



**Raghibir v Maina (Tribunal Case E650 of 2021)  
[2023] KEBPRT 360 (KLR) (29 May 2023) (Judgment)**

Neutral citation: [2023] KEBPRT 360 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E650 OF 2021  
GAKUHI CHEGE, VICE CHAIR  
MAY 29, 2023**

**BETWEEN**

**GUJRAL SANDEEP SINGH RAGHBIR ..... LANDLORD**

**AND**

**GIBSON GICHUKI MAINA ..... TENANT**

**JUDGMENT**

1. The Landlord herein moved this Tribunal seeking recovery of rent arrears in the sum of Kshs.1,448,000/- and possession of the tenant's business premises standing on L.R No. Noonkopir Trading Centre/195 pursuant to a notice to terminate tenancy dated 25<sup>th</sup> June 2021.
2. The Landlord served the said notice on 26<sup>th</sup> June 2021 as per the affidavit of service of Martin Muia Mwiwa sworn on 2<sup>nd</sup> July 2021 attached to the notice of motion dated 4<sup>th</sup> November 2021 marked 'GSR4'. He sought to amend the rent arrears to read Kshs.1,403,000/- during the hearing and the same was allowed. The notice to terminate tenancy was expressed to take effect on 1<sup>st</sup> September 2021 and is in the prescribed form. It is based on the ground that the landlord intended to occupy the premises for his own use for a period of not less than one year.
3. The tenant objects to the application through a replying affidavit sworn on 22<sup>nd</sup> November 2021 wherein he deposes that he has been in occupation of the suit premises for a period of 12 years running a carwash and a car body repair shop.
4. He deposes that sometimes in 2014, the County Government of Kajiado together with Kenya Highway Authority demolished his workshop and part of the landlord's property claiming the same was on the road reserve as evidenced by photographs marked "GGM-1". As a result his business was hugely affected by the said demolition.



5. He subsequently rebuilt the business premises upon being reassured by the landlord that he had filed suit in court over the demolitions and legal ownership of the property but the County Government demolished the structures on two (2) consecutive occasions in 2019 and 2020.
6. On all occasions, the landlord assured the tenant that the portion of land occupied by the latter was not on any road reserve. A copy of the court's judgment is annexed as "GGM-2" in Kajiado ELC No. 11 of 2017 and a ruling in Misc. App. No. 27 of 2019.
7. The tenant complains further that Kenya Power/Ketraco installed a three phase electric system and two poles over the portion in his occupation blocking the entry to the car wash thereby limiting his business on account of the danger posed by the live electric wires which hang low as evidenced by annexure marked "GGM-3".
8. According to the tenant, KENHA and the County Government of Kajiado have constantly claimed that his business is on a public road/way leave and was issued demolition notices to that effect marked "GGM-4" from KENHA.
9. The tenant's requests to the landlord for relocation of his business to another portion of the property have been futile. There have been vandalism and theft at the tenant's business premises which diminished his capacity to pay rent coupled with the demolitions aforesaid.
10. The tenant deposes that he used Kshs.3 million to rebuild the business premises without any compensation despite paying rent for the occupied portion and he denies owing the landlord any rent arrears.
11. The landlord had been compensated for the demolitions by the County Government in the sum of Kshs.10 million but was yet to consider the loss incurred by the tenant in reconstructing the premises. He annexes a valuation report marked "GGM-6" which was produced in Kajiado ELC no. 11 of 2017 which mentions the loss suffered by him on account of the demolitions.
12. The tenant deposes that for the period he has been a tenant in the suit premises, he has always paid rent but the landlord has never issued him with receipts as proof of payment made either in cash or Mpesa when the landlord is not around.
13. The tenant deposes that he was shocked to be served with a proclamation notice for rent arrears as a result of which he instructed his advocates to write a letter dated 3<sup>rd</sup> November 2021 marked "GGM-7" which was not responded to. He denies having been served with the notice of termination of tenancy.
14. According to the tenant, the landlord has a large portion of the whole property which is vacant but was only targeting the small portion in his occupation. He contends that the notice of termination of tenancy does not disclose the kind of business the landlord wishes to carry on the portion.
15. The tenant contends that the landlord wants to take away his business and the goodwill which he has worked hard to build over 12 years and sell it to a third party thereby depriving him of his rights over the suit property. As such he prays for dismissal of the application.
16. The Landlord filed a further affidavit sworn by him on 23<sup>rd</sup> December 2021 wherein he reiterates that the tenant owed him a sum of Kshs.1,491,000/- for the years 2018 to 2021 as per annexures marked "GSSR-7 & 8. All rent was being paid via Mpesa and was properly recorded and accounted for.
17. According to the landlord, the tenant does not state how much he disputes of the rent claimed to be in arrears and the amount he has paid out of Kshs.1,493,000/-. The cost of reconstruction of the car



- wash in the sum of Kshs. 3 million claimed by the tenant is exaggerated, unsubstantiated and baseless according to the landlord.
18. The tenant was not a party in Kajiado ELC No. 11 of 2017 as he never sought to be joined in the said case to lay his claim for damages in respect of demolition of his business premises as alleged. The said case according to the landlord was in respect of the larger property which the County Government intended to encroach and make a road.
  19. The award of Kshs.10 million in the said case in exemplary damages was not expressed to be shared with the tenant and was yet to be paid by the County Government of Kajiado.
  20. The landlord maintains that he was entitled to distress for rent under Section 3(1) of the [Distress for Rent Act](#), Cap. 293 Laws of Kenya in recovery of rent arrears.
  21. The landlord contends that the notice to terminate tenancy was properly served and there was no evidence to rebut service or claimed rent arrears.
  22. Both the landlord and the tenant filed their witnesses statements which repeat the depositions made in the affidavits analysed above. They also gave oral evidence in court adopting the said statements and documents attached to their respective affidavits aforesaid. I need not repeat the said evidence.
  23. The landlord filed his bundle of documents dated 16<sup>th</sup> January 2023 which he adopted as his exhibits at the hearing.
  24. I am now required to determine the following issues:-
    - a. Whether the landlord's notice to terminate tenancy dated 25<sup>th</sup> June 2021 ought to be approved or dismissed.
    - b. Whether the landlord's application dated 4<sup>th</sup> November 2021 ought to be allowed or dismissed.
    - c. Who is liable to pay costs?.
  25. Section 4(2) of [Cap. 301](#), Laws of Kenya provides as follows:-
 

“ A Landlord who wishes to terminate a controlled tenancy or to alter to the detriment of the tenant, any term or condition in or right or service enjoyed by the tenant under such a tenancy shall give notice in that behalf to the tenant in the prescribed form”.
  26. I have looked at the notice marked as exhibit “GSR-5” and have confirmed that it is in the prescribed form. According to Section 4(6) of the said [Act](#) on the issue of service, a tenancy notice may be given to the receiving party by delivering it to him personally or to an adult member of the family or any other servant residing with him or employed in the premises concerned or to his employer's known address and any such notice shall be deemed to have been given on the date on which it was so delivered or on the date of postal receipt given by a person receiving the letter from the Postal Authorities as the case may be.
  27. The tenant disputes service of the notice to terminate tenancy issued by the landlord. On the other hand, the landlord has filed an affidavit of service sworn by one Martin Muia Mwiwa on 2<sup>nd</sup> July 2021 wherein he states that on 26<sup>th</sup> June 2021, he went to the office of the tenant and served the notice upon his son who accepted service by signing the principal copy returned to the Tribunal.
  28. The tenant has not disputed the signature on the copy returned to this Tribunal together with the affidavit of service neither did he seek to call the process server for purposes of cross examination and I therefore have no reason to doubt that the notice was properly served in line with the decision in



the case of *Secretary & another v Lucia Ndinda Musyoka t/a Jocia stores* (2019) eKLR at paragraph 22 where the learned judge cited with approval the treatise *Chitale and Anaji, Rao the code of Civil Procedure vol.11 page 1670* on presumption of service as follows:-

“There is a presumption of service 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 is put in the witness box and opportunity of cross examination given to those who deny service”.

29. In absence of any application by the tenant to cross examine the process server, this Tribunal is left with no option but to believe what is contained in the process server’s affidavit of service.
30. Section 6(1) of *Cap. 301*, Laws of Kenya requires a receiving party who wishes to oppose a tenancy notice to notify the requesting party under Section 4(5) of the *Act* that he does not agree to comply with the notice and to file a reference in the Tribunal before the date upon which the notice is to take effect whereupon such notice shall be of no effect. No such reference has been filed by the tenant against the tenancy notice herein.

31. Section 10 of the said *Act* provides as follows:-

“ 10. Where a landlord has served 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 to terminate or alter the terms and conditions thereof or the rights or services enjoyed thereunder”.

32. It is my considered view that the landlord’s notice having not been referred to this Tribunal by the tenant, the same took effect on 1<sup>st</sup> September 2021 as specified therein in line with the foregoing provision of the law.
33. The tenant has stated that the landlord did not specify for what purpose he intended to use the premises but that could have been an issue for consideration had he filed a reference in line with the decision in the case of *Sabeb v Hassanaly* (1981) eKLR where it was held at page 4/7 as follows:-

“In my opinion, it is clear that under Section 10, if a valid notice is not referred, the landlord is entitled to possession without having to prove any of the statutory grounds relied upon in the notice.....”.

34. In regard to the notice of motion dated 4<sup>th</sup> November 2021 and in particular the prayer for recovery of Kshs.1,403,000/- as amended during the hearing, I am convinced that the landlord was able to demonstrate through his evidence and Mpesa statements how the amount is made up. The tenant on the other hand did not provide evidence that he paid any part of the said amount and in line with Sections 107, 108 and 109 of the *Evidence Act*, I shall enter judgment for the said amount in favour of the landlord.



35. As regards costs, the same are in 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 costs to the landlord.
36. Before I conclude this judgment, I have noted that a lot of references have been made to proceedings in the Environment and Land Court at Kajiado in ELC No.11 of 2017. I note that the tenant was not a party to the said case and any award made in favour of the landlord therein was not in any way to be shared with him. In this case, the amount claimed by the landlord as rent arrears is not affected by any award made in that case. The alleged demolitions which took place on the suit property was perpetrated by third parties and does not in any way affect the landlord's claim to rental income from the tenant's use of the premises. The alleged interference by County Government of Kajiado, KENHA and KETRACO with the suit property did not absolve the tenant from payment of agreed rent. He cannot through use of such interference question the Landlord's title under Section 121 of the [Evidence Act](#). In any event, the landlord's title to the suit property was upheld by the Superior Court.
37. In conclusion, the final orders which commend to me in this case under Section 12(4) of [Cap. 301](#) as read with Section 12(1) (e) thereof are as follows:-
- a. The landlord's notice to terminate tenancy dated 25<sup>th</sup> June 2021 is hereby approved and the tenant's tenancy over L.R No. Noonkopir Trading Centre/195 is hereby terminated with effect from the date therein specified.
  - b. The tenant shall deliver vacant possession of the suit property and in default shall be evicted therefrom by a licensed Auctioneer who shall be accorded security by the OCS, Kitengela Police Station.
  - c. The Tenant shall pay the claimed sum of Kshs.1,403,000/- as at 30<sup>th</sup> March 2023 together with any additional amount accrued as mesne profits thereafter until the date of delivery of vacant possession or eviction from the suit property.
  - d. The tenant shall pay costs of Kshs.75,000/- to the Landlord for this case.

**RULING SIGNED & VIRTUALLY DELIVERED THIS 29<sup>TH</sup> DAY OF MAY 2023.**

**HON. GAKUHI CHEGE**

**VICE CHAIR**

**BUSINESS PREMISES RENT TRIBUNAL**

Ruling delivered in the presence of:

Mageto for the Tenant

Murimi for the Landlord

Mageto: I seek for 30 days stay of execution

Murimi: No objection for 30 days stay.

Order: There shall be stay of execution of the judgment for 30 days as prayed by the Tenant.

**HON. GAKUHI CHEGE**

**VICE CHAIR**

**BUSINESS PREMISES RENT TRIBUNAL**

