



**Chogoro v Nyanchoka (Tribunal Case E018 of 2023)
[2023] KEBPRT 677 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 677 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E018 OF 2023
GAKUHI CHEGE, CHAIR & J OSODO, MEMBER
OCTOBER 19, 2023
KENYA RE: TOWERS GROUND FLOOR**

BETWEEN

EDBA MORAA CHOGORO TENANT

AND

ALFRED MISIANI NYANCHOKA LANDLORD

RULING

1. Through a motion dated 21st March 2023, the tenant moved this Tribunal seeking for restraining orders against the landlord from evicting her from Tavern Lounge and Grill situate on plot No. West Mugirango/Siamani/1395 or from interfering with her quiet possession and lawful enjoyment of the suit premises. The tenant further seeks for a determination that it is the lawful/bona fide tenant of the Respondent and enjoys a controlled tenancy within the meaning and intendment of Section 2 of Cap. 301 which can only be terminated in accordance with provisions of Section 4(2) of the said Act.
2. The application is predicated upon the grounds set out on the face of the application and the tenant's affidavit attached thereto. The tenant initially took the suit premises from one Geoffrey Omondi Machogu for a period of 5 years until further notice. In June 2022, the landlord transferred the tenancy due to poor health.
3. The applicant discussed terms of the tenancy with the landlord and continued investing in renovations and equipment's in the suit premises on the previous terms. The tenant was shocked after receiving the landlord's communication that he desired to terminate the tenancy having invested a huge sum in the business and created goodwill with a large clientele base overtime.
4. The landlord was accused of taking advantage of the gentleman's agreement between him and the tenant to be paying rent quarterly and changed terms of the lease contract. This both done with ulterior motive. The tenant contends that the landlord would not suffer any prejudice if the tenancy run its



full term. The tenant stands to suffer the risk of being auctioned on account of debts procured from family and friends as well as bank loans taken to finance the business.

5. Among the documents annexed to the supporting affidavit are payslips from the Teachers Service Commission, Kenya Commercial Bank statement, cash sale receipts, rent agreement dated 20th June 2021, tenancy agreement dated 17th December 2022, photographs of the suit premises before and after the renovations and Mpesa messages for rent payment.
6. According to clause 2 of the tenancy agreement dated 17th December 2022, the tenant is obligated to pay rent every 6 months with the initial payment having been made upon execution of the agreement.
7. Clause 4 of the agreement provides that if rent is not paid for a period of six (6) months, an interest of 30% per month would be payable.
8. The application is opposed through the landlord's replying affidavit sworn on 2nd May 2023 wherein it is deposed that the parties entered into a written tenancy agreement on 17th December 2022 at an agreed monthly rent of Kshs.10,000/- payable every six (6) months marked "AMN-1". The applicant is alleged to have defaulted in rent payment in the sum of Kshs.30,000/-.
9. The Applicant is also accused of doing renovations and restructuring the suit premises including building other structures outside it without the landlord's consent as stipulated in the lease agreement. The tenant is also accused of failing to cooperate with the landlord's agent or caretaker in ensuring that the premises was in good shape and tennatable condition.
10. Owing to the foregoing reasons, the landlord deposes that he decided to initiate the process of evicting the tenant from the suit premises to enable him look for another tenant in terms of annexure "AMN-2". He further deposes that he did not want the tenant in his premises as their relationship had irretrievably broken down. He therefore wanted the tenant to vacate to allow him to choose another tenant in the interest of justice.
11. Among the annexed documents is the landlords' notice to terminate tenancy dated 7th February 2023 expressed to take effect on 7th May 2023 on the ground:-
 - "(1) You have defaulted to pay your rent as agreed on tenancy agreement.
 - (2) The landlord intends to use the business premises for his own use whereby your availability will not make it possible"
12. The tenant was granted leave by consent on 16th May 2023 to file a Reference. The Reference was filed on 22nd May 2023 in this case and on 19th June 2023, both parties agreed to canvass it by way of written submissions. Each party was granted 14 days to file witnesses statements and documents (if any) and the landlord a similar period after the tenant.
13. On 3rd August 2023, the matter came up for mention to confirm payment of filing fees for the reference and taking a ruling date. The landlord was not present and the matter was adjourned to 15th August 2023 when the tenant indicated her compliance with previous orders and the case was therefore fixed for ruling without the landlord's submissions.
14. We are now required to determine the following issues:-
 - (a) Whether the landlord is entitled to terminate the tenant's tenancy in terms of the notice dated 7th February 2023.
 - (b) Whether the tenant is entitled to the reliefs prayed for in the application dated 21st March 2023.



(c) Who is liable to pay costs?

15. What provoked the instant dispute is the landlord's notice to terminate the tenancy herein dated 7th February 2023. The notice is predicated upon the grounds that the tenant had defaulted to pay rent as agreed in the tenancy agreement. Secondly, the landlord stated that he intends to use the business premises for his own use and the tenant's presence therein will not make it possible.
16. Although the notice is in the prescribed form and there is no contest on its service upon the tenant, we are required to interrogate its validity in determining the reference.
17. In his replying affidavit sworn on 2nd May 2023, the landlord at paragraphs 6 & 9 depones as follows:-
 - “6. That due to the foregoing and the strained relationship between myself and the Applicant, I initiated the process of evicting the tenant from the premises to enable me look for another tenant (Attached hereto and marked as AMN-2 is the said notice)
 - 9 That I besiege (*sic*) this court to direct that the Tenant to vacate the premises and reimburse the me (*sic*) to choose a tenant of my choice after paying me all the arrears”.
18. It is therefore clear from the foregoing depositions that the landlord has no intention to occupy the suit premises for his own business as stated in ground No. 2 of his tenancy notice. Secondly, the alleged default in payment of rent is not specified given that in December 2022, the tenant paid six (6) months rent as per clause 2 of the tenancy agreement which states as follows:-
 - “2. That the tenant shall be paying rent every 6 months deposit rent which sum the landlord acknowledges receipt as part payment upon signing of this lease agreement”.
19. The said agreement was entered into on 17th December 2022 and possession was to be surrendered immediately meaning that the next rent instalment would fall due on 17th May 2023. The tenancy notice is dated 7th February 2023 when the six (6) months' rent was still running. Consequently, it cannot be true that the tenant had defaulted in payment of rent as contended by the landlord.
20. In view of the foregoing, the notice to terminate tenancy is invalid and a candidate for dismissal.
21. In regard to whether the tenant is entitled to other reliefs sought in the application dated 21st March, 2023, it is clear that when the tenant came to this Tribunal, she was faced with imminent eviction based on the tenancy notice which we have already found to be invalid. It therefore means that the tenant has already demonstrated a prima facie case.
22. Secondly, if the tenant is evicted, he has demonstrated that it could ruin his economic status given the number of loans owing to various creditors as shown in the annexures to his supporting affidavit. There is no greater harm that can be visited upon an individual than being put into economic ruin. We find and hold that any failure by this Tribunal to protect the tenant would amount to an abdication



of duty in view of the object of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* Cap. 301 Laws of Kenya which states as follows:-

“An Act of Parliament to make provision with respect to certain premises for protection of tenants of such premises from eviction or from exploitation and for matter connected therewith and incidental thereto”.

23. I find and hold that a court of equity ought to prevent an illegality where such a matter is brought to its attention and it matters not that damages would be awardable to the victim if the act was allowed to take place to completion. Such an approach would lead to injustice which no court of law should countenance. The application therefore ought to be allowed.
24. Costs of every action before this Tribunal are in our discretion under Section 12(1)(k) of Cap. 301 but always follow the event unless for good reasons otherwise ordered. We have no reason to deny costs to the tenant who is the successful party.
25. In conclusion, the following final orders commend to us in this matter under Section 9 of Cap. 301, Laws of Kenya:-
 - (a) The landlord's tenancy notice dated 7th February 2023 is invalid and of no legal consequence.
 - (b) The tenant's application dated 21st March 2023 is allowed in terms of prayer 3 thereof.
 - (c) The Landlord shall not serve a similar notice upon the tenant in the next twelve (12) months in line with Section 9 (3) of Cap. 301, Laws of Kenya.
 - (d) The landlord will pay costs of Kshs.10,000/- to the tenant which shall be offset against the rent account.

It is so ordered.

RULING DATED, SIGNED & VIRTUALLY DELIVERED THIS 19TH DAY OF OCTOBER 2023.

HON. GAKUHI CHEGE

PANEL CHAIRPERSON

BUSINESS PREMISES RENT TRIBUNAL

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HON. JOYCE OSODO

(MEMBER)

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