



**Maluki v Zavery (Tribunal Case E1189 of 2022)
[2023] KEBPRT 81 (KLR) (Civ) (17 March 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 81 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
CIVIL
TRIBUNAL CASE E1189 OF 2022
GAKUHI CHEGE, VICE CHAIR
MARCH 17, 2023**

BETWEEN

KENNY MUTHOKA MALUKI TENANT

AND

MAAD ZAVERY LANDLORD

RULING

1. Through a complaint dated December 15, 2022, the tenant moved this Tribunal under section 12(4) of [cap. 301](#), Laws of Kenya claiming that the landlord had served notice of termination of tenancy dated September 9, 2022 which was invalid since expiry of a tenancy was not a good reason to terminate tenancy as both parties had by conduct continued as landlord and tenant over time.
2. He also complains that the landlord was guilty of various landlord-tenant misconduct and breaches like failing to keep a rent book and failure to issue receipts among others. The landlord is accused of harassing the tenant by unleashing auctioneers to levy distress contrary to section 12(h) of [cap. 301](#), with a view of evicting him without following the law.
3. The landlord is also accused of refusal to accept rent for the ensuing months and for acting in bad faith with a view to terminate tenancy.
4. The tenant therefore seeks that the notice to terminate tenancy dated September 9, 2022 be declared invalid and the landlord be restrained from unlawfully evicting him or levying distress without following due process. He also seeks for an order that the landlord refunds Kshs.33,000/- for unlawfully attempting to evict him and pay costs of the reference.



5. The tenant also filed a motion of even date seeking for interim restraining orders against the landlord from evicting him on the basis of the invalid and incompetent notice issued on September 9, 2022 until further orders of this Tribunal. He also seeks that the said notice be declared invalid and incompetent.
6. The application is supported by the affidavit of tenant sworn on December 15, 2022 wherein it is deposed that the parties entered into a lease agreement in respect of plot No.2/Kitui Municipality in 2015 at a monthly rent of Kshs.25,000/-. The premises are an open compound with two houses where the tenant conducts a warehousing business and a godown ever since.
7. The tenant has annexed evidence of payment of rent to the landlord through E. Kinyanjui & Co. Advocates as “JP-001 (a)-(c)” and JP-003 (a) – (c)”. He however deposes that the landlord has been harassing him by sending Auctioneers to extort money as evidenced by annexure “JP-002”.
8. On September 9, 2022, the landlord served a notice of termination of tenancy which the tenant claims was issued without following the law and statutory period required for such notice.
9. According to the tenant, he is opposed to the notice because there were no justifiable reasons to terminate the tenancy relationship and the notice is invalid and incompetent.
10. He deposes that even if it is assumed that the tenancy agreement had expired, it is not a justifiable cause to terminate the tenancy because by the parties conduct they have always renewed it by continuing in business as if there was a tenancy. The landlord is accused of acting unreasonably by refusing to renew the tenancy on flimsy grounds.
11. A cheque No.00976 for Kshs.100,000/- issued in favour of the landlord was returned. It is annexed as “JP-003 (a) and the forwarding letter and return letter “JP-003 (b) & (c) “respectively.
12. Interim orders were given on December 21, 2021 b- arising the landlord from evicting the tenant pending hearing inter-partes on January 20, 2023.
13. The application is opposed through the landlord’s replying affidavit sworn on January 18, 2023 wherein the tenant is accused of material non-disclosure by reason of failure to account for non-payment of increased rent of 10% per annum after every two years as per the tenancy agreement marked “MNZ-001” dated October 1, 2015.
14. The tenant is said to have filed Nairobi BPRT No.E523 of 2021 which was dismissed for want of prosecution as per annexure “MN2-002”.
15. According to the landlord, the notice to terminate tenancy served upon the tenant complied with section 4(2) of cap. 301 and the latter was free to notify him of any objection thereto but never did.
16. The tenancy agreement according to the landlord subsisted between October 1, 2015 to September 30, 2020 and there has been no intention of renewal. According to clause t of the tenancy agreement, no tenancy can be construed to have been created between the parties according to the landlord.
17. It is the landlord’s case that the issues herein were determined on December 9, 2022 and the Tribunal is now functus officio so far as the subject suit is concerned as evidenced by annexure marked “MN2-002”. The suit herein raises similar issues and the tenant is accused of coming to this Tribunal with unclean hands and bad faith. As such this case is said to be an abuse of court process meant to waste the Tribunal’s time.
18. The tenant filed a supplementary affidavit sworn on February 20, 2023 wherein it is deposed that the termination notice was served upon his advocate via email on September 29, 2022 and was objected



to on the same day. A reply to the notice of objection was done and the tenant annexes the email correspondence marked “SAF-001 & 002”.

19. The matter was directed to be disposed of by way of written submissions and both parties complied. I shall advert to the submissions while dealing with the issues for determination set out herein below.
20. Going by the pleadings, I am required to determine the following issues:-
 - a. Whether there exists a landlord/tenant relationship between the parties herein.
 - b. Whether the notice to terminate tenancy was valid and effective in law.
 - c. Whether this Tribunal is *functus officio*.
 - d. Whether the tenant is entitled to the reliefs sought in the complaint and application dated December 15, 2022.
 - e. Who is liable to pay costs of the suit?.
21. The relationship between the two parties herein was established vide a tenancy agreement entered into on October 1, 2015 over plot no. 2/Kitui Municipality for a period of 5 years subject to renewal on agreed terms.
22. It is therefore clear that by dint of section 2(1) of [cap. 301](#), Laws of Kenya, the tenancy relationship is a controlled one. It is not in dispute that the said agreement expired by effluxion of time on July 31, 2020. The same was not renewed in writing but the tenant continued to occupy the suit premises and to pay rent as and when the same fell due and payable without any objection by the landlord as evidenced by annexures marked “JP-001(a)-(c)”.
23. On September 9, 2022, the landlord served a notice of termination of tenancy under section 4(2) of [cap. 301](#), Laws of Kenya upon the tenant which was expressed to take effect on October 9, 2022 on the grounds that “the tenancy agreement was for a period of 5 years commencing on October 1, 2015 which terminated on October 1, 2020 with no renewal of agreement terms and as such the tenant ought to vacate the premises forthwith.
24. The landlord submits that clause (t) of the tenancy agreement dated October 1, 2015 was to the following effect:-

“No payments by the tenant howsoever made referable or on account of a period subsequent to the determination of the term hereby deemed or be construed as payment or acceptance of rent and the same shall not have the effect of creating a tenancy of the demised premises in favour of the tenant except where an agreement or tenancy in favour of the tenant is expressly and in writing created and entered into by the landlord”.
25. According to the landlord, the lease agreement having terminated by effluxion of time meant that the tenant was illegally occupying the suit premises from October 1, 2020 to date and any subsequent rent payments holds no ground. The landlord cites the decision of justice Mativo in [Euromec International Limited – vs- Shandong Taikai Power Engineering Company Limited](#) (2021) KEHC 93 where it was held as follows:-

“When a person signs a document, that signature should denote an intention to be bound by the terms and conditions embodied in the signed document.....



The first is the principle that public policy demand that contracts freely and consciously entered into must be honoured”.

26. Citing the decision of the court of appeal in [*Pius Kimaiyo Langat – vs- Cooperative Bank of Kenya Limited*](#) (2017) eKLR, the landlord maintains that it is not the business of courts to rewrite contracts between parties and that parties are bound by the terms of their contracts unless coercion, fraud or undue influence are pleaded and proved.
27. Section 60(2) of the [*Land Act*](#), 2012 provides as follows:-

“(2) A lessor who accepts rent in respect of any period after the lease has been terminated or the term of the lease has expired, shall not, by reason of that fact, be deemed to have consented to the lessee remaining in possession of the land or as having given up on any of the rights or remedies of the lessor against the lessee for breach of a covenant or condition of the lease and if the lessor continues to accept rent from a tenant who remains in possession for two months after the termination of the lease, a periodic lease from month to month shall be deemed to have come into force”
28. This provision of the law takes precedence over any other contract entered into by the parties as the same cannot be ousted through a private contract. To that extent, I find and hold that clause (t) of the tenancy agreement entered into between the parties herein is void to the extent that it offends section 60(2) of the [*Land Act*](#), 2012 and there exists a periodic tenancy between the two parties which is controlled.
29. The next issue is whether the notice to terminate tenancy served by the landlord upon the tenant is valid. The said notice is dated September 9, 2022 and is expressed to take effect on October 9, 2022 which is a period of only one (1) month.
30. Section 4(4) of [*cap. 301*](#), Laws of Kenya provides as follows:-

“No tenancy notice shall take effect until such date, not being less than two months after the receipt thereof by the receiving party, as shall be specified therein...”.
31. It is therefore clear that the notice served by the landlord offends the Act and is therefore null and void. It is a candidate for striking out.
32. The next issue is whether this Tribunal is functus officio. The doctrine of functus officio as correctly submitted by counsel for the landlord was defined in the case of [*Raila Odinga & others – vs- IEBC & others*](#) (2013) eKLR which followed the case of [*Jersey Evening Post Limited – vs- Al Thani*](#) (2002) JLR 542 at 550 as follows:-

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded and the court functus, when its judgment or order has been perfected. The purposes of the doctrine is to provide finality once proceedings are finality. Once proceedings are finally concluded, the court cannot review or alter its decision, any challenge to its ruling on adjudication must be taken to a higher court if that right is available”.



33. The landlord relies on annexures marked 'MNZ-002' and "MNZ-004" to show that there was a case no. E523/2022 (Nairobi) between the two parties on the same issues which was admittedly dismissed suo motto by the Tribunal. I have not seen the order of dismissal nor any ruling of the Tribunal.
34. My understanding of the doctrine of functus officio is that it applies to the same case between the parties which is determined on merit and fully executed. It cannot apply to different or subsequent proceedings between the same parties.
35. The notice of termination herein being invalid as I have held above cannot be allowed to stand and this Tribunal is enjoined by dint of cap. 301, Laws of Kenya to prevent illegal eviction of the tenant. In absence of any order upholding the said notice by any competent Court or Tribunal, I find and hold that the doctrine of functus officio does not apply to this case.
36. As regards whether the tenant is entitled to the reliefs sought in this case, I find that the notice of termination of tenancy having been declared null and void, the tenant was right to come for protection to this Tribunal from any illegal eviction from the suit premises. I am therefore satisfied on the authority of Aikman & others – vs- Muchoki & others (1982) eKLR that the tenant is entitled to this Tribunal's protection through an order of injunction.
37. In the said case, the court of appeal had the following to state at page 4/6:-

“.....The court ought never to condone and allow to continue a flouting of the law. Those who flout the law by infringing the rightful title of others and brazenly admit it ought to be restrained by injunction. If I am adding a new dimension for the grant of an interlocutory injunction, be it so. Equity will not assist law breakers”.
38. As regards costs, the same are always at the court's discretion under Section 12 (1) (k) of Cap. 301, Laws of Kenya but always follow the event unless for good reasons otherwise ordered. I have no reason to deny costs to the tenant.
39. In conclusion, the final orders which commend to me in this matter under Section 12(4) of Cap. 301, Laws of Kenya are:-
 - a. That there exists a landlord/tenant relationship between the Applicant and the Respondent over the business premises situate on L.R No. 2/Kitui Municipality which is controlled under Section 2(1) of Cap. 301 Laws of Kenya.
 - b. That the notice of termination of tenancy dated 9th September 2022 served upon the tenant by the landlord is null and void as it offends Section 4(4) of Cap. 301, Laws of Kenya and is hereby struck out.
 - c. That this Tribunal has jurisdiction to adjudicate and determine this matter as it is not functus officio.
 - d. That the tenant is entitled to an order of injunction against the landlord restraining him from evicting or interfering with his peaceful occupation and use of the suit premises without adhering to the provisions of Cap. 301, Laws of Kenya.
 - e. That no other termination notice will issue in the next twelve (12) months in line with Section 9 (3) of Cap. 301, Laws of Kenya.
 - f. The tenant is awarded costs assessed at Kshs.30,000/- against the landlord which shall be deducted from the rent account.



It is so ordered.

RULING DATED, SIGNED & VIRTUALLY DELIVERED THIS 17TH DAY OF MARCH 2023.

HON. GAKUHI CHEGE

VICE CHAIR

BUSINESS PREMISES RENT TRIBUNAL

Ruling delivered in the presence of:

Miss Marltim for the Tenant

No appearance for the Landlord

