



**Namuseyi v Mukoyani (Tribunal Case . E081 of 2021)
[2023] KEBPRT 30 (KLR) (Civ) (30 January 2023) (Judgment)**

Neutral citation: [2023] KEBPRT 30 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
CIVIL
TRIBUNAL CASE . E081 OF 2021
GAKUHI CHEGE, VICE CHAIR
JANUARY 30, 2023**

BETWEEN

MOSES NAMUISEYI TENANT

AND

BRIAN MUKOYANI LANDLORD

JUDGMENT

1. The Landlord served the tenant with a notice to terminate his tenancy over his business premises with effect from 1st day of February 2022. The notice is dated 19th November 2021 and is based on the grounds that the tenant had refused to pay rent and was in rent arrears of Kshs.45,000/-. The landlord also indicates that he wishes to use the premises and required the tenant to pay all rent in arrears and vacate therefrom.
2. Being opposed to the said notice, the tenant filed a reference dated 1st December 2021 on the same date. On 2nd June 2022, the matter came up for hearing and the landlord submitted that the tenant owed him Kshs.60,000/- in rent arrears. The tenant responded that he had paid rent up to May 2022 and had evidence to that effect. He stated that he had filed the evidence and was surprised that the documents were not in the court file. He stated that he was ready to provide evidence of rent payment.
3. The matter was therefore slated for mention on 5th July 2022 for parties to file their documents. On 5th July 2022, the matter came up for mention but both parties had not filed their witnesses statements and documents. As a result, the matter was adjourned to 17th August 2022 for them to file and exchange witnesses statements. The tenant was directed to continue paying rent.
4. On 17th August 2022, when the matter came up for mention, it was noted that both parties had complied with Order 11 of the Civil Procedure Rules and the matter was therefore fixed for hearing of the reference on 28th September 2022.



5. The tenant filed his witness statement dated 30th June 2022 and the landlord on the other hand filed a list of documents namely Rent payment records and Mpesa statement on 16th June 2022 and subsequently a witness statement on 13th July 2022. On 29th November 2022, the tenant filed his further list of documents dated 25th November 2022 attaching his own statement of rent account.
6. The parties adopted their statements and documents during the hearing conducted on 1st December 2022. The landlord testified first and the tenant followed.
7. The landlord in his filed statement and evidence in court testified that the monthly rent payable by the tenant is Kshs.4000/- and is always paid through Mpesa. From 2019, the tenant's payment of rent became intermittent and inconsistent as per the rent statement filed on 13th June 2022 and Mpesa statement attached thereto. By the date of recording the said statement, the tenant owed Kshs.87,050/- in rent arrears.
8. Upon being cross-examined by the tenant's counsel, the landlord stated that the tenant entered into the premises in the year 2016 August. His rent was still Kshs.4000/-. By 19th November 2021, the tenant owed the landlord Kshs.45,000/-. The landlord stated that he kept records of rent payment. The tenant paid rent through Mpesa. The rent records start from 2019.
9. The landlord denies that the tenant moved to a smaller room. It was his evidence that all rooms attract rent of Kshs.4000/- per month. The payments of less than Kshs.4000/- made by the tenant were part of the rent for various months made but not full rent. The landlord denied any cash payments in respect of rent.
10. On his part, the tenant adopted his witness statement recorded on 30th June 2022 together with his list of documents enumerated above and produced as exhibits. In his recorded statement, the tenant states that he has been the landlord's tenant since April 2016 to date. Between April 2016 to 2019, the tenant states that he occupied 2 rooms at a monthly rent of Kshs.4000/-. From August 2019 to date, he has been in occupation of one room paying Kshs.3000/- per month.
11. It is the tenant's evidence that the landlord has been receiving rent either through Mpesa or cash whenever the Landlord goes to his business and takes money from the tenant. From September 2016 to April 2018, the tenant testified that he paid rent via Mpesa and that the landlord was being insincere when he denies receiving rent in cash and in particular from the tenant's shop.
12. According to the tenant, the landlord had failed in his statutory duty of issuing rent receipts for the last 6 years and failing to keep a rent book as required. He denies owing Kshs.45,000/- in rent arrears. It is the tenant's case that the landlord is the author of his own misfortune by failing to keep a rent book and is not issuing receipts.
13. According to the tenant, based on the Mpesa statements, he has only paid Kshs.212,500/- in rent out of a possible Kshs.270,000/-. As such, the landlord appear to be generously foregoing a payment of Kshs.57,500/- in expected rent. The tenant argues that no landlord can allow a tenant to stay in his shop for 19 months without rent. He denies owing the landlord any rent.
14. In cross-examination, the tenant maintained that he pays rent in Mpesa and cash. He stated that he started paying rent via Mpesa in September 2016. He stated that his rent is Kshs.3000/- from August 2019 to date. He also stated that his rent account statement had a mistake as it indicates that all payments are made in cash.



15. On 1st December 2022, the tenant was ordered to avail his original Mpesa statement for the period 26th June 2022 to 5th April 2017. However by the time of writing of this judgment, the statement had not been availed.
16. I am required to determine the following issues in this matter:-
 - (a) Whether the landlord's notice to terminate tenancy dated 19th November 2021 ought to be approved or dismissed.
 - (b) Whether the landlord is entitled to recover any rent arrears from the tenant and to vacant possession of the suit premises.
 - (c) Who is liable to pay costs of the reference?.
17. Section 4(2) of Cap. 301, Laws of Kenya stipulates that 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 to the tenant in the prescribed form.
18. Section 7(1) (b) of the said Act provides one of the grounds for seeking to terminate tenancy by a landlord to be a tenant's default in paying rent for a period of two months after such rent has become due or payable or has persistently delayed in paying rent which has become due or payable. This is one of the grounds cited by the landlord.
19. The second ground cited by the landlord is that he intends to put the premises into his own user. However, no evidence has been tendered to prove the said ground including the intended use the landlord proposes to put the premises into. The ground therefore fails.
20. As regards the second ground of non-payment of rent, the landlord has produced a document he calls in his list of documents "payment Booklet". It dates from 2019 to 15th June 2022, the landlord states that the tenant owed Kshs.83,050/-
21. The said arrears are tabulated as follows:-

2019- Kshs.26,050.00

2020 – Kshs.26,000.00

2021 – Kshs.20,000.00

2022 – June Kshs.11,000.00

Total Kshs.83,050.00
22. In the year 2019, the tenant only paid Kshs.21,950/- out of expected rent of Kshs.48,000/-. In 2020 he paid Kshs.22,000/- out of expected rent of Kshs.48,000/- in 2021 he paid Kshs.28,000/- out of expected total of Kshs.48,000/-. In the year 2022 up to June the tenant had only paid Kshs.13,000/- out of an expected total of Kshs.24,000/-. The said accounts are backed by Mpesa statement for the period 2nd January 2019 to 2nd June 2022 in respect of the Landlord's Mpesa account no. 07214xxxxx.
23. Although, the tenant was served with the tenant's documents aforesaid, none of the entries has been disputed or controverted. Instead, the tenant argues that from August 2019, he occupied one room in the landlord's premises at a rent of Kshs.3000/- having moved from the original two rooms. However, there is no evidence on record to prove that the tenant moved from one place to another within the landlord's premises. It would appear that even in the months of August, September, November and December 2019, the tenant only paid Kshs.2000/- per month as opposed to the purported rent of



- Kshs.3000/-. No agreement for lower rent has been exhibited by the tenant to prove the alleged lower rent.
24. In any case, Section 4(3) of [Cap. 301](#), Laws of Kenya provides as follows:-
- “(3) A tenant who wishes to obtain a reassessment of the rent of a controlled tenancy or the alteration of any right or service enjoyed by him under such a tenancy shall give notice in that behalf to the landlord in the prescribed form”.
25. No such notice or order for reassessment of rent payable by the tenant from the initial agreed sum of Kshs.4000/- to Kshs.2000/- has been exhibited by the tenant and I find and hold that the rent payable for the suit premises has always remained at Kshs.4000/-.
26. The tenant through his statement of account appears to suggest that most of the times, the rent payable to the Landlord was made in cash at his own shop. No acknowledgement of whatever nature has been exhibited and the Landlord has stated that all rent payments are made through Mpesa which has been proved through the Landlord’s Mpesa statements from January 2019 to June 2022. Why would the tenant pay cash if some payments were being made through Mpesa without receiving any rent payment receipts?.
27. Section 107 (1) of the [Evidence Act](#), Cap. 80 Laws of Kenya provides as follows:-
- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”.
28. Section 108 of the same Act provides as follows:-
- “The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side”
29. The tenant claims to have made cash payments to the Landlord without providing any iota of evidence on how the same was made. Not a single witness has been called to corroborate the tenant’s evidence of such payments. I am doubtful about the said claims and I refuse to be swayed in favour of the tenant’s narrative.
30. The Landlord’s rent account statement have proved that the tenant is guilty of persistent and irregular payment of rent and I have every reason to believe the landlord’s evidence that the tenant was indebted to him in the sum of Kshs.83,050/- as at 1st June 2022 and the ground of default of payment of rent for more than two (2) months has been proved on a balance of probabilities. As such, the Landlord is entitled to vacant possession in respect of the suit premises.
31. As regards costs, the same are in the Tribunal’s discretion under Section 12(1) (k) of [Cap. 301](#), Laws of Kenya but always follow the event unless for good reasons otherwise ordered. I have no reason to deny the Landlord costs of the reference.
32. In conclusion, the final orders which commend to me in this case are:-
- (a) The landlord’s notice of termination of tenancy dated 19th November 2021 is approved and the tenant’s tenancy is hereby ordered terminated forthwith.



- (b) The tenant shall deliver vacant possession of the suit premises and in default shall be evicted therefrom by a licensed Auctioneer who shall be accorded security by the OCS Webuye Police Station.
- (c) The tenant shall pay the rent arrears of Kshs.83,050/- as at 1st June 2022 together with any additional accrued rent up to date and the landlord is authorized to use lawful means to recover the same prior to or at the time of the tenant's eviction from the suit premises.
- (d) The Landlord is awarded costs of Kshs.15,000/- against the tenant.

It is so ordered.

RULING DATED, SIGNED & DELIVERED VIRTUALLY THIS 30TH DAY OF JANUARY 2023.

HON. GAKUHI CHEGE

VICE CHAIR

BUSINESS PREMISES RENT TRIBUNAL

Ruling delivered in the presence of:

Miss Theuri holding brief for Wanyonyi for the Tenant

No appearance for the Landlord.

