



**Karasha v Karasha (Tribunal Case E415 of 2022)
[2023] KEBPRT 5 (KLR) (10 January 2023) (Judgment)**

Neutral citation: [2023] KEBPRT 5 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E415 OF 2022
GAKUHI CHEGE, VICE CHAIR
JANUARY 10, 2023**

BETWEEN

ALFRED SANKALE KARASHA APPLICANT

AND

SIMON JOSEPH KARASHA RESPONDENT

JUDGMENT

1. The Landlord named herein served a tenancy notice dated April 21, 2022 seeking to terminate the Applicant's tenancy over the business premises known as "laiser Farmers Bar & Restaurant" erected on Title no Ngong/Ngong Town Block 2/88 with effect from July 1, 2022.
2. The grounds upon which termination is sought are:-

"That the landlord intends to carry out extensive renovations to the premises comprised in the tenancy or a substantial part thereof which he cannot reasonably do without obtaining possession of the premises".
3. Being opposed to the notice, the tenant filed a reference dated May 16, 2022 against it together with a motion and supporting affidavit wherein it is deposed that there was an ownership dispute between the landlord and the tenant pending before the court of appeal vide Appeal case No E710 of 2021 whose record of appeal had been served on December 1, 2021. The said appeal arose from the judgement of Kajiado ELC case No 39 of 2019.
4. It is the tenant's case that he has not been paying rent as he believes that he is the rightful owner of the suit premises and had filed the instant case before this Tribunal as the notice to vacate served upon him was a prescribed notice from the Tribunal.



5. It is thus prayed that this Tribunal should therefore order the landlord to wait for the court of appeal decision before issuing any notice to vacate the suit premises. It is further pleaded that it is in the interest of natural justice, equity and conscience if the application and prayers sought were granted.
6. Through a ruling delivered on September 16, 2022, this Tribunal dismissed the Tenant's motion dated May 16, 2022 and directed both parties to comply with order 11 of the Civil Procedure Rules within Thirty (30) days thereof. The matter was therefore fixed for mention on October 25, 2022 to confirm compliance.
7. On September 25, 2022, this Tribunal directed that the matter proceeds by way of written submissions under section 9(1) of Cap 301, Laws of Kenya which mandates the Tribunal to conduct an inquiry rather than a hearing with both counsels being required to address the tenancy notice and preliminary objection together. The matter was therefore fixed for mention on November 25, 2022 to confirm compliance and fixing of a judgment date.
8. In compliance with orders of September 16, 2022, the tenant filed a notice of preliminary objection dated October 24, 2022 and a list of documents of even date. It is the Applicant's contention that the notice to terminate tenancy dated April 21, 2022 is fatally defective, incompetent in law, frivolous and vexatious.
9. He further contends that there is no tenant and landlord relationship between him and the Respondent as there was neither a tenancy nor a lease agreement between the parties and the Applicant does not pay any rent whatsoever to the Respondent.
10. It is also reiterated that the suit premises is subject of an ownership dispute between the Applicant and the Respondent in Nairobi Civil Appeal No E710 of 2021 whose record of appeal was served upon the Respondent's advocates on December 1, 2021.
11. The Applicant contends that BPRT case No 70 of 2017 (Kajiado) between the parties herein over the suit land was dismissed due to the pendency of Nairobi ELC Suit No 1064 of 2013 which was transferred to Kajiado court as ELC No 39 of 2019 against whose judgment the Applicant appealed vide Nairobi Civil Appeal Case No E710 of 2021.
12. As such, it is averred that this Tribunal does not have jurisdiction to determine issues relating to ownership of the suit premises and as such, the notice to terminate tenancy ought to be dismissed with costs in absence of a tenancy agreement between the parties.
13. Among the documents in the list filed by the Applicant is an order given on December 19, 2017 in BPRT No 70 of 2017(Kajiado) where it was ordered inter-alia that the tenant gives vacant possession of the business premises located on plot No 2/88, Ngong/Ngong immediately and in default OCS, Ngong Police Station to enforce eviction. The tenant was also to pay the landlord costs of Kshs 10,000/-.
14. On the other hand, the landlord relies on the replying affidavit sworn on June 17, 2022 in response to the supporting affidavit and further affidavit sworn on May 16, 2022 and May 24, 2022 by the tenant. He states that he is the registered proprietor of land parcel known as Title no. Ngong/Ngong Town Block 2/88 whereon he built a business premises in the 1960's.
15. He named the building erected by him on the suit property as "Laiser Farmer's Bar & Restaurant".
16. After the Applicant who is his biological son lost his job with Uchumi Supermarket Limited in early 1990's, he took over the business premises which had been previously been rented to another tenant



- for a reserved rent. The said takeover was on the landlord's initiative and the Applicant was to run the business on similar rental arrangement.
17. The applicant only paid rent for three(3) months after assuming occupation of the suit premises but thereafter failed to make payments.
 18. In the year 2013, the Applicant filed Nairobi (Milimani) ELC No 1064 of 2013 which was later transferred to Kajiado as ELC Case no 39 of 2019(Originating summons) seeking to be registered as owner of Title no Ngong/Ngong Town Block 2/88 by way of adverse possession as per annexure marked 'SJK2'.
 19. He deposes in his supporting affidavit sworn on August 26, 2013 at paragraph 5,6, & 7 as follows:-
 - "4. That the property which is situated within the geographical area of Ngong Township is specifically known as Laiser Farmers Bar & Restaurant" plot number Ngong/4480/45 (originally known as Ngong Township/Block2/88) which measures approximately 0.0287 hectares (annexed hereto and marked as 'SK-2' is a copy of the lease).
 5. That sometime in the year 1990, the property was handed over to the Applicant and from that time onwards, the Applicant, who is the son to the Respondent has been continuously and without any interruption been running the business for his livelihood and that of his family and now the Respondent without any good reason and/or justifiable cause is unlawfully and irregularly still registered as the proprietor of the property.
 6. That from the time when it was handed out to him, the Applicant has continued running the business of "laiser farmers Bar & Restaurant" to date in his name (annexed hereto and marked as 'SK-3(a), (b), (c) and (d)" are the liquor licence no 275 088 dated March 26, 1990 and a bundle of photographs to this effect)".
 20. According to the landlord, the tenant in his sworn affidavit testified and admitted that the suit property was handed over to him in 1990 and had run the business uninterrupted and that since there was no contractual agreement between him and the landlord, he mistakenly understood that he had been gifted the suit premises. The said suit was finally dismissed and the court held that the Applicant entered the suit premises with permission of the landlord and run the business in the same name used by the latter since the 1960's.
 21. It is the Respondent's contention that although the Applicant had filed appeal against the said judgment in the court of appeal, there was no order to bar him from terminating the tenancy by the said court and this Tribunal cannot assume jurisdiction to do so.
 22. The landlord contends that he seeks to terminate the tenancy as he intends to carry out construction works on a substantial part of the now dilapidated structure comprised in the tenancy which cannot be reasonably carried out without obtaining possession.
 23. The landlord has attached as annexures "SJK5(a) (b), (c) and (d) copies of Approval for Development permission, bank statement, instructions to contractor and their acceptance respectively.
 24. Both counsels filed submissions on the reference and preliminary objection which I shall consider together with the issues for determination set out below.



25. Based on the pleadings, the following issues arise for determination:-
- (a) Whether this Tribunal has jurisdiction to hear and determine this reference.
 - (b) Whether the landlord's tenancy notice dated April 21, 2022 ought to be approved or dismissed.
 - (c) Who is liable to pay costs of the Reference?
26. This Tribunal's jurisdiction is donated by the [landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#) Cap 301 Laws of Kenya in respect of controlled tenancies.
27. Section 2(1) of the said Act defines a controlled tenancy to mean "a tenancy of shop, hotel or catering establishments-
- (a) "Which has not been reduced into writing or
 - (b) Which has been reduced into 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 the commencement thereof Or
 - (iii) relates to premises of a class specified under sub-section (2) of this section"
28. The term "tenant" is defined under the same provision to mean:-
- ".....the person for the time being entitled to the tenancy whether or not he is in occupation of the holding and includes a sub-tenant".
29. The term 'Landlord' is defined in the same legal provision to mean:-
- ".....the person for the time being entitled as between himself and the tenant to the rents and profits of the premises payable under the terms of the tenancy".
30. In his submissions, the Applicant contends that there is no landlord and tenant relationship between him and the Respondent herein neither was there a tenancy nor a lease agreement between the parties and he does not pay any rent whatsoever to the Respondent. He further contends that the suit is subject matter of an ownership dispute between him and the Respondent vide Nairobi Civil Appeal Case No E710 of 2021.
31. He further alludes to a previous case no BPRT 70 of 2017 (Kajiado) involving him and the Respondent over the suit property which was allegedly dismissed owing to the pendency of Nairobi ELC Case no 1064 of 2013 which was later transferred and became Kajiado ELC case No 39 of 2019 which was subsequently dismissed leading to the pending appeal at the court of appeal.
32. According to the Respondent's submissions, the Applicant assumed occupation of his father's business premises in the early 1990's after he lost his job with Uchumi Supermarket Limited. He sued his father in the ELC case at Milimani case no 1064 of 2013 which later became Kajiado ELC case no 39 of 2019 (OS) under the doctrine of adverse possession. He admitted in his sworn affidavit that he entered the suit premises with consent of the landlord as owner and denied being a trespasser thereon. The ELC observed glaring contradictions in the tenant's testimony and dismissed the claim.



33. The ELC noted that the business the tenant was running was under the same name and style of “Laiser Farmer’s Bar and Restaurant” used by the landlord since 1960’s. The ELC observed that the tenant regrettably “seems to want to take advantage of his father’s love and support to short-change him of his business by seeking to acquire the land through the doctrine of adverse possession but this must fail. “The judgment is exhibited by the landlord as annexure “SJK3”.
34. Although the tenant filed appeal in the court of appeal, it is submitted that there was no order barring the landlord from terminating the tenancy and there was no application seeking to suspend the landlord’s notice to terminate tenancy dated April 21, 2022. There was equally no order to stay proceedings of the Tribunal and as such, the Tribunal should act within the law to determine the case before it.
35. I have looked at the definition of “Landlord” and “tenant” reproduced above and the circumstances under which the Applicant occupied the suit premises and I am convinced that he did so as a tenant of the Respondent after the previous tenant was requested to move out by the latter when the Applicant lost his employment with Uchumi Supermarket Ltd in 1990. This fact was upheld by the Kajiado ELC in case No 29 of 2019 (OS) and I am by so holding not determining any issue of ownership of the suit Property which is already determined by the superior court.
36. The fact that the tenant has not been paying rent to the landlord who is his father does not in any way negate the relationship in view of section 121 of the Evidence Act, Cap 80, which provides as follows:-

“No tenant of immovable property or person claiming through such tenant shall during the continuance of the tenancy be permitted to deny that the landlord of such tenant had at the beginning of the tenancy a title to such immovable property and no person who came upon any immovable property by the license of the person in possession thereof shall be permitted to deny that such person had a right to such possession at the time when the lincense was given”.
37. In the case of Abdukrazak Khalifa Salimu v Harun Rashid Khator & 2 Others [2018] eKLR, the court of appeal had occasion to consider the foregoing legal provision at paragraph 36 as follows:-

“In the instant appeal, the appellant is attempting to question the title of the respondents by invoking section 4(2) of the Limitations of Actions Act. He is also challenging the respondents’ title by asserting that the trial court ought to have inquired who put Mr. Said A. Bawazir into possession of the suit property. In this context, the appellant as the owner of house without land and being a tenant is questioning the title of the respondents qua landlord. This he cannot do.

The appellant is estopped from challenging the respondents’ title as landlord of the suit property. If a tenant denies or challenges the title of the landlord, the tenant must first surrender the possession of the property back to landlord. He cannot on one hand oppose the landlord’s title and on the other have possession of the property”.
38. Section 12(1) (a) of Cap 301, Laws of Kenya empowers this Tribunal to determine whether or not any tenancy is a controlled tenancy. I find and hold that the relationship between the Applicant and the Respondent is a controlled tenancy despite the fact that the landlord has not insisted on payment of monthly rent for a long period. This finding is based on the circumstances under which the former went into possession of the demised premises and the absence of any written agreement.



39. I am fortified in this regard by the definition of a tenancy at will on page 343 of the Treatise *Mergarrry's Manual of the Law of Real Property* 6th Edition” where the author states as follows:-
- “ 4. Tenancies at will. A tenancy at will arises whenever a tenant with the consent of the landlord occupies qua tenant (and not merely as a servant or agent) on the terms that either party may determine the tenancy at anytime. In some cases the tenant holds rent freebut unless the parties agree that the tenancy shall be rent free, the landlord is entitled to compensation for the use and occupation of the land and if a rent is fixed, the landlord may distrain for it in the usual way.
- A tenancy at will comes to an end when either party does any act incompatible with the continuance of the tenancy.....or either party gives notice to the other determining the tenancy.....”.
40. I find and hold that the tenancy herein was at will between a father and a son and the fact that the landlord did not enforce payment of rent does not negate his right to issue the notice to terminate the tenancy moreso in view of the latter’s challenge of his title to the suit property.
41. In regard to the termination notice, I find and hold that there is no evidence tendered by the tenant to demonstrate that the documents relied upon by the landlord and the reasons given for termination of the tenancy are not genuine.
42. The landlord has demonstrated that he has a settled intention to undertake extensive renovations to the premises comprised in the tenancy which cannot reasonably be done without obtaining possession of the premises. I have no reason to doubt his desire to do so given the preparations already demonstrated in the documents exhibited as annexures “SJK5 (a) –(d) of the replying affidavit sworn on June 17, 2022.
43. Section 9 (1) of Cap 301, provides as follows:-
- “(1) Upon a reference, a Tribunal may, after such inquiry as may be required by or under this Act or as it deems necessary-
- (a) Approve the terms of the tenancy notice concerned either in its entirety or subject to such amendment or alteration as the Tribunal thinks just having regard to all the circumstances of the case or
- (b) Order that the tenancy notice shall be of no effect,
- (c) And in either case make such further or other order as it thinks appropriate”.
44. Having found that the landlord has proved the ground set out in his notice to terminate tenancy under section 7(1) (f) of Cap 301, Laws of Kenya, I shall approve the terms of the notice without amendment and direct the tenant to vacate therefrom to enable the landlord carry out the proposed renovations or constructions.
45. In regard to costs, the same are always at the Tribunal’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 the landlord costs of the reference.



46. In conclusion, I make the following final orders under section 9(1) of Cap 301 Laws of Kenya in this matter:-

- (a) The landlord's tenancy notice dated April 21, 2022 is hereby approved as drawn and the tenant's tenancy over LR No Ngong/Ngong Town Block 2/88 is hereby terminated with effect from July 1, 2022.
- (b) The tenant shall deliver vacant possession of the suit premises and in default shall be evicted therefrom by a licensed auctioneer who shall be accorded security by the OCS, Ngong Police Station.
- (c) The tenant's notice of preliminary objection dated October 24, 2022 and the reference dated May 16, 2022 are hereby dismissed with costs.
- (d) The landlord's costs are assessed at Kshs 50,000/- all inclusive.

It is so ordered.

JUDGMENT DATED, SIGNED & VIRTUALLY DELIVERED THIS 10TH DAY OF JANUARY 2023.

HON. GAKUHI CHEGE

VICE CHAIR

BUSINESS PREMISES RENT TRIBUNAL

Judgment delivered in the presence of:-

Taliti for the Applicant

Wachira for the Landlord

