



**Muruthi v Njuki (Tribunal Case E057 of 2023)  
[2023] KEBPRT 1221 (KLR) (18 September 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 1221 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E057 OF 2023  
P MAY, MEMBER  
SEPTEMBER 18, 2023**

**BETWEEN**

**ALLAN KANYUA MURUTHI ..... LANDLORD**

**AND**

**SOLOMON NJUKI ..... TENANT**

**RULING**

**Background**

1. The landlord issued the tenant with the notice to terminate tenancy dated 25<sup>th</sup> January, 2023 and which was to take effect as from 1<sup>st</sup> April, 2023. The grounds given in the notice issued is that the tenant had defaulted in paying rent, had illegally sublet the premises and has failed to pay water bills when they fell due.
2. The notice of termination of tenancy seems to have failed to elicit any response or action from the tenant and the notice period lapsed on 1<sup>st</sup> April, 2023. This prompted the landlord to file a reference dated 3<sup>rd</sup> April, 2023 seeking the intervention of the Tribunal as the tenant had failed to vacate the premises. The landlord also filed a notice of motion under certificate seeking to have the tenant compelled to pay the outstanding rent arrears and yield up vacant possession.
3. The application was opposed vide the Replying affidavit sworn on 25<sup>th</sup> May, 2023. The parties elected to canvass the application by way of written submissions.

**Landlord's case**

4. The landlord's application was premised on the grounds set out on the face of it and the further grounds enunciated in the supporting affidavit which I shall summarize hereunder:



5. The landlord stated that he had served the tenant with a lawful notice to vacate the tenancy premises. It was the landlord's contention that the tenant had failed to vacate the premises upon the lapse of the notice period and had failed to settle water bills.
6. The landlord averred that the tenant had unlawfully sublet the demised premises and was ill bent in ensuring that he frustrates him and denies his right to repossess the demised premises.

#### **Tenant's case**

7. The tenant in their response admitted to having been served with the notice to terminate the tenancy but was quick to state that the same was served upon them on 1<sup>st</sup> April, 2023. He maintained that he had always paid rent as when it fell due and that the allegations of being a habitual rent defaulter were untrue.
8. The tenant stated that since the landlord had accepted the rent paid after termination, there was created a periodic tenancy as provided under Section 60(2) of the [Land Act](#). The tenant also challenged the jurisdiction of the Tribunal stating that it only covered tenancy that had lasted for 5 years and not 28 years as is the case herein (sic). He therefore prayed that the application be dismissed with costs.

#### **Analysis**

9. The present dispute revolves around the notice of termination issued by the landlord dated 25<sup>th</sup> January, 2023. Before I determine the merits or otherwise of the notice, practice dictates that I have to address the question of whether the Tribunal is clothed with the jurisdiction to hear and determine the dispute as the same has been challenged by the tenant. This Tribunal is a creature of statute and only has jurisdiction to determine disputes emanating from controlled tenancies. Controlled tenancy is defined under Section 2 of [Cap 301](#).
10. Section 2, of the [Act](#) states:-

“a controlled tenancy” means a tenancy of a shop, hotel or catering establishment-

- a) which has not being reduced into writing; or
- b) which has been reduced to writing and which-
  - i. is for a period not exceeding five years; or
  - ii. contains provision for termination otherwise than for breach of covenant, within five years from commencement thereof; or
  - iii. relates to premises of a class specified under subsection (2) of this section:

Provided that no tenancy for which the Government, the Community or local authority is a party, whether as a landlord or tenant, shall be a controlled tenancy.

“A shop” means premises occupied wholly or mainly for the purposes of a retail or wholesale trade or business or for purpose of rendering services for money or money's worth.



“A tenancy” means a tenancy created by a lease or underlease, by an agreement for a lease or underlease, by a tenancy agreement or by operation of law, and includes a sub-tenancy but does not include any relationship between a mortgagor and a mortgagee.

“A tenancy notice” on the other hand, means a notice given under subsection (2) or subsection (4) of the Act.

11. I have analyzed the above provisions against the attached agreement which was entered into sometimes in 1994. The brief agreement was reduced into writing but did not stipulate the term of the lease thus felt within the ambit of controlled tenancy. The arguments advanced by the tenant is erroneous and one that is least expected from a represented litigant.
12. Having found that the Tribunal is clothed with jurisdiction, I will now proceed to deal with the validity of the notice of termination. The orders sought will either fail or succeed on the foundation of the validity of the notice of termination. At the onset, the tenant has disputed being served with the notice earlier. I have taken note that there is an affidavit of service which even though disputed, the tenant has not taken any step known in law to have it impugned and expunged.
13. In *Shadrack Arap Baiywo – Vs – Bodi Bach* [1987] eKLR, the Court of Appeal held as follows:-

“There is a presumption of services 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 an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross examination given to those who deny the service.”(own emphasis)
14. In light of the foregoing, it is my finding that the tenant having failed to disprove service, the notice of termination was duly served as stated in the affidavit of service sworn by Samuel Omari. I will now assess the validity of the notice of termination.
15. The position of the law on the issue of a termination notice is now settled. The Court in *Manaver N. Alibhai T/A Diani Boutique vs. South Coast Fitness & Sports Centre Limited*, Civil Appeal No. 203 of 1994, stated that: -

“The Act lays down clearly and in detail, the procedure for the termination of a controlled tenancy. Section 4(1) of the Act states in very clear language that a controlled tenancy shall not terminate or be terminated, and no term or condition in, or right or service enjoyed by the tenant of, any such tenancy shall be altered, otherwise than in accordance with specified provisions of the Act. These provisions include the giving of a notice in the prescribed form. The notice shall not take effect earlier than 2 months from the date of receipt thereof by the tenant. The notice must also specify the ground upon which termination is sought. The prescribed notice in Form A also requires the landlord to ask the tenant to notify him in writing whether or not the tenant agrees to comply with the notice.”
16. It is evident that the notice of termination of the tenancy herein was in Form A as prescribed by the Act. Further, the notice of termination of the tenancy was to take effect on 1<sup>st</sup> April 2023, being a period exceeding two months as required by the Act.



17. The Landlord has been able to prove that he served notice of termination of tenancy upon the tenant who instead of filing a reference, waited for the notice period to lapse and thus exposed himself to the provisions of Section 10 of [Cap. 301](#), Laws of Kenya which is in the following terms: -

“Where a landlord has served a notice in accordance with the requirements of section 4 of this [Act](#), on a tenant, and the tenant fails within the appropriate time to notify the landlord of his unwillingness to comply with such notice, or to refer the matter to a Tribunal then subject to section 6 of this [Act](#), such notice shall have effect from the date therein specified to terminate the tenancy, or terminate or alter the terms and conditions, thereof or the rights or services enjoyed thereunder”.

18. At this juncture, it is prudent to rehash the provisions of Section 6 (1) of the [Act](#) which clearly state as follows:

“A receiving party who wishes to oppose a tenancy notice, and who has notified the requesting party under section (5) of this [Act](#) that he does not agree to comply with the tenancy notice, may, before the date upon which such notice is to take effect, refer the matter to a Tribunal, whereupon such notice shall be of no effect until, and subject to, the determination of the reference by the Tribunal:

Provided that a Tribunal may, for sufficient reason and on such conditions as it may think fit, permit such a reference notwithstanding that the receiving party has not complied with any of the requirements of this section.” (Emphasis provided)

19. For avoidance of doubt, Section 2(1) defines a “receiving party” as “a tenant or a landlord of a controlled tenancy to whom a tenancy notice is given”.
20. From the aforesaid provision, therefore, the recipient of a tenancy notice may elect to do one of four things. Either: -
- a. Do nothing;
  - b. Serve an objection upon the requesting party voicing his disagreement with the changes proposed in the tenancy notice then do nothing further or;
    - a. Send an objection and lodge a reference before the tribunal for a formal determination of the dispute or;
    - a. Fail to send an objection but proceed to lodge a reference in the tribunal.
21. Where a reference is lodged, as in (c) and (d) above, the tenancy notice is suspended from taking effect pending the hearing and determination of the reference by the tribunal. Section 6(1) above makes this abundantly clear. It is only the filing of a reference which suspends time with regard to the tenancy notice. (The only aspect that serves to suspend time with regard to the tenancy notice is the filing of a reference). Any other act short of lodging a reference not even service of an objection has no effect on the running of time stipulated in the notice.
22. In our opinion, in the absence of a reference, duly lodged in the Tribunal and served by the tenant, the contention that a controlled tenancy continued to exist even upon the lapse of the stipulated notice period is erroneous. Without the reference, the controlled tenancy comes to an end the minute the



notice period specified in the notice lapses, whereupon there will be no longer a Landlord/Tenant relationship.

23. Having failed to file a reference to the said notice, this Tribunal cannot interrogate whether the reasons for termination given by the Landlord in his notice were justified or not.

### **Disposition**

24. In light of the findings above, the following orders commend itself:
- a. The notice of termination dated 25<sup>th</sup> January, 2023 is upheld.
  - b. The landlord's reference dated 3<sup>rd</sup> April, 2023 is allowed to the extent that the tenant shall yield up vacant possession of the demised premises by 1<sup>st</sup> November, 2023.
  - c. The tenant shall clear any outstanding rent arrears and utility expenses incurred within 7 days from the date hereof. In default the landlord shall be at liberty to commence any lawful recovery process without further reference to the Tribunal.
  - d. The OCS Bondeni Police Station to ensure compliance with the above orders where necessary.
  - e. The landlord is awarded costs assessed at Kshs. 23,500/-

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 18<sup>TH</sup> DAY OF SEPTEMBER 2023.**

**HON. P. MAY - MEMBER**

**18.10.2023**

In the presence of Ms Dae for Chege for the Tenant/Respondent

No appearance for the Applicant/Landlord

