



Gachoki v Gaitho (Tribunal Case E382 of 2023)
[2023] KEBPRT 1238 (KLR) (28 November 2023) (Ruling)

Neutral citation: [2023] KEBPRT 1238 (KLR)

REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E382 OF 2023
CN MUGAMBI, CHAIR
NOVEMBER 28, 2023

BETWEEN

BERNARD GACHOKI TENANT

AND

JULIA WAITHERA GAITHO LANDLORD

RULING

Introduction

1. The landlord's notice to terminate tenancy in this case is the one dated 26.1.2023 with an effective date of 1.4.2023. The ground upon which termination is sought is that the landlady intends to occupy the business suit premises for her own purposes. The tenant in response to the landlord's notice to terminate tenancy filed his reference dated 11.4.2023.
2. This matter proceeded for hearing on 10.8.2023 when both parties gave oral testimony and which I proceed to summarize as follows:

The landlady's case

3. The landlady sought to and was allowed to rely on her witness statement and the list of documents which she had earlier filed in court. The witness statement and the documents in the list of documents were produced as the landlady's exhibits 1-5. The bank statements referred to in the list of documents were excluded from the landlady's exhibits after the counsel for the landlady confirmed that indeed the statements were not filed.
4. The statement of the landlady filed in court and dated 25.7.2023 may be summarized as follows hereunder:-
 - a. That she is the landlady of Stall No. B6 Kenyatta market where the tenant pays a monthly rent of Kshs. 11,500/= and the said tenancy has subsisted for over thirty-five (35) years.



- b. That sometimes in the year 2017, the landlady issued a notice to terminate tenancy upon the tenant but the same was held by the Tribunal to be illegal, though the Tribunal noted that the landlady was at liberty to issue the tenant with a fresh notice of termination of tenancy in the prescribed form.
 - c. That the landlord issued the tenant with a notice dated 26.1.2023 but which was served upon the tenant on 15.2.2023. the said notice was issued pursuant to the provisions of section 7(1) (g) of Cap 301.
 - d. That the landlady has the requisite funds to operate the intended butchery business as soon as she gets possession thereof.
 - e. That no prejudice will be occasioned upon the tenant as he has been in occupancy of the suit premises for over thirty-five (35) years.
 - f. That the landlady has complied with the provisions of Cap 301 in issuing the notice of termination of tenancy dated 26.1.2023.
5. The landlady further testified that the rent for the premises where the tenant runs a butchery was paid on a monthly basis in order to make it easy for the landlady to repossess the premises.
6. The landlady also testified that the tenant has sublet the premises to a third party and relocated up country and if the tenant vacated the premises, the landlady would like her son to run a butchery business therein. The landlady in this regard testified that herself or her son would not run a butchery which sells ready meat.
7. The landlady also testified that she does not intend to let out the butchery to another person as she was only interested in having her son take over the premises.
8. It was also the landlady's evidence that she does not own any other stall at Kenyatta market, a fact which could easily be verified by the city market.
9. The landlady further stated that she did not charge the tenant any goodwill as she is the one who even assisted the tenant with her weighing machine.
10. Upon cross examination by Counsel for the tenant, the landlady stated as follows:-
- a. That she would like her son to occupy the premises and together they will run the business as she is not able to do the work by herself.
 - b. That the tenant left the premises and is renting it out as if it were his own.
 - c. That her son is an adult of sixty-four (64) years old with children of his own.
 - d. That the landlady is aware that she ought to give notice to terminate tenancy on account of use of the premises by herself
 - e. That there is nothing special about the tenant's butchery other than the fact that the former president of the Republic of Kenya took lunch there.
 - f. That though the landlady resides at Nyeri, she frequents Nairobi.
 - g. That the person in the butchery is not an employee of the tenant.



11. Upon re-examination, the landlady stated that she did not intend to carry out the same operation in the suit premises like the tenant and specifically that she did not intend to operate a kitchen in the premises, consequently, she does not intend to benefit from any goodwill from or by the tenant.

The Tenant's case

12. The tenant sought to and was allowed to rely on his statement dated 7.8.2023 and the photographs in his list of documents. The statement and the photos were produced as the tenant's exhibit 1 and 2 respectively.
13. The statement of the tenant may be summarized as follows hereunder;-
 - a. That he has been a tenant of the Respondent in the suit premises since 1982 wherein he has been carrying on the business of a butchery dealing with ready/cooked and raw meat.
 - b. That over the years, he has dutifully paid the rent for the premises and he has also improved the suit premises by carrying out renovations.
 - c. That his business has attracted clientele from the high and mighty and has thus generated worthy goodwill, it is this goodwill that the landlady will exploit if she was to take over the premises.
 - d. That the landlady has five other stalls and it is suspicious why she has only pitched on the tenant's stall and considering that she intends to carry on the same business that the tenant is currently carrying on in the suit premises.
 - e. That the tenant does not believe that the landlady who is at an advanced age of over ninety-four (94) years is able to carry on the business of a butchery.
 - f. That the tenant believes that the landlady intends to rent out the premises to another party to get goodwill and thereby unjustly enrich herself.
 - g. That it would be difficulty for the tenant to get another stall even if he was given a notice of two years and the tenant requires the tribunal to grant him five years in which to vacate the premises.
 - h. The tenant ha also requested the Tribunal to carry out an inspection of the premises in order to determine the amount of goodwill payable at the lapse of five years.
14. Upon cross examination by Counsel for the landlady, the tenant stated as follows;
 - a. That he received the notice to terminate the tenancy.
 - b. That in the year 2017, the landlady had intended to occupy the premises and had issued the tenant with a notice to vacate.
 - c. That the parties do not have a written lease over the premises.
 - d. That the tenant has no evidence that the landlady intends to let the premises to another party.
 - e. That the tenant did not pay any goodwill to the landlady for the premises.
 - f. That he is aware that the landlady has the right to take over the premises and she has had this desire since the year 2017.
 - g. That the tenant cannot get a similar premises.



- h. That although he knows that the landlady has other stalls, he has no documentary evidence to prove the same.

The Tenant's submissions

15. The tenant has submitted that the landlady did not controvert the tenant's evidence that the landlady owns five other stalls in Kenyatta market, and therefore her notice is premised on bad faith and ill will.
16. It is the tenant's submissions that the landlady has not demonstrated that she intends to put up a business as required by law; instead, the landlady has only demonstrated that the premises is to be used by a third party.
17. The tenant further submits that the Tribunal ought to assess the premises and determine the goodwill payable and further that the tenant ought to be given a reasonable time to exit the premises.
18. That the tenant's premises is unique, popular and special and hence patronized by a high and ranking clientele, and this ought to be rewarded through payment of goodwill.

The landlady's submissions

19. The landlady has submitted that she intends to run a butchery business with her son but that the butchery would be different in nature and style from the one being run by the tenant.
20. The landlady submits that the tenant has been aware that she intended to occupy the premises since 2017 and that further the tenant had confirmed that he had been served with the proper notice to terminate tenancy in this case.
21. The landlady also submits that the tenant confirmed that he had not paid any goodwill to the landlady and he is therefore not entitled to any goodwill.
22. It is finally submitted by the landlady that the notice dated 26.1.2023 is valid, legal and has fulfilled the requirements of Section 7(1)(g) of Cap 301 and ought to be allowed.

Issues for determination

23. The issues that arise for determination in this matter, in my view, are the following:-
- a. Whether the landlady has proved the notice to terminate tenancy issued to the tenant and dated 26.1.2023.
- b. If the answer to issue A is in the affirmative, whether the tenant is entitled to goodwill upon the termination of his tenancy.
- c. What orders ought to issue in the circumstances of this case.

Issue A

24. The landlady's notice to terminate or alter terms of tenancy dated 26.1.2023 is brought on the grounds that;-
- “The landlady has issued the tenant with several notices to vacate the premises but he has refused to vacate. The landlady desires to occupy the suit premises for her own business purposes.”



25. I have perused the notice to terminate tenancy, hereinafter referred to as the “Notice” and I find the same to satisfy the requirements of Section 4 of Cap 301. It is valid notice.
26. The Section of Cap 301 under which the notice has been brought and which the landlady is required to satisfy is Section 7(1)(g) of Cap 301 and which provides as follows:-
- “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 purpose or partly for the purposes, of a business to be carried on by him therein, or at his residence.”
27. The landlady’s evidence is majorly to the effect that she intends to run the business of a butchery with her son. It is her evidence that unlike the tenant who runs a butchery selling ready cooked meat, the landlady will run a different kind of an outfit. The landlady’s desire and intention to occupy the premises for her own business has not been challenged. The tenant’s allegation that the landlady intends to let out the premises to a third party with the intention of being paid goodwill has not been substantiated. The tenant’s further allegation that the landlady has four other stalls within Kenyatta market and which she could have utilized has not been substantiated. I do not find anything wrong with the landlady desiring to use the suit premises together with her son and I further do not find any merit in the assertion by the tenant that the landlady is of an advanced age and that the said age is an impediment to the landlady carrying out the rigorous business of a butchery.
28. Even if the landlady had other premises, a fact I have found not to have been proven, I do not think it is for the tenant to determine which of the stalls the landlady ought to have chosen for her own occupation. All the landlady needed to do under the law was to issue the notice required under Section 4 of the Act and which the tenant admits to have received anyway. In this regard, I agree with the observation in the case of; *James Kariuki Kithinji vs Dominic Ntongai* [2020] eKLR where the court stated;-
- “the Act does not state that a detailed account should be given regarding the nature of the intended use of the premises by the landlord. It was therefore sufficient for the Respondent to demonstrate that he intended to put up a business and use the suit premises.”
29. I also note from the proceedings that it’s a commonly agreed fact that the landlady has been trying to take over the suit premises since the year 2017 but failed to do so due to legal technicalities. The tenant has therefore all along been aware of the landlady’s intention to take over the premises.
30. The tenant has stated in his evidence that he has been in the suit premises for over forty (40) years and that he requires a period of at least five years to get an alternative premises. My view of the matter is that the law contemplated this kind of scenarios when it provided for the two months’ notice in which time the tenant would be expected to secure an alternative premises. In the circumstances of this case, the tenant knew as early as the year 2017 that the landlady intended to occupy the premises. That was more than enough time for the tenant to have sought and secured an alternative premises. I therefore find the request by the tenant that he should be granted five years to secure an alternative premises to be unreasonable and unjustified.
31. The provisions of the Act that deal with termination of controlled tenancies have not made any mention of the period a tenant stays in the demised premises as a factor to be considered when determining the outcome of a notice to terminate tenancy. Consequently, I do not think the forty plus years that the tenant has been on the suit premises affect the two months statutory period of notice under Section 4 of Cap 301.



32. In concluding on this issue, I do therefore find that the landlady has proved her notice to terminate tenancy and the same is approved subject to the alterations in this ruling hereinafter.

Issue B

33. The tenant's claim for goodwill is based on the allegation that;

“the tenant has ably demonstrated through documentary evidence the reputation of his butchery business in the subject premises. indeed the landlady confirmed in evidence that the former Kenyan president and other high ranking leaders often patronize the tenant's butchery on the subject premises.”

And further, the tenant has submitted and I quote;

“Why then do the high ranking leaders shown in the produced photos flock to the tenant's only butchery? It is obviously not the only butchery in Kenyatta market or indeed in Nairobi. It is thus special, very popular and unique courtesy of the tenant's efforts. Its reputation stands out amongst the rivals.”

34. It is to be noted that the tenant has been in the suit premises for a period of over forty years. It is further not contested that the landlady now desires to take over the suit premises and although the landlady states that she is going to carry out the business of a butchery different in nature and style from the one carried out by the tenant, the fact of the matter is that the landlady intends to carry out the business of a Butchery anyway. The tenant has also ably demonstrated that the suit premises is popular and unique and has attracted high end personalities like the former president of the Republic of Kenya. Although the landlady thinks very little of this event, I do note that indeed very senior personalities have indeed patronized the eatery. That in my view counts for something, Heads of state and Government do not ordinarily pop into every other eatery on routine lunch trips!
35. I am persuaded that if the landlady will be setting up a Butchery business in the premises, she will immensely benefit from the goodwill the premises has attracted as a “Butchery” and will most likely benefit from the already established clientele.
36. The tenant's request that the premises be assessed and goodwill payable be determined from the assessment seems to miss the point. Any assessment of the premises would be structural assessment for the purposes of making a determination as to the amount of compensation payable on the improvements. I do not understand this to be the tenant's claim. The tenant's claim is as to the payment of goodwill on the termination of his tenancy.

Under Section 12(L) of Cap 301, the Tribunal shall have power-

“To award compensation for any loss incurred by a tenant on termination of a controlled tenancy in respect of goodwill and improvements carried out by the tenant with the landlord's consent.”

37. What then is the definition of goodwill? In the case of; *Commissioner of Inland Revenue vs Miller & Co. Margarine Ltd* [1900-1903], ALL ER 413, quoted in Civil Appeal NO. 167 of 2009, [*Rosemary Wakalo vs Gideon Onuango Bundock*](#), Lord Macnaughton defined goodwill as follows;-

“it is the benefit and advantage of the good name, reputation and connections of a business. It is the attractive force which brings in custom. It is the one thing that distinguishes



an old established business from a business at its first start. The goodwill of a business must emanate from a particular center or source. However, wildly extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates.”

38. The tenant’s business captures all the ingredients in the definition of goodwill in the cited authority. But what is the nature of the compensation sought by the tenant?
39. Whereas the tenant is entitled to goodwill, he has not made any efforts or placed any material before the Tribunal to enable the Tribunal make a determination on this issue. For example, it would have helped if the tenant had provided financial statements on the historical income strengths of the business and its future profit projections. It would also have helped if the tenant had shown by way of a valuation report, the extent of his improvements and what effect those improvements and renovations had on the sales within the business. That ought to have formed part of the tenant’s claim. There is no material before me to establish the true worth of the business and consequently, I am unable to put any figure to the tenant’s claim for compensation on account of goodwill.

Issue C

40. I have already found that the tenant was properly served with a valid notice to terminate his tenancy and I have further found that the landlady has proved her notice to terminate. I have also found that the tenant is entitled to goodwill but no material has been placed before the court to enable the assessment thereof. Consequently, and in the circumstances of this case, I will make the following orders:-
- a. That the tenancy notice dated 26.1.2023 is approved and the tenancy terminated.
 - b. That the tenant shall render vacant possession of the suit premises, Stall No. B6 Kenyatta Market within the next six (6) months from the date of this ruling.
 - c. That the tenant failing to vacate, the landlady shall be at liberty to evict the tenant using a licensed auctioneer.
 - d. That the tenant shall bear the costs of the reference to be agreed upon or to be assessed by the Tribunal.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF NOVEMBER 2023

HON. CYRPIAN MUGAMBI

CHAIRPERSON

28. 11.2023

Delivered in the presence of

Ms. Irungu for the landlady

In the absence of the tenant and his counsel

