



**Gacheru v Kiura t/a Njuki Imwe Hardware (Tribunal Case  
E003 of 2024) [2024] KEBPRT 801 (KLR) (7 May 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 801 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E003 OF 2024  
N WAHOME, CHAIR & JOYCE MURIGI, MEMBER  
MAY 7, 2024**

**BETWEEN**

**DANSON MURIITHI GACHERU ..... APPLICANT**

**AND**

**ANGELO NJERU KIURA T/A NJUKI IMWE HARDWARE ..... TENANT**

**RULING**

1. These proceedings were originated by the Reference dated 5<sup>th</sup> January, 2024 said to be brought under Section 12(4) of the Landlord and Tenant (Shops, Hotels and Catering Establishments Act (Cap 301). The grievances raised by the Landlord in the Reference are that;-  
  
“The Tenant has failed to pay rent when it is due and failed to comply with notice. Has failed to vacate the premises despite notice duly served.”
2. The notice alluded to in the Reference is the Landlord’s notice to terminate the tenancy dated 22.9.2023 and which was to take effect on the 1.12.2023. The grounds stated for the termination were that;-
  - i. You have defaulted in paying rent and you are in arrears amounting to Kshs. 41,640/=.
  - ii. You have failed/refused to pay rent when it is due and payable.
  - iii. Ensure to clear the outstanding rent arrears and any rent due.
3. The Reference was accompanied by a notice of motion of even date and which was founded on a certificate of urgency. The motion sought for the following reliefs;-
  - i. Spent



- ii. That the Honourable court to hereby grant the Applicant leave to levy distress against the Tenant to recover Kshs. 81,000/= up to October, 2023.
  - iii. That the Honourable court be pleased to grant the Applicant/landlord vacant possession for failure on the part of the Tenant to file a Reference after being served with a notice to vacate.
  - iv. That costs of the Application be provided for.
4. The landlord/Applicant also filed the submissions dated 10.3.2024. The case for the landlord is that:-
- a. The Respondent/Tenant was a serial rent payment defaulter who owed Kshs. 41,640/= as at the time of the notice of termination dated 22.9.2023.
  - b. The rent arrears as at October, 2023 was Kshs. 81,000/= as claimed in the notice of motion Application dated 5.1.2024.
  - c. Tenant had also defaulted in payment of rent to his co-landlords namely Margaret Gacheru and Eunice Gacheru.
  - d. The Tenant's exhibits marked ANK 1 and ANK 3 were evidence enough of rents in arrears.
5. The landlord therefore sought to have the Tenant compelled to pay the rents in arrears as at March, 2024 at Kshs. 84,500/= and be ordered to deliver vacant possession of the demised premises. He also sought for costs.
6. On his part, the Tenant in response to the Reference and notice of motion dated 5.1.2024 filed the Replying affidavit sworn by himself on the 6.2.2024:-
- i. He denied that the Applicant was his landlord as pertains to title No. Embu Municipality 112/53.
  - ii. The Applicant was landlord to the Respondent jointly with Margaret and Eunice Gacheru and shared the monthly rent which was Kshs. 16,000/= at Kshs. 6,000/=: Kshs. 6,000/= and Kshs. 4,000/= respectively.
  - iii. He did not owe any rent arrears to Margaret and Eunice Gacheru and produced annexure "ANK1."
  - iv. That it was only in the months of April, May, October, November and December, 2023 during his sickness and that of his son that he never remitted rents to the Applicant.
  - v. He however in the month of December, 2023 paid the Applicant Kshs. 30,000/= to cater for the arrears (Annexure "ANK 2").
  - vi. At the time of his response on the 6.2.2024, he did not owe the Applicant or the other landlords any rent in arrears.
7. The Respondent therefore sought to have the Reference and motion both dated 5.1.2024 dismissed as lacking in any merit.
8. Having perused all the pleadings in this matter, we are of the view that the issues for determination in this matter are the following;
- A: Whether the notice of termination dated 5.1.2024 is lawful.
  - B: Whether the Applicant's Application dated 5.1.2024 is merited.



C: Who should bear the costs of this Application

**Issue No. A: Whether the Notice of termination dated 5.1.2024 is lawful**

9. Though the Tenant faintly denounced the Applicant from being his landlord, the evidence on record show otherwise. In his replying affidavit sworn on the 6.2.2024, the Tenant recognizes the Applicant as his landlord together with Margaret and Eunice Gacheru. The Tenant also admits paying the Applicant Kshs. 30,000/= in rent arrears on 11.12.2023- Annexure “ANK2” and also to having paid him rents for January and February, 2024 – Annexure “ANK3.” It is therefore inexplicable how the Tenant would deny the Applicant as one of his landlords.
10. That assertion is therefore found wanting especially when looked against the definition of landlord as provided for under Section 2(1) of the Act. The same provides thus;-

“Landlord in relation to a Tenancy, means the person for the time being entitled, as between himself and the Tenant, to the rents and profits of the premises payable under the tenancy.”
11. Though the termination notice dated 22.9.2023 is compliant in terms of Sections 4(2) and 4(4) of the Act and Regulation 4(1) of the Regulations to the Act in terms of form and content, I doubt that the same satisfies the requirements of Section 7(1)(b) of the Act. The same provides that as a ground of termination of tenancy;-

“The Tenant has defaulted 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.”
12. In this matter, there are three (3) landlords, two of them namely; Margaret and Eunice Gacheru have not complained of any rent in arrears owed to them by the Tenant. They have also not demonstrated any intention to terminate the Tenancy by the Respondent.
13. On his part, the Applicant issued a notice of termination dated 22.9.2023 which presumably took effect on the 1.12.2023. However, on the 11.12.2023 through the Tenant’s annexure “ANK2” the Landlord was committing not to interfere with the tenancy. One clause of the annexure provided that;-

“That by consent of the parties, the landlord will not evict the Tenant forcefully or otherwise vide orders of Tribunal Case No. E072 of 2023.”
12. Pursuant to annexure “ANK3” by the Tenant, the Applicant is signing for receipt of rents for the months of January and February, 2024. Therefore, by the conduct of the parties, even if the Tenancy had terminated on the 1.12.2023 and which I highly doubt, the same had been effectively restored.
13. Our doubts are further informed by the contradictions in the evidence offered by the Applicant on the purported rent arrears. In the notice of termination dated 22.9.2023, he alleged that the rent in arrears was Kshs. 41,640/=. However, in the notice of motion dated 5.1.2024, he claimed that the same had shot up to Kshs. 81,000/= by October, 2023. This was barely a month later and his share of rent per month is only Kshs. 6,000/=. This was an impossibility.
14. Further, in his supporting affidavit sworn on the 5.1.2024, the Applicant had alleged that the monthly rent payable on the premises was Kshs. 20,000/= only.



It was to later admit in his submissions dated 10.3.2024 that it was actually Kshs. 16,000/=. With this kind of evidence, it is impossible to conclude that there was any rent in arrears at the time the notice of termination dated 22.9.2023 was issued to the Respondent.

15. Section 107(1) of the Evidence Act provides that:-

“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 these facts exist.”

16. The Applicant in ou view has failed to offer evidence on a balance of probabilities to show that the Tenant was in rent arrears of at least two (2) months at the time the notice of termination of tenancy was issued on the 22.9.2023.

17. We also do note that the said notice would not have been effective when not issued jointly by the Applicant and the other landlords namely Margaret and Eunice Gacheru. There is no evidence that the demised premises was in distinct shares which could be separated if the Applicant’s notice was effected. That then demonstrates conflicting interests of the landlords which can only be resolved in favour of the Tenant.

18. The upshot of all these is that the notice of termination of tenancy dated 22.9.2023 is unlawful and without any effect in law.

#### **Issue No. B: Whether the Applicant’s Application dated 5.1.2024 is merited.**

19. We have already determined that the Applicant has not succeeded in demonstrating the amount owed to him in rent arrears if at all. It has also been resolved that the notice of termination dated 22.9.2023 has no effect in law. This renders the two prayers in the notice of motion to sequential failure.

20. It is however noted that in the annexure marked “ANK2” which is recognized by both parties, that on payment of Kshs. 30,000/= to the Applicant some rents in arrears were still left due to him. The agreement provided that:-

“The Tenant is granted leave to settle the outstanding arrears on or before 31.1.2024.”

21. There is no evidence as to how much that rent in arrears was. No prove has further been provided that the rents for March, April and May, 2024 have been paid. I would therefore direct both parties to reconcile their rental accounts and report to the court in thirty (30) days with such reconciliation of accounts, the Reference herein and dated 5.1.2024 will with that confirmation also stand resolved in the same terms as the Application herein.

#### **Issue No. C: Who should bear the costs of this Application**

22. The Applicant has succeeded to show that the Tenant has in some instances fallen into arrears on rent payment. He is however to blame for poor management of his rent account with the Tenant. The Tenant has also succeeded in defeating the tenancy notice. Both parties have been partial winners in this legal duel. We would therefore order that each party do bear own costs.

23. In the final analysis, the orders that commend to us are the following:-

- (a) That the notice of termination dated 22.9.2023 is declared unlawful and of no legal effect.
- (b) That the parties will within thirty (30) days reconcile the rental payment account and report back to court with a view to recording a settlement on the Reference dated 5.1.2024.



(c) That each party shall bear own costs of this Application.

Those are the orders of the court.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 7<sup>TH</sup> DAY OF MAY, 2024.**

**HON. NDEGWA WAHOME, MBS - PANEL CHAIRPERSON**

**BUSINESS PREMISES RENT TRIBUNAL**

**AND**

**HON. JOYCE MURIGI - MEMBER**

**BUSINESS PREMISES RENT TRIBUNAL**

Ruling delivered in the presence of the landlord and in the absence of the Tenant and Counsel

**Court:** Matter for mention on the 14.06.2024 for further directions

