreed that the suit premises would attract a monthly rent of Kshs 6,000/= upon renovation but the same was made impossible by the Applicant’s refusal to move out. In the circumstances, the Respondent is entitled to recoup the said amount from the Applicant from 1st July 2024 until he vacates or is evicted therefrom as he continues to be in possession thereof against the voluntary agreement entered into with the Respondent.



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

33. 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 shall award the costs of the reference to the Respondent being the successful party.

D. Orders

34. In conclusion, the following final orders commend to us; -
- a. The Applicant's reference dated 27th June 2024 is hereby dismissed with costs to the Respondent.
 - b. The Respondent is entitled to enforce the agreement dated 17th June 2024 against the tenant who shall forthwith vacate from the suit premises failing which, he shall be evicted therefrom by a licensed Auctioneer who shall be accorded security by the OCS within whose area the premises are situated.
 - c. The Applicant shall pay to the Respondent mesne profits for wrongful occupation of the suit premises at the rate of Kshs 6,000/= per month from 1st July 2024 until he vacates or is evicted therefrom.
 - d. The Respondent's costs of the case are assessed at Kshs 30,000/= against the Applicant.

it is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 4TH DAY OF OCTOBER 2024.

HON. GAKUHI CHEGE

(PANEL CHAIRPERSON)

BUSINESS PREMISES RENT TRIBUNAL

HON. JOYCE AKINYI OSODO

(PANEL MEMBER)

In the presence of:

Shihemi for the Respondent

No appearance for the Applicant

