



**Desouza t/a St Mark Orthodox Health Centre v Georgios, Presiding
Bishop Orthodox Diocese of Kisumu & All Western Kenya (Tribunal
Case E126 of 2023) [2024] KEBPRT 614 (KLR) (12 April 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 614 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E126 OF 2023
N WAHOME, MEMBER
APRIL 12, 2024**

BETWEEN

**FENLEY NGAIRAH DESOUZA T/A ST MARK ORTHODOX HEALTH
CENTRE APPLICANT**

AND

**HG MARK THEODOSIS GEORGIOS, PRESIDING BISHOP ORTHODOX
DIOCESE OF KISUMU & ALL WESTERN KENYA RESPONDENT**

RULING

1. These proceedings were initiated by the Reference dated 11.08.2023. The grievances as stated in the Reference were;-

“Illegal termination notice. Has caused to be issued illegal termination notice based on false allegations of rent arrears, whereas the same has been paid in advance to October, 2023.”
2. The Reference was brought together with a notice of motion of even date and founded on a certificate of urgency dated 11.8.2023. The Applicant sought for the following reliefs;-
 - i. Spent.
 - ii. Pending hearing and determination of the Application herein, the Honourable Tribunal be pleased to issue temporary injunction restraining the Respondent/Landlord whether by themselves, servants, agents and/or whomsoever from interfering with the Applicant/Tenant's Health facility business and/or evicting the Applicant/Tenant from the suit premises on Land Reference No. Kakamega/Chamakanga/461 as per their notice in the letter dated 4.8.2023.
 - iii. Pending hearing and determination of the Reference herein, the Honourable Tribunal be pleased to issue temporary injunction restraining the Respondent/Landlords whether by



themselves, servants, agents and/or whomsoever from interfering with the Applicant/Tenant's Health facility business and/or evicting the Applicant/Tenant from the suit premises on Land Reference No. Kakamega/chamakanga/461 as per their notice in letter dated 4.8.2023.

- iv. Pending hearing and determination of the Application and Reference herein, the OCS Mudete police station to ensure that there is no breach of peace by the Respondent/Landlords, whether by themselves, servants, agents and/or whomsoever in attempt to unlawfully evict the Applicant/Tenant.
 - v. The costs of the Reference and Application be provided for.
3. The Application was supported by the Affidavit of Fenley Ngairah Desouza sworn on the 11.8.2023. The Applicant's main contention was that;-
 - i. The Respondent had issued an illegal notice to terminate the tenancy by a letter dated 4.8.2023 which was for twelve (12) days.
 - ii. Had paid rent to the Respondent in advance for up to 31.10.2023 at the time of filing the suit (Annexure "FND4").
 - iii. The lease agreement between the parties is dated 14.2.2017 and was to run for ten (10) years with a break clause No. 3.
 - iv. He came to court for fear of eviction as the Respondent has been unleashing goons on the business which is a healthy facility.
4. On being served with the Reference and Application, the Respondent filed the Replying affidavit sworn by M/S H.G. Mark Theodosius Georgis on the 18.9.2023. It was his case that;-
 - i. Did not receive any response to their letter dated 4.8.2023 which was a notice to vacate.
 - ii. This Tribunal has no jurisdiction to hear this matter pursuant to Section 2 of the Act.
 - iii. Respondent had never unleashed goons on the Applicant and his only issue is the problematic payment of rent on the part of the Applicant contrary to clause 4(d) of the lease agreement.
 - iv. The Applicant had not provided clear schedules for payment of rents and receipts issued in acknowledgment of such payments.
 - v. As at August, 2023, the Applicant was in rent arrears of Kshs. 564,629/=.
 - vi. They were agreeable to issuing a notice to the Applicant to vacate and to run for a period of six (6) months pursuant to the lease agreement.
 - vii. The Landlord wishes to terminate the tenancy on the grounds of breach of contract by non-payment of rent as agreed.
5. In response to the Replying affidavit, the Applicant filed the supplementary affidavit sworn on the 17.11.2023. He reiterated his earlier averments and further added that;-
 - i. The Respondent's notice of preliminary objection was incompetent and should be dismissed with costs.
 - ii. He responded to the impugned notice dated 4.8.2023 by the letter dated 11.8.2023.



- iii. There existed at the Hamisi Law Courts Criminal Case No. 320 of 2023 Republic vs Peter Imbayi where the later who is his personal assistant to the Respondent and others were charged in court.
 - iv. He has always paid rents to the Landlord for at least eight (8) months in advance.
 - v. In BPRT Case No. 71 of 2020, the Respondent had issued a notice of termination on the ground of non-payment of rent but which he withdrew when the same came up for hearing.
 - vi. The Respondent is yet to pay the costs awarded to the Applicant.
 - vii. He does not block any access to the demised premises and in any event, he is mainly out of the country.
 - viii. The purported fresh notice dated 10.9.2023 was also illegal and of no legal effect.
 - ix. He has taken good care of the demised premises and the reason he has continued to be licensed by the Medical and Dentists Board to operate the facility.
6. By his notice of preliminary objection filed in court on the 19.9.2023, the Respondent had questioned the jurisdiction of this court. In his view, the relationship between the parties was for a period exceeding five (5) years and thus the jurisdiction of this court under Section 2(1) of the Act had been ousted.
7. Directions were given on the 19.10.2023 to the effect that both the Application and the notice of preliminary objection would be canvassed together and by way of written submissions. The Landlord filed the submissions dated 11.12.2023 and those of the Tenant are dated 24.1.2024 and 17.11.2023.

A: Tenant's Submissions

8. The Tenant has submitted that;-
- i. The relationship between the parties was a controlled tenancy under Section 2(1) of the Act and this court had jurisdiction to hear and determine this matter.
 - ii. That both the purported notices of termination by the letters dated 4.8.2023 and 10.9.2023 were not compliant with Section 4 of the Act and therefore a nullity in law.
 - iii. The notices issued to the Applicant being illegal, his grievances to court were well founded in law and the Application herein should be allowed.

B: The Landlord's submissions

9. The Landlord on his part submitted that;-
- i. This court had no jurisdiction to preside over the matters herein. A notice of preliminary objection would dispose of the same. The case of; Mukisa Biscuits Manufacturing Company Limited vs West End Distributors [1069] EA was referred to.
 - ii. Without jurisdiction, this court should down its tools and take no further step. The case of; Motor Vessel "Lilians S" vs Caltex Oil (Kenya) Ltd [1989] eKLR was cited.
 - iii. The relationship between the parties was not that envisioned under Section 2(1) of the Act and therefore outside the jurisdiction of this court.
 - iv. The notice of termination dated 10.9.2023 was lawful and effective as it was in strict compliance with clause 3 of the Tenancy agreement dated 14.02.2017.



- v. The Application by the Applicant has no merit as the Applicant was in rent arrears of Kshs. 564,629/= at the time the notice of termination was issued.
10. Having perused the pleadings and submissions by both parties, I am of the view that the issues to determine this matter are the following:-
- A: Whether the notice of preliminary objection is merited.
- B: Whether the notices of termination of Tenancy dated 4.8.2023 and 10.9.2023 are lawful.
- C: Whether the Application herein has merit.
- D: Who should bear the costs of this Application.

Issue No. A: Whether the notice of preliminary objection is merited

11. This notice was on the ground that the relationship between the parties herein was not a controlled Tenancy under Section 2(1) of the Act and therefore this Tribunal had no jurisdiction to preside over this matter. The main reason for this assertion was that the Tenancy was for a term of Ten (10) years pursuant to the Agreement dated 4.2.2017.
12. Section 2(i) of the Act provides that a controlled tenancy means a tenancy of a shop, hotel or catering establishment-
- a. Which has not been reduced into writing; or
- b. Which has been reduced into writing and which-
- i. Is for a period exceeding five years;
- ii. Contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or”
13. Clause 3 of the lease Agreement dated 4.2.2017 provides that;-
- “The duration of the lease shall be for Ten years commencing April, 2017 to April, 2027 and may be reviewed at the instance of the parties or may be terminated by either party upon giving six months’ notice and/or upon expiry of the lease in writing to be served upon the other party personally.”
14. The plain reading of this clause is that any party was at complete liberty to terminate the tenancy at any time and for no cause shown for such termination. The only requirement being that such notice be for six (6) months, same be in writing and served to the receiving party in person.
15. This court cannot create contracts for parties and its role is merely to interpret the same. The import of the lease agreement confers a controlled tenancy to the parties.

In the case of; Khalif Jere Mohamed & Another vs Republic & Another [2019] eKLR the court of Appeal in similar circumstances held that;-

“in the present case, the termination clause was a blanket provision that gave liberty to the parties to terminate at any time and for any reason within the six (6) year term of the tenancy. In effect, it could be invoked by either party and either party could terminate the tenancy within five (5) years of the term or even five (5) years after commencement of the tenancy. In effect, as worded, the termination clause did not exclude termination of the tenancy within



five (5) years of the term..... To that extent, we are satisfied that the termination clause as worded brought the tenancy within the meaning of a controlled tenancy under Section 2(1)(b)(ii) of the Act. Consequently, the Tribunal was clothed with jurisdiction over the matter.”

16. In view of the above, it is my determination that the notice of preliminary objection lacks in any merit and the same is dismissed. For clarity, this court has jurisdiction to preside over this matter to its conclusion.

Issue No. B: Whether the notices of termination dated 4.8.2023 and 10.9.2023 are lawful

17. In considering this issue, due regard is given to Sections 4 and 7 of the Act on the pre-requisites of a valid termination notice. Section 4(2) provides that;-

“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.”

18. To fortify that position, Regulation 4(1) of the Regulations to the Act provides that;-

“A notice under Section 4(2) of the Act by a landlord shall be in Form A in the schedule to these Regulations.”

It is my finding that the Tenant’s purported notices of termination dated 4.8.2023 and 10.9.2023 are not in compliance with these otherwise mandatory provisions of the law.

19. Indeed, the purported notices also did not give the minimum of sixty (60) days required of such a notice under Section 4(4) of the Act or any valid ground for such intended termination. This is borne out of the contradictions that can be inferred from the Respondent’s filings in court on the purported non-payment of rent by the Applicant. In the letter dated 4.8.2023, the rent arrears was claimed to be Kshs. 1,540,000/=. The letter dated 10.9.2023 cited a figure of Kshs. 540,000/= and the Replying affidavit sworn on the 18.9.2023 claimed a sum of Kshs. 564,629/=. This cannot be an expression of any reality by the landlord. I agree with the Tenant that it was merely a disguise to terminate the tenancy and evict him.

20. In the case of; Fredrick Mutua Mulinge t/a Kitui Uniform vs Kitui Teachers Housing Co-operative Society Limited [2017] eKLR, the court held that;-

“It is clear from the foregoing authorities that the tenancy notice dated 28.06.2014 was null and void for failing to give the Appellant two months notice as such was of no legal effect. Life could not be breathed into the defective notice by the letter dated 1.7.2014 through which the Respondent purported to amend the effective date of the notice. The letter was not a notice in the prescribed form provided for under the Act.”

21. I therefore determine that both the purported notices of termination dated 4.8.2023 and 10.9.2023 were of no legal effect nor consequences and would proceed to dismiss the same.

Issue No. C: Whether the Application herein has merit

22. The Application dated 11.8.2023 was filed against the Respondent’s illegal notice dated 4.8.2023. This court has declared the said notice and the purported subsequent one dated 14.9.2023 as of no legal effect. This therefore speaks to the success of the Applicant’s Application. The Applicant required to



come to court for preservation of his fundamental rights as provided for under the Act. I therefore find the Application as being meritorious and will allow it in the terms to be stated hereinafter.

23. Looking at the Reference herein, nothing will be left of the same to call for a hearing thereof. By the determination in the Application herein, the same has been fully compromised. The same will also be allowed in the same as the Application.

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

24. On this issue, I will follow the conventional wisdom of Section 27 of the [Civil Procedure Act](#) and award costs to the Applicant/Tenant.
25. In conclusion and in the disposal of this matter, I make the following orders;-
- a. That the notice of preliminary objection is dismissed.
 - b. That the notices of termination dated 4.8.2023 and 10.9.2023 are declared illegal and of no legal effect nor consequence.
 - c. That the Applicant/Tenant shall be allowed quiet possession of the demised premises unless otherwise disturbed in strict compliance with the law.
 - d. That the Respondent shall pay costs to the Applicant assessed at Kshs. 30,000/= to be offset from rent payable to the Respondent.

Those are the orders of the court.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 12TH DAY OF APRIL, 2024.

HON. NDEGWA WAHOME, MBS - MEMBER

BUSINESS PREMISES RENT TRIBUNAL

Delivered in the presence of;

M/S Shijenje for the Applicant/Tenant

M/S Lumallas for the Respondent/Landlord

