



**Real Agencies Limited v Nguthi (Tribunal Case E105 of 2023)  
[2023] KEBPRT 655 (KLR) (17 October 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 655 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E105 OF 2023  
GAKUHI CHEGE, CHAIR  
OCTOBER 17, 2023**

**BETWEEN**

**REAL AGENCIES LIMITED ..... APPLICANT**

**AND**

**GERALD WACHIRA NGUTHI ..... RESPONDENT**

**RULING**

1. The tenant moved this Tribunal by way of a notice of motion dated 30<sup>th</sup> January 2023 seeking that the status quo order as to the rental payments currently standing at Kshs.11,300/- in respect of the shop on Plot No. 5 118/223 Naromoru be issued pending hearing and determination of the reference.
2. The Tenant also sought for injunction to be issued restraining the landlord from interfering with its quiet peace and enjoyment of the suit premises aforesaid and that the OCS, Naromoru Police Station or officers under his command to ensure compliance.
3. It also seeks for an order for assessment of rent payable in respect of the suit premises together with an order for striking out the landlord's notice dated 8<sup>th</sup> January 2023.
4. According to the grounds on the face of the application, the landlord issued the Tenant with an un-procedural, irregular and illegal notice hiking the rent payable in respect of the suit premises. The tenancy being controlled and/or protected is subject to the operation of the law. The tenant objected to the notice as it did not comply with mandatory provisions of Cap. 301, Laws of Kenya.
5. Interim orders of injunction were granted pending hearing inter-partes on 17<sup>th</sup> March 2023. The landlord filed a replying affidavit sworn on 4<sup>th</sup> May 2023 wherein it is deposed that the application is founded on bad faith as the tenant had accumulated rent arrears amounting to Kshs.52,000/- by the end of April 2023. A notice of termination of tenancy dated 27<sup>th</sup> September 2022 was served and took effect on 1/1/2023 whereupon an application dated 3<sup>rd</sup> April 2023 was filed vide Nyeri BPRT Case No. E034 of 2023.



6. All the other two (2) tenants complied with notice to increase rent but the Applicant herein failed to do so. It is thus disputed that the notice was served in January 2023.
7. According to the landlord, the said notice is legal as it complies with Cap. 301, Laws of Kenya. The landlord deposes that it is now 10 years since the last rent increment. As such, the increment of rent from Kshs.11,000/- to Kshs.25,000/- was necessary due to the high cost of living.
8. The tenant is accused of being stubborn, uncooperative and a stumbling block to any positive negotiations, consensus and/or mutual agreement and was also adamant to sign a lease agreement. The landlord states that he was not involved in renewal of the tenant's contract with Safaricom.
9. The tenant is further accused of renovating the suit premises without the landlord's authority or written agreement and the costs incurred ought to be disregarded as he is not entitled to compensation.
10. The tenant filed a supplementary affidavit sworn on 18<sup>th</sup> July 2023 stating that the tenant sent a letter dated 25<sup>th</sup> January 2023 objecting to the landlord's irregular and illegal notice and as such was not obliged to comply with Section 6(1) of Cap. 301, Laws of Kenya.
11. It is deposed that the notice dated 27<sup>th</sup> September 2022 was served on 8<sup>th</sup> January 2023 and it is annexed to the tenant's affidavit of 30<sup>th</sup> January 2023 as annexure "NM-3".
12. The tenant filed grounds of opposition to the application in Nyeri BPRT No.E034 of 2023. The Tenant contends that the rent increment from 1<sup>st</sup> July 2013 was effected pursuant to elaborate and cordial negotiations between the parties.
13. According to the tenant, the tenancy notice served by the landlord was contrary to section 4(5) of Cap. 301 as it does not specify the grounds upon which the landlord seeks to increase the monthly rent payable. The need for strict compliance was emphasized in the case of Lall – vs- Jeypee investment Ltd (1972) EA 512.
14. The affiant denies being stubborn, uncooperative and a stumbling block to positive negotiations on the rent payable at a negotiated market price.
15. It is deposed that the continued acceptance of rent after the termination notice and lease expiry created a periodic controlled tenancy of month to month under section 60(2) of the Land Act, 2012 in line with the decision in Nancy Njeri Gitau & Another – vs- James Muchone Njuga & Another (2021) eKLR.
16. It is further deposed that the landlord has always been aware of the tenant's contract with Safaricom PLC and that the affiant informed the landlord about the conditions for renewal of the contract which information was disregarded forcing the tenant to incur the renovation costs.
17. In Nyeri BPRT No.E034 of 2023, the landlord moved this Tribunal seeking for orders to compel the tenant to pay outstanding rent arrears together with an order terminating the tenancy. He also seeks for vacant possession or the tenant's eviction therefrom. In regard to rent arrears, the landlord seeks for distress for rent through an authorized auctioneer and that the OCS, Narumoru Police Station provides security.
18. The application is supported by the landlord's affidavit sworn on 3<sup>rd</sup> April 2023 and the grounds on the face thereof wherein it is pleaded that the tenant was served with notice to increase rent dated 26<sup>th</sup> September 2022 on the following day. The notice sought to increase rent from Kshs.11,000/- to Kshs.25,000/- per month with effect from 1<sup>st</sup> January 2023.



19. The tenant did not comply with the notice neither did he file an objection. All the other tenants complied with the notice to increase rent. By 3<sup>rd</sup> April 2023, the tenant was in arrears of Kshs.38,100/-.
20. The application is opposed through grounds of opposition dated 19<sup>th</sup> May 2023 in which the tenant contends that the application is an abuse of court process brought with the sole purpose to delay and obstruct justice and circumvent due process.
21. The tenant contends that the application is subjudice under Section 6 of the Civil Procedure Act in view of Nairobi BPRT No. E105 of 2023 over the same subject matter which was instituted before. According to the tenant, the landlord's hands are soiled and he is not entitled to equitable orders. As such, the application ought to be dismissed or struck off with costs.
22. Both applications were directed to be canvassed by way of written submissions. However, only the tenant's counsel complied.
23. I am now required to determine the following issues:-
  - a. Whether the tenant's application dated 30<sup>th</sup> January 2023 ought to be allowed or dismissed.
  - b. Whether the landlord's application dated 3<sup>rd</sup> April 2023 ought to be allowed or dismissed.
  - c. Who is liable to pay costs?
24. The dispute herein arose from a notice of increment of rent dated 27<sup>th</sup> September 2022 in which the landlord sought to increase rent from Kshs.11,300/- to Kshs.25,000/- with effect from 1<sup>st</sup> January 2023 every month.
25. According to the tenant in its director's supplementary affidavit of 18<sup>th</sup> July 2023, the said notice was served on 8<sup>th</sup> January 2023 which makes it unprocedural, irregular and illegal.
26. I have looked at the notice marked "NM-3" annexed to the tenant's supporting affidavit and noted that it bears the stamp of this Tribunal on the left hand top corner with a date of 26<sup>th</sup> September 2022. The affidavit of service by Julius Kariuki Mundia a court process server annexed to the landlord's affidavit in support of the application dated 3<sup>rd</sup> April 2023 shows that the notice was served on 27<sup>th</sup> September 2022.
27. The landlord deposes that his two other tenants who were similarly served with notices to increase rent complied on due date which explains why only the tenant herein has a dispute with him. The notice attached to the tenant's application is similar to that attached to the landlord's application.
28. The tenant did not seek to call the process server for cross-examination on the contents of the affidavit of service despite having been served with the application dated 3<sup>rd</sup> April 2023.
29. In the case of secretary & Another – vs- Lucia Ndinda Musyoka t/a Jocia Stores (2019) eKLR, the court followed the decision in Joseph Nathaniel Kipruto Arap Ngok & Another – vs- EABS Bank Limited (2014) e KLR where it was held at paragraphs 26 & 27 as follows:-
  - “26. In the case of Miruka – vs- Abok & Another (1990) KLR 541, the process server was cross-examined about the service of summons which the defendants had disputed.
  27. In that case, Omolo J. (as he then was) quoted with approval the following words of Plat J.A In Baiwo – vs- Bach (1957) KLR 89,



“There is a qualified presumption in favour of the process server recognized in MB Automobile – vs- Kampala Bus Service (1966) EA 480 at page 484, as having been the view taken by the Indian Courts in construing similar legislation. On Chitale and Annaji Rao “The code of Civil Procedure “Vol. II page 1670, the learned commentators say:

3. Presumption of service

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 if the fact of service is denied, it is desirable that the process server should be put in the witness box and opportunity of cross examination given to those who deny the service”.

30. In absence of an application made by the tenant to cross-examine the process server of the notice of increment of rent, I have no reason to doubt the contents of the affidavit of service aforesaid and I find and hold that service was made on 27<sup>th</sup> September 2022 as deposed therein.
31. The tenant did not file a reference as stipulated under Section 6(1) of Cap. 301, Laws of Kenya and the notice to increase rent therefore took effect on 1<sup>st</sup> January 2023 in terms of Section 10 of Cap. 301, Laws of Kenya.
32. Once the notice took effect, this Tribunal has no basis to interrogate whether the increment was justified or not as that would only have been possible had a reference been instituted against the notice in accordance with Section 6(1) of Cap. 301, Laws of Kenya. I have not been shown any reference instituted under the said provisions within the required period.
33. In the case of Saheb – vs- Hassanally (1981) eKLR at page 4/7, the court of appeal had the following to state in regard to application of Section 10 of Cap. 301 Laws of Kenya:-

“In my opinion, it is clear that under the terms of Section 10, if a valid notice is not referred, the landlord is entitled to possession without having to prove any of the statutory grounds relied upon in the notice”.
34. Section 4(2) of Cap. 301, Laws of Kenya provides as follows:

“(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 in that behalf to the tenant in the prescribed form”.
35. I have looked at the impugned notice and the same is in the prescribed form, it clearly states that the same is for increment of rent from Kshs.11,300/- to Kshs.25,000/-. The grounds set out in Section 7 of the Act only relate to termination notices and therefore need not be cited in a notice for increment of rent by a landlord. I find and hold that a notice to increase rent need not cite any grounds upon which the increment is sought. Had the notice been challenged however, the landlord would have been required to justify the increment by filing a valuation for rent assessment report with comparables for similar premises within the same locality. In absence of any challenge of the notice of increment of rent issued by the landlord, I do not see how he is expected to justify the increment. I shall not treat the tenant’s application dated 30<sup>th</sup> January as a reference under section 6(1) of Cap. 301 Laws of Kenya



in view of Regulation 5 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Tribunal (forms and Procedure) Regulations, 1966 which provides as follows:

“ 5. Reference to the Tribunal under Section 6(1) of Section 12(4) of the Act shall be in Forms B and C in the schedule to these Regulations”.

36. I note that annexure dated 27<sup>th</sup> January 2023 attached to the tenant's application dated 30<sup>th</sup> January 2023 attracted a fee of Kshs.60/- only and in my considered view ought to have been filed within two (2) months of service of the notice of increment of rent dated 26<sup>th</sup> September 2022. No leave was sought before filing the purported reference out of time in line with the proviso to section 6(1) of Cap. 301, Laws of Kenya.
37. In the premises, I find and hold that there is no valid reference against the notice of increment of rent which took effect on 1<sup>st</sup> January 2023 and nothing prevents the landlord from enforcing rent at the new rate of Kshs.25,000/- per month.
38. In the light of the foregoing, the tenant's application dated 30<sup>th</sup> January 2023 has not merit and is a candidate for dismissal.
39. As regards the landlord's application dated 3<sup>rd</sup> April, 2023, there is no notice by the landlord to terminate the tenancy herein and therefore prayers 3,4,5,7 and 8 cannot be granted. The only prayer that ought to issue is prayer 2 thereof as there is no reason to deny the landlord a return on his investment based on the new rent of Kshs.25,000/- with effect from 1<sup>st</sup> January 2023. I shall allow the said application to that extent.
40. In regard to costs, the same are always at this Tribunal's discretion under Section 12(1)(k) of Cap. 301, Laws of Kenya but always follow the event. I have no reason to deny costs to the landlord being the successful party.
41. In conclusion, I shall make the following final orders in this case:-
  - a. The tenant's application dated 30<sup>th</sup> January 2023 and the reference dated 27<sup>th</sup> January 2023 are hereby dismissed with costs.
  - b. The landlord's application dated 3<sup>rd</sup> April 2023 is allowed in terms of prayer 2 with costs.
  - c. The landlord's costs against the tenant in the two matters herein are assessed at Kshs.30,000/- all inclusive.

It is so ordered.

**RULING DATED, SIGNED & VIRTUALLY DELIVERED THIS 17<sup>TH</sup> DAY OF OCTOBER 2023.**

**HON. GAKUHI CHEGE**

**FOR: CHAIRMAN**

