



**Mwabweni & 4 others v Nzaro (Tribunal Case E182 of 2023)
[2024] KEBPRT 671 (KLR) (16 April 2024) (Judgment)**

Neutral citation: [2024] KEBPRT 671 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E182 OF 2023
N WAHOME, MEMBER
APRIL 16, 2024**

BETWEEN

**SALIM MASHAKA MWABWENI 1ST TENANT
MARIAM JOHN 2ND TENANT
BASILIO MUGWIKI 3RD TENANT
HASSAN DUBOW 4TH TENANT
CHARLES MAKORI 5TH TENANT**

AND

SAID EDWARD NZARO LANDLORD

JUDGMENT

1. The landlord issued notices to terminate the tenancies of all the five (5) Applicants. All the notices were standard and/or similar and were said to be brought under Section 4(2) of the Landlord and Tenant (Shops, Hotels & Catering Establishments Act (Cap 301) hereinafter “the Act.”
2. The grounds upon which the termination was sought were that;-
 - i. Failure to pay rent as agreed in tenancy agreement for a period of over one (1) year.
 - ii. Breach of Tenancy agreement by illegal expansions and subletting the premises beyond the agreement.
 - iii. The Landlord wants to use/occupy the premises for his own purpose.



3. All the Applicants filed a joint Reference dated 29.7.2023 with a prayer that;-
- “We therefore request the Tribunal to investigate the matter and determine the issues involved.”
4. By consent of the parties, status quo at the demised premises was agreed to be sustained and by that, the Application dated 31.7.2023 was dispensed with. The parties were to dispose off the Reference by way of oral evidence and thereafter file submissions on issues of law.
5. Over and above, the Reference and Application dated 31.7.2023, the Applicants had also through the 1st Applicant filed the witness statement dated 8.01.2024, the written submissions dated 26.2.2024 and the list of authorities thereof dated 26.2.2024.
6. The Landlord on his part filed the Replying affidavit sworn on the 4.9.2023, his witness statement dated 15.1.2024, the list of documents of even date and the submissions dated 16.2.2024. I have perused all the pleadings and evidence by the parties above.
7. The Applicants testified through the 1st Applicant Mr. Salim Mashaka Mwabweni. He is the head Tenant. He adopted his witness statement dated 8.1.2024 as evidence. He also produced the list of documents of even date and the documents were marked as exhibits No. 1 and 2.
8. The evidence of the Tenant was that;-
- He had a tenancy agreement with the landlord to build a hotel on a podium at the landlord's premises at the rent of Kshs. 6,000/= per month.
 - Later on, the landlord allowed him to build stores at the same plot at an extra rent of Kshs. 1,000/= making total rental obligations at Kshs. 7,000/= per month.
 - That he build six (6) stores and rented out five (5) while gifting one to the landlord at his request.
 - He used about Kshs. 700,000/= to build the six stores and was to recover the same by retaining Kshs. 3,500/= from the rent payable to the landlord.
 - He had only recovered Kshs. 238,000/= leaving a balance of Kshs. 462,000/= and needed more time to recover the same.
 - He owed the landlord Kshs. 159,000/= in rent arrears for reason that he had declined to receive the same.
 - The claims by the landlord were a disguise to evict him as he had not stated what business he intended to run at the premises and for how long.
 - The lease was entered into in May, 2018. The total rent paid to the landlord through Mpesa statements was Kshs. 31,250/=-, but had infact paid him Kshs. 78,500/=-.
 - The one store he gave to the Respondent is used as a butchery.
 - The Respondent has been interfering with his stores and has denied him the right to install a Tenant in one of the stores.
 - Had at one point reported the Respondent to the police for interfering with his tenancy.
 - It is the landlord who has been declining to receive rent and he had not demanded for rent arrears nor sought to levy distress.



9. The Applicants therefore sought that the termination notices be nullified.
10. On his part, the landlord testified as Landlord Witness No. 1. (LLW1) and closed his case. His evidence is that;-
 - i. He adopted his statement dated 15.1.2024 as his evidence and produced the list of documents of even date as exhibits No. 1 to 4.
 - ii. In May, 2018, he rented out a podium at his premises for the 1st Applicant to build a hotel at the monthly rent of Kshs. 7,000/=.
 - iii. The Applicant has only paid him Kshs. 31,250/= for the five (5) years and seven (7) months that he has been a Tenant.
 - iv. He gave the notice of termination dated 24.5.2023 to the 1st Applicant and the 2nd to 5th Applicants who are the subtenants of the 1st Applicant.
 - v. The reason for the termination is the non-payment of rent, erection of illegal structures and that he wanted same for personal use.
 - vi. The 1st Applicant had collected Kshs. 1,444,000/= from the sub-tenant which he claimed.
 - vii. He had not rejected to receive any rent and the 1st Applicant did not pay rent even when ordered by the court.
 - viii. The 1st Applicant had already recovered the alleged Kshs. 700,000/= he had used to put up the structures though the same was without his authority.
 - ix. He had not complained about the construction of the six (6) stores and saw them when being constructed.
 - x. The 1st Applicant vacated the demised premises and only collects rent from the sub-tenants.
 - xi. The Kshs. 7,000/= rent was for the hotel built on the podium but did not include the stores.
11. Having perused all the materials placed before me, I am of the view that the issues for determination are;-
 - A: Whether the notice of termination dated 24.5.2023 by the landlord is valid.
 - B: Whether the Reference dated 29.7.2023 has merit.
 - C: Who should bear the costs of the suit.

Issue No. A: Whether the notice of termination dated 24.5.2023 by the landlord is valid
12. At the outset, I find that the 2nd to 5th Applicants had no obligation to pay any rent to the Respondent. The 1st Applicant has indeed not claimed any non-payment of rent by them. Therefore, that ground in respect of the 2nd to 5th Applicants fails.
13. The Respondent also did not offer any iota of evidence that the 2nd to 5th Applicants had erected any structures on his property. The 1st Applicant confirmed to have erected the six (6) stores on the demised property with the consent of the Respondent. The Respondent has admitted knowledge of the construction of the six (6) stores and did not deny being a beneficiary of one of the stores. Therefore, the 2nd ground of termination in respect of all the Tenants fails.



14. The 3rd ground of termination is that the landlord intends to use the demised premises himself. If you include the hotel, there are seven (7) business units at the landlord's property. The landlord did not indicate what he needed to use each and every of the business units for. He also did not indicate the kind of preparedness he had put in place to establish such business or businesses including financial foundation for such intention.
15. Section 7(1)(g) of the Act allows for termination of tenancy on grounds that the landlord intends to personally occupy the premises for a period of not less than one year. The provision specifically provides as follows:-

“Subject as hereinafter provided, that on the termination of the tenancy the landlord himself intends to personally occupy the premises for a period of not less than one year the premises comprised in the tenancy for the purposes, or partly for the purposes of a business to be carried on by him therein, or at his residence.”
16. In the case of; Auto Engineering Ltd vs Gonella & Company [1978] eKLR, the court on the issue held that;-

“Apart from making a mere assertion that he intends to occupy the premises for a period of not less than one year, the landlord's intention can be gauged from the surrounding circumstances which lead a court to find on a balance of probabilities that the landlord has established such an intention.”
17. Further, in the case of; Hashim Omar Hashim vs Alliance Nominee Ltd [2020] eKLR, the court rendered itself thus;

“I am in the circumstances of this case, ready to infer that the landlord wishes to use the premises for more than one year based partly on the reason that the landlord disclosed the nature of the business he intended to operate and the amount of money intended to be spent which is Kshs. 20-30 million ...”
18. I would therefore find that the landlord has failed to establish this ground for purposes of termination of all the Applicants' tenancies.
19. However, on the first ground for termination as against the 1st Applicant, I am persuaded that the landlord has been able to proof this particular ground. Though in the notice of termination of the tenancy the amount of rent arrears was not stated. The Tenant himself admitted to owing the landlord Kshs. 159,000/= in rent arrears. I am not sure that the same is liquidated to date despite several court orders to that effect.
20. Further, from the evidence produced in court by the 1st Applicant himself, he had only paid Kshs. 31,250/= for the five (5) years and seven (7) months that he had been at the landlord's premises. this was the only available evidence on payment.
21. I do not accept the invitation to the arena that the landlord had declined to receive rent. I note that the Tenant had difficulty in paying the same even when he was granted authority by this court to do so.



22. Section 7(1)(b) of the Act provides the following as a ground for termination of tenancy;-

“That the tenant has defaulted in paying rent for a period of two (2) months after such rent has become due or has persistently delaying in paying rent which has become due or payable.”

23. The rent arrears as admitted by the 1st Applicant himself at Kshs. 159,000/= at the monthly rent of Kshs. 7,000/= was for a period of almost twenty-four (24) months. I therefore reiterate that the notice of termination dated 24.5.2023 is lawful as against the 1st Applicant and that the same took effect on the 31.7.2023.

24. I would also wish to say that I am unable to calculate the rent that may be owed to the landlord in totality or the actual cost of the construction of the six (6) stores. I however note that both parties had essentially settled on Kshs. 700,000/= as the cost of such construction. It is also not in contest that the five (5) stores brought in Kshs. 25,000/= per year. That sums up to about Kshs. 2,350,000/=. I would consider the 1st Applicant sufficiently compensated for his ingenuity and innovation. On the other hand, the landlord having not complied with Section 3(3) of the Act, I can only award him the rent as admitted by the Tenant together with mesne profit thereof at the same rate effective the 1.8.2023. The Section provides that;-

“The landlord of a controlled tenancy shall keep a rent book in the prescribed form, of which he shall provide a copy for the Tenant and in which shall be maintained a record, authenticated in the prescribed manner, of the particulars of the parties to the tenancy and the premises comprised therein, and the details of all payments of rent and of all repairs carried out to the premises.”

25. Lastly on the Issue of proof of the actual rent arrears, the cost of the renovations or the terms of the oral agreement is not clear. I would say that both parties were hovering in the darkness and the best I could do is to infer possible logic in the circumstances and make application of the law. This is to say that on those triple issues except where admissions have been made or intentions drawn, the parties were unable to proof any other aspects of their respective cases pursuant to Section 107(1) of the [Evidence Act](#). That provision 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 those facts exist.”

Issue No. B: Whether the Reference dated 29.07.2023 has merit

26. I have already confirmed that the Reference is merited as it relates to the 2nd to 5th Applicants. The same has failed in respect of the 1st Applicant and the notice of termination dated 24.5.2023 therefore took effect on the 31.7.2023.

Issue No. C: Who should bear the costs of this suit

27. Both the Applicants and the Respondents have succeeded in one way or another. The landlord's notice has been upheld as relates to the 1st Applicant. It has also failed as relates to the 2nd to 5th Applicants. On their part, the 2nd to 5th Applicants have succeeded against the landlord. It is a draw so to say. I would direct that each party do bear own costs.

28. In the final analysis, the orders that commend to me are the following;-



- a. That the notice of termination of tenancy dated 24.5.2023 is upheld in respect to the 1st Applicant namely Salim Mashaka Mwabweni but is dismissed as against the 2nd to 5th Applicants.
- b. That the 1st Applicant shall pay all the rents in arrears as admitted at Kshs. 159,000/= and all other accrued mesne profits at the same rates as the rent that was payable on the premises.
- c. That each party shall bear own costs of this suit.

Those are the orders of the court.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF APRIL, 2024.

HON. NDEGWA WAHOME, MBS

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

Judgment delivered in the presence of Mr. Mariaria for the Landlord/Respondent and
Mr. Mwawasaa for the Tenant/Applicants

FURTHER ORDER

Copy of the Judgment to be supplied to the parties on payment of the requisite court fees.

HON. NDEGWA WAHOME, MBS

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

