



**Otieno v Ogaga (Tribunal Case E004 of 2022)
[2023] KEBPRT 1212 (KLR) (23 May 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 1212 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E004 OF 2022
CN MUGAMBI, CHAIR
MAY 23, 2023**

BETWEEN

MILLICENT OTIENO APPLICANT

AND

CHARLES OBONDI OGAGA RESPONDENT

RULING

Introduction

1. The Landlord's notice to terminate tenancy dated 3rd December 2021 is brought on the grounds;-
"That the landlord wants to undertake massive renovations and repairs on the business premises which will not be possible if the tenant is still in occupation."
2. The tenant, unwilling to comply with the said notice filed his reference to the Tribunal dated 3.1.2022.
3. This matter proceeded for hearing on 20.2.2023 when both parties testified in support of their cases.

The Landlord's case

4. The landlord relied on his statement dated 5.12.2022 and the list of documents dated the same day. The landlord's statement was adopted as his evidence in chief and his list of documents admitted in evidence as the landlord's exhibit Nos. 1 to 5.
5. The landlord's statement may be summarized as follows;-
 - a. That the Applicant has been the Respondent's tenant since the year 2012 paying a monthly rent of Kshs. 3,500/=.



- b. That the landlord has issued the tenant with a notice to terminate tenancy whose effective date is 1.2.2022, the reason for terminating the tenancy is articulated under paragraph 3 of the notice.
 - c. That the premises was constructed in 1988, the roof has since rusted, the floor and the walls have since depreciated and therefore require massive renovation which cannot be carried out while the tenant is in occupation.
 - d. That during the construction of the Kisii-Oyugis Highway, Murram was heaped at the entrance of the premises and during heavy down pour, (rain) there are inflows into the premises causing further damage.
 - e. That the tenant has not paid the rent of December 2021.
 - f. That the landlord has no malicious intentions to evict the tenant and the landlord further states that he is entitled to renovate his premises only after issuing the appropriate notice.
 - g. The landlord therefore prayed that the tenant's reference be dismissed.
6. Upon cross examination by counsel for the Tenant, the landlord stated as follows;-
- a. That the landlord has four other tenant's in the suit premises.
 - b. That it is the landlord who issued the notice dated 11.11.2020 to the tenant.
 - c. That the tenant refused to attend a meeting at the Oyugi's Chamber of Commerce on 8.6.2022.
 - d. That on 3.12.2022, the tenant was served with a notice to terminate tenancy.
 - e. That the landlord has the permission of the Homabay County Government to carry out the renovations upon the said premises but had no evidence of the said permission in court.
 - f. That it is the tenants who informed the landlord that the roofs of the suit premises were leaking.
 - g. That the Public Health officers did not inspect the premises.
 - h. That the landlord had no photos of the building materials at the premises.
 - i. That although the landlord has the financial ability to carry out the construction, he had not filed any (bank) statements to that effect.
 - j. That the other tenants vacated the premises to give room for the renovations and came back after the repairs.
 - k. That the landlord did not damage the suit premises.
 - l. That the landlord removed iron sheets that Safaricom was painting on the premises while this matter was still pending.

The Tenant's case

- 7. The tenant adopted her statement dated 30.11.2022 and the list of documents were duly produced as the tenant's exhibit Nos. 1-0. The tenant's statement may be summarized as follows;-
 - a. That the tenant does not owe the landlord any rent.
 - b. That the landlord has issued illegal notices to the tenant.



- c. That on 17.12.2021, the tenant was served with a notice to terminate tenancy in the office of the OCS Oyugis and on 22.12.2021 the tenant wrote a letter to the landlord informing the landlord that he would not comply with the notice.
 - d. That the suit premises do not need any repairs and even the Public Health Department has not demanded for any repairs.
 - e. That the landlord's notice is malicious and borne of envy.
 - f. That even after the landlord hiked the rent to Kshs. 5,000/=, the tenant still complied and paid the same.
 - g. That the repairs the landlord wants to carry out on the premises can be done while the tenant is in the premises, as the landlord has carried out repairs for two tenants while they were still in the premises.
 - h. That the landlord has not demonstrated he has obtained the necessary approvals to carry out the renovations he alleges to intend to carry out.
 - i. That the suit premises is in good condition except the verandah that needs some renovations.
 - j. That the landlord, removed iron sheets from the roof of the building while this case was ongoing and he has not returned the same.
8. Upon cross examination by counsel for the landlord, the tenant stated as follows:-
- a. That the landlord served her with the notice to terminate tenancy but the tenant did not vacate the premises.
 - b. That she does not know when the suit premises was constructed.
 - c. That the repair of the verandah does not affect the building.
 - d. That the tenant has a lot of responsibilities and customers and that is why he does not want to vacate the premises.
 - e. That the tenant thinks that the landlord wants her out of the premises because the tenant is doing well.
 - f. That the landlord can repair the suit premises while the tenant is still in the suit premises.
 - g. That it is the tenant who allowed the painting of the suit premises by Safaricom.
 - h. That the tenant will vacate the suit premises if the court orders that he vacates.

Analysis and determination

- 9. The only issue that arises for determination is whether the landlord has established sufficient grounds to warrant the termination of the tenancy between him and the tenant.
- 10. The landlord has raised the following issues for determination: _
 - i. Whether the landlord has issued a valid notice to terminate the tenancy upon the tenant?
 - j. Whether the landlord's notice to terminate the tenancy should be approved or upheld.
 - k. Whether the tenant's reference should be dismissed.



11. The tenant has raised similar issues for determination and I will therefore adopt the issues as set out above and determine the same.

Whether the Landlord has issued a valid notice to terminate the tenancy upon the Tenant

12. The landlord's notice to terminate tenancy is the one dated 3.12.2021. It is brought under the provisions of Section 4(2) of [Cap 301](#). I do find that it satisfies the requirements of Section 4(4) and 4(5) of the [Act \(Cap 301\)](#). The grounds upon which the landlord seeks to terminate the tenancy are not provided for under Section 7 of [Cap 301](#). For good measure, the tenant's counsel has reproduced Section 7 of [Cap 301](#) in their submissions and I have perused the same.
13. The landlord's notice to terminate is brought on the grounds that; the landlord intends to undertake massive renovations and repairs which repairs would not be possible if the tenant is still in occupation of the premises. Is this ground provided for under Section 7 of the [Act \(Cap 301\)](#)?

Section 7(4) of [Cap 301](#) provides as follows;-

“That on the termination of the tenancy, the landlord intends to demolish or reconstruct the premises, comprised in the tenancy or a substantive part thereof or to carry out substantive work of construction on such premises or part thereof and that he could not reasonably do so without obtaining possession of such premises.”

14. Whereas the landlord's notice is not in the exact and express terms under Section 7(4) of [Cap 301](#), I understand the landlord to have issued the notice pursuant to the said provisions and I also think that the tenant did not suffer any prejudice in the circumstances simply because the exact wording of the [Act](#) was not duplicated in the notice. I therefore do not find any merit in this challenge and proceed to hold that the notice to terminate tenancy dated 3.12.2021 is valid and proper.

Whether the Landlord's notice to terminate tenancy should be approved or upheld

15. The landlord's evidence in support of his grounds for termination of rent are amongst others, that the suit premises were constructed in 1988, the roof has since rusted and the floors and the walls have depreciated and therefore require massive renovations. The only other reasons I get from his statement are that the premises belong to him and he is entitled to renovate the same and that the only thing he is required to have done is to issue the termination notice to the tenant which he has already done.
16. The landlord has in further support of his case produced photographs of the premises. Whereas the iron sheets are indeed appearing rusty, not much else can be gleaned from the said photographs.
17. The landlord during cross examination confirmed that he had no evidence in court to prove that he had the permission of the Homabay County Government to carry out the renovations upon the suit premises. He further confirmed that the Public Health officers had not inspected the premises.
- It was confirmed on cross examination that although the landlord alleged to have the financial muscle to carry out the massive repairs, he had no proof of the same by way of any bank statements.
18. I do not think in the circumstances the landlord has established a settled and firm intention to carry out any massive repairs as indicated in his notice to terminate tenancy. This conclusion is buttressed by the earlier notices issued by the landlord to the tenant. In the notice to vacate dated 11.11.2020, the landlord stated as follows:-

“RE: Notice to vacate



Dear Sir/Madam,

Due to reasons including peaceful co-existence at my plot among other reasons, you are hereby given a notice requiring you to move out of my plot, your notice begins from 1st November 2020 to 1st February 2021. Failure to which further action will be taken at your own cost.”

signed

19. It would therefore appear that the reasons for the termination are not entirely for the purposes of a massive construction and repairs on the suit premises. I am therefore not convinced that the tenant needs to leave the premises for the carrying out of any repairs. I further do not think the repairs to be carried out on the verandah require the tenant to be out of the premises. The landlord’s assertion that the roof, walls and floors need to be massively repaired and reconstructed has not been established by the evidence presented before the Tribunal. I am not satisfied the intention to reconstruct is genuine and in this regard, I am guided by the case of; *Auto Engineering Ltd v M. Gonella & Co. Ltd* (1978) eKLR where the court stated;-

“For this purpose, the court must be satisfied that the intention to reconstruct is genuine and not colourable, that it is a firm and settled intention, not likely to be changed, that the reconstruction is of a substantial part of the premises, indeed so substantial that it cannot be thought to be a device to get possession, that the work is so extensive that it is necessary to get possession of the holding in order to do it, and that it is intended to do the work at once and not after a time....”

20. On this issue, I therefore find that; the landlord has not proved the grounds of termination set out in his notice of termination of tenancy.

Whether the Tenant’s Reference should be dismissed?

21. In view of my finding that the landlord has not established the grounds for termination of tenancy set out in his notice to terminate the said tenancy, it follows that the reference has merit and is therefore allowed with costs.

Final disposition

22. Further, in view of my findings above, I do make the following orders.
- That the tenancy notice dated 3.12.2021 shall be of no effect.
 - The tenant’s reference dated 3.1.2022 is allowed in the above terms in (a).
 - The landlord shall bear the costs of the reference assessed at Kshs. 30,000/= which the tenant shall be at liberty to deduct from the rent unless the landlord pays the same.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 23RD DAY OF MAY 2023

HON. CYPRINA MUGAMBI

CHAIRPERSON

23.5.2023

In the absence of the parties.

