



**Kyalo v Kilungya (Tribunal Case E390 of 2023)  
[2023] KEBPRT 669 (KLR) (1 November 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 669 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E390 OF 2023  
J OSODO, CHAIR & GAKUHI CHEGE, MEMBER  
NOVEMBER 1, 2023**

**BETWEEN**

**LAWRENCE KYALO ..... TENANT**

**AND**

**NICHOLAS KILUNGYA ..... LANDLORD**

**RULING**

**A. The Dispute Background**

1. The tenant moved this tribunal through a reference under section 6 of the landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301 dated 11<sup>th</sup> April, 2023, wishing to oppose a notice of termination served upon him by the landlord on 4<sup>th</sup> April, 2023.
2. The tenant filed a notice of Motion dated 14<sup>th</sup> April, 2023 in which he sought the following orders: -
  - i. That the matter be certified urgent
  - ii. That the landlord/respondents be restrained by an order of this court from evicting/removing the tenant/applicant from his business premises erected on Plot No. 415 Matuu Market and/or town pending hearing and determination of the application.
  - iii. That the Landlord/respondent be restrained by an order of this court from evicting/removing the tenant/applicant from his business premises erected on Plot No. 415 Matuu market and/or town pending hearing and determination of the suit.
  - iv. That the OCS Matuu Police Station do ensure compliance of the orders.
  - v. That the cost of the application be in cause.
3. The application is supported by an affidavit of even date wherein it is deposed as follows: -



- i. That he is a business man operating a kerosene and petrol pump within Matuu Market and/or town Plot No. 415 which belongs to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
  - ii. That he has been a tenant to the respondents for more than 5 years and has been paying rent promptly and has no rent arrears.
  - iii. That on 4<sup>th</sup> April, 2023 he received a notice to vacate from the demised premises dated 27<sup>th</sup> February, 2023. The notice is annexed as LKN-1.
  - iv. That though he received the notice to vacate served on 4<sup>th</sup> April, 2023, going by the date of notice, the notice expires on 14<sup>th</sup> April, 2023.
  - v. That the notice was not within the prescribed period as provided by the law, neither does it give sufficient reasons to warrant his eviction.
  - vi. That he carries out business in the demised premises and the structures are very strong and in good condition therefore no repairs/renovations are required as alleged.
  - vii. That the eviction is just a calculated plan orchestrated maliciously to cripple his business and destabilize him financially.
4. On 28<sup>th</sup> April, 2023, the court granted a temporary injunction against the landlord pending hearing of the application on 8<sup>th</sup> June, 2023.
  5. The application is opposed through a Replying affidavit sworn on 5<sup>th</sup> June, 2023 wherein the respondent deposes as follows: -
    - i. That it is true that the applicant is indeed a tenant at Plot No. 415, Matuu Market.
    - ii. That it is not true that the claimant was served with a Notice to vacate on 4<sup>th</sup> April, 2023 but he was served on 28<sup>th</sup> February, 2023 as per the Affidavit of Service by Boniface Mathuva Mumbua annexed as NKK-2.
    - iii. That the tenant was personally served with the notice on 28<sup>th</sup> February, 2023 to vacate on 1<sup>st</sup> May, 2023 which was 2 months' notice as per the provisions of Section 4(6) Cap 301 and that the affidavit of service by the court process server has been annexed hereto and marked as NNK-2 and notice annexed as NKK-3.
    - iv. That the tenancy notice specified grounds upon which the landlord was terminating the tenancy which is to develop the said plot and that allegations by the tenant that the structures are very strong and in good condition is misplaced because the landlord wants to develop the premises and not to do repairs or renovations.
    - v. That there is no malice in the eviction notice as alleged by the tenant and that a proper notice has been issued.
  6. At the court hearing on 8<sup>th</sup> June, 2023, the court directed that the application be canvassed by way of written submissions and both parties complied with the tenant/applicant filing his submissions on 7<sup>th</sup> August, 2023 and the landlord/respondent filing his on 13<sup>th</sup> October, 2023. We shall consider the submissions while dealing with the issues for determination.

## **B. List of Issues for Determination**

7. The following are the issues for determination;



- a. Whether the termination notice dated 27<sup>th</sup> February, 2023 is valid.
- b. Whether the applicant is entitled to the reliefs sought.
- c. Who bears the costs of the application?

Issue (a) Whether the termination notice dated 27<sup>th</sup> February, 2023 is valid.

8. 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.”

9. 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.”

10. The landlord is also required to show a good reason why he wants to terminate a tenancy. Among the grounds set out under section 7 (f) of *Cap 301*, Laws of Kenya, is-

“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;”

11. In the instant case, the termination notice dated 27<sup>th</sup> February, 2023 annexed as NKK-3 is in the prescribed form according to the provisions of Section 4(4) of the *Landlord and Tenant (Shop, Hotel and Catering Establishments) Act, Cap 301* and we therefore have no reason to dismiss the termination notice on that basis.



**Issue (b) Whether the applicant is entitled to the reliefs sought.**

12. In the Supporting Affidavit dated 14<sup>th</sup> April, 2023, the tenant herein contends that he was served with the termination notice dated 27<sup>th</sup> February, 2023 on 4<sup>th</sup> April, 2023, therefore claiming that the said notice was defective.
13. An affidavit of service attached to the respondent's replying affidavit however reveals that the Notice to terminate tenancy dated 27<sup>th</sup> February, 2023 was served on the 28<sup>th</sup> February, 2023. The affidavit of service is annexed as NKK-2.
14. The landlord/ respondent in his submissions alludes to the case of David Koome Matugi v APA Insurance Limited [2021] eKLR

“ 27. Quite illuminating eminent work by Chitaley and Annaji Rao; The Code of Civil Procedure Volume II page 1670 that:

There is a presumption of service as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service. [Underlining mine for emphasis]

(28) See also Shadrack arap Baiywo vs. Bodi Bach KSM CA Civil Appeal No. 122 of 1986 [1987] eKLR, where the Court of Appeal quoted with approval the foregoing eminent writing. M B Automobile v Kampala Bus Service, [1966] EA 480 at page 484 is also pointedly relevant on this subject.

(29) Accordingly, it was desirable for the party questioning the return of service, to put the process server in the witness box especially where, without such cross-examination, the court is likely to find that service was effected. Ultimately, the Appellant did not discharge the burden of disapproving service, and instead was preoccupied with the notion that the service will be invalidated nonetheless. On that basis, it should be accepted that the Appellant was served as per the contents of the affidavit of service. I so find.”

15. There is no evidence to contradict the process server's Affidavit of service, we find that the tenant/ applicant was properly served with the Notice to terminate tenancy and that the tenant was unable to show sufficient proof of late service of the termination notice herein.
16. The tenant did not demonstrate that the landlord has no genuine intention to undertake the construction sought to be done on the suit premises and we have no reason to doubt him in that regard in absence of such evidence.

**Issue (c) Who bears the costs of the application?**

17. 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 find that the termination notice is valid and was properly served to the tenant herein. We therefore have no reason to deny the landlord herein costs.



### **C. Orders**

18. In conclusion, the following final orders commend to us;

- a. The application dated 14<sup>th</sup> April, 2023 and reference dated 11<sup>th</sup> April, 2023 are hereby dismissed with costs.
- b. The Landlord's Notice to Terminate tenancy dated 27<sup>th</sup> February, 2023 is hereby upheld.
- c. Interim orders granted on 28<sup>th</sup> April, 2023 are hereby discharged.
- d. An order of immediate vacant possession in respect of the suit premises being Matuu Market and/or town Plot No. 415 is hereby issued against the Tenant and in default he shall be evicted by a licensed auctioneer who shall be provided with security by the OCS Matuu Police Station
- e. Costs of ksh. 25,000 to the Landlord/Respondent.

It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 1<sup>st</sup> DAY OF NOVEMBER 2023.**

**HON. JOYCE AKINYI OSODO**

**(PANEL CHAIRPERSON)**

**BUSINESS PREMISES RENT TRIBUNAL**

**HON GAKUHI CHEGE**

**(MEMBER)**

**In the presence of:**

**Ngure h/b for Mr. Uvyu for Landlord/respondent**

**No appearance for the Tenant/applicant.**

