



**Masara v Kimani & 2 others (Tribunal Case E117, E119 & E120 of 2023
(Consolidated)) [2024] KEBPRT 556 (KLR) (3 May 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 556 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E117, E119 & E120 OF 2023 (CONSOLIDATED)
GAKUHI CHEGE, CHAIR & J OSODO, MEMBER
MAY 3, 2024**

BETWEEN

FRANCISCA NASIMIYU MASARA LANDLORD

AND

ADAMS MAGANGA KIMANI 1ST TENANT

SHARON NALIAKA WAFULA 2ND TENANT

DAN ODONGO WAFULA 3RD TENANT

RULING

1. The landlord herein served the three tenants with notices dated 15th May 2023 under seeking to terminate their tenancies on the ground that they had refused to pay rent and had rent arrears of Kshs 48,000/=, kshs 81,000/= and Kshs 66,000/= respectively and that efforts to recover the arrears had failed. The tenancy notices were to take effect on 1st August 2023.
2. The tenants failed to file references pursuant to Section 4(2) of Cap. 301, Laws of Kenya to oppose the tenancy notices as a result of which the landlord moved this Tribunal by way of references dated 2nd August 2023 under Section 12(4) of Cap. 301 seeking that the tenants be ordered to pay the arrears and vacate her premises.
3. On being served with the references, the tenants filed separate applications seeking to be granted leave to file responses to the notices by the Applicant/Landlord out of time. They also sought for orders that the draft preliminary objection annexed to their application be deemed as duly filed upon payment of the requisite court fees.
4. The applications are based on the grounds that they were tenants in the suit property where they were carrying out business. On 19/7/2023, they picked papers from their shops' doors which they discovered upon perusal were notices dated 15/5/2023 from the Business Premises Rent Tribunal



Kakamega directed to them by the deceased's second widow FRANSISCA NASIMIYU MASARA requiring them to make a response to the allegations contained in the said notices.

5. That failure to file the said response on time was occasioned by the hard-economic times affecting the country in general and that they engage in small scale businesses that can hardly sustain them fully. They further contend that the delay was occasioned by the limited legal knowledge concerning court procedures.
6. The tenants appointed the Law Firm of Marisio Luchivya & Company Advocates, P.O BOX 1545-50200, BUNGOMA, 4th Floor, Bungoma Chemist Building to take up the matter and represent them in this matter.
7. The tenants contend that it is in the interest of justice that they be granted leave to file a preliminary objection to the notice by the Applicant/Landlord.
8. All the three tenants swore and filed separate affidavits in support of their respective applications repeating the contents of the grounds set out on the face thereof. They all depose that failure to file their responses within the prescribed period of 15 days provided by the Tribunal was due to financial constraints occasioned by the hard-economic times and limited knowledge on legal matters especially on court procedures and directions.
9. According to the tenants, their advocate on record informed them that they had a strong and justifiable defense against the claims by the Applicant/Landlord which was likely to succeed and the allegations by the Applicant/Landlord dismissed.
10. It is further deposed that the Applicant/Landlord herein does not fall under the definition of a Landlord as envisaged by Section 2(1) of Cap 301 Laws of Kenya and that this suit is brought out of sheer malice because of their association with members of the deceased's first family since the deceased was a polygamous man and the Applicant/Landlord herein is a second widow to the deceased.
11. The draft notice of preliminary objection is attached and marked as SN4. It is on the foregoing basis that they seek that this Tribunal grants them leave to file the said preliminary objection out of time and that the draft preliminary objection be deemed as duly filed upon payment of the requisite court fees.
12. They undertook to comply with further court procedures and directions under the guidance of their advocate stating that the rules of natural justice provide that persons should not be condemned unheard and that justice should not be denied on the basis of procedural technicalities.
13. The application is opposed through separate replying affidavits of the landlord sworn on 8th September 2023 wherein she deposes that the applications filed by the Respondents herein together with the intended preliminary objections are misplaced, vexatious, frivolous and an abuse of the due process of the honorable court. The orders sought by the Respondents in their applications are a waste of the court's time and if the same are granted, then the Applicant/landlord will suffer irreparably.
14. The Applicant/landlord is the only surviving widow and the legal administrator of the estate of her late husband one ASUMANI MUTIMBA MULAHA after obtaining a limited grant in Bungoma Succession Cause No. 4 of 2023 as per annexed copy of limited grant marked as annexure "FNM-I"
15. The Respondents herein are tenants operating businesses in the building known as MUTIMBA INVESTMENTS situate on plot number EAST BUKUSU/SOUTH KANDUYI/25616.
16. As at 15/5/2023, the Respondents/tenants had fallen into rent arrears as stated in the tenancy notices aforementioned. The Applicant/landlord acting under the law proceeded to issue the Respondents



- with three months' notices dated 15/5/2023 directing them to clear their outstanding arrears failing which they should vacate the premises. She attaches affidavits of service marked as annexure "FNM-2"
17. The Respondents despite being served with the said notices ignored to respond to the same. The Applicant obtained summons/hearing notices dated 2/8/2023 from this Tribunal which were served upon the Respondents on 9/8/2023, to appear before court on 14/9/2023 for hearing as per the annexed affidavit of service marked as "FNM-2."
 18. According to the landlord, the allegation by the Respondents that they found papers thrown at their door steps of their business premises on 19/7/2023 was a total lie as no service was effected upon them on the said date.
 19. The Landlord contends that the Respondents have to date not paid any single coin and had continued to play ping pong games while enjoying stay in the business premises and yet they were persons of means who had hired an advocate to act on their behalf but deliberately refused to pay the outstanding rent arrears.
 20. The Applicant/landlord has school going children who are now staying at home for lack of school fees and therefore seeks that the application before court be dismissed and the Respondents be ordered to pay the outstanding rent arrears and vacate the business premises.
 21. On 18th September 2023, this Tribunal made orders inter-alia directing the tenants to pay rent to the Applicant/landlord with effect from 1st October 2023 and in any event before the 10th day of each month. The tenants were granted leave to file further affidavits and one RAMADHAN MASAKHWE MUTIMBA was enjoined in this matter as an interested party on the Tribunal's own motion.
 22. We are required to determine the following issues;
 - a. Whether the tenants are entitled to the reliefs sought in their applications dated 26th August 2023.
 - b. Whether the landlord's reference ought to be allowed or not.
 - c. Who is liable to pay costs?
 23. The tenants herein were served with notices issued under Section 4(2) of Cap. 301 by the landlord seeking to terminate their tenancies. They did not file any references under Section 6(1) of the said Act which provides as follows;

“

“(1) A receiving party who wishes to oppose a tenancy notice, and who has notified the requesting party under section 4(5) of this Act that he does not agree to comply with the tenancy notice, may, before the date upon which such notice is to take effect, refer the matter to a Tribunal, whereupon such notice shall be of no effect until, and subject to, the determination of the reference by the Tribunal:

Provided that a Tribunal may, for sufficient reason and on such conditions as it may think fit, permit such a reference notwithstanding that the receiving party has not complied with any of the requirements of this section.”
 24. Instead of seeking to file references out of time as provided in the proviso to the foregoing Section of the relevant Act, the tenants sought to file a notice of preliminary objection out of time. There is no provision under the Act for such an approach. The tenants also raised an issue of lack of service of



the tenancy notices which reason we are not convinced is genuine as the explanation given in all the supporting affidavits is similar in all respects. The landlord stated that there was no service effected on 19th July 2023 as alleged by the tenants. They did not seek to cross examine the process server who swore the affidavits of service. We have no reason to doubt that service of the tenancy notices was effected as per the process server's affidavits of service but the tenants chose to ignore the same to their detriment.

25. Section 10 of Cap. 301 provides as follows;

“

“10. Effect of notice where tenant fails to refer to Tribunal, etc.

Where a landlord has served a notice in accordance with the requirements of

section 4 of this Act, on a tenant, and the tenant fails within the appropriate time to notify the landlord of his unwillingness to comply with such notice, or to refer the matter to a Tribunal then subject to section 6 of this Act, such notice shall have effect from the date therein specified to terminate the tenancy, or terminate or alter the terms and conditions, thereof or the rights or services enjoyed thereunder.”

26. In absence of any reference against the tenancy notices, it is our considered view that the Landlord's application ought to be allowed in line with the foregoing provision of the relevant Act as read with Section 12(1)(e) of the said Act which provides as follows;

“

“(1) A Tribunal shall, in relation to its area of jurisdiction have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in addition to and without prejudice to the generality of the foregoing shall have power—

.....

(e) to make orders, upon such terms and conditions as it thinks fit, for the recovery of possession and for the payment of arrears of rent and mesne profits, which orders may be applicable to any person, whether or not he is a tenant, being at any material time in occupation of the premises comprised in a controlled tenancy;”

27. In view of the foregoing and in absence of any evidence of payment of the rent arrears claimed by the landlord against the tenants, we shall order them to settle the same and vacate from the suit premises and in default be evicted therefrom by a licensed Auctioneer who shall be given security by the OCS, BUNGOMA POLICE STATION.

28. Costs of every action before this tribunal are at our discretion under Section 12(1)(k) of Cap. 301, Laws of Kenya but always follow the event unless for good reasons otherwise ordered. We have no reason to deny costs to the landlord being the successful party.

29. In conclusion, the following final orders commend to us in this matter;

- a. The tenants' applications dated **26th August 2023** are hereby dismissed with costs.
- b. The landlord's references dated **2nd August 2023** are hereby allowed and the tenancy notices upheld.



c. The tenants shall pay all outstanding rent arrears to the landlord and vacate the suit premises in any event within the next Thirty (30) days hereof failing which they will be evicted therefrom by a licensed Auctioneer who shall be given security by the **OCS BUNGOMA POLICE STATION**.

d. The tenants shall each pay costs of **Kshs 10,000/=** to the Landlord in her respective references.

It is so ordered.

DATED, SIGNED & VIRTUALLY DELIVERED THIS 3RD DAY OF MAY 2024

HON GAKUHI CHEGE

PANEL CHAIRPERSON

HON JOYCE A OSODO

PANEL MEMBER

In the presence of :

The landlord in person

No appearance of Tenants

