



**Mucheru v Ndolo (Tribunal Case E066 of 2024)
[2024] KEBPRT 1517 (KLR) (4 October 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 1517 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E066 OF 2024
CN MUGAMBI, CHAIR
OCTOBER 4, 2024**

BETWEEN

PATRICK MUCHERU APPLICANT

AND

ROSE MUSENGYA NDOLO RESPONDENT

RULING

Introduction

1. The Landlady's notice to terminate tenancy dated 30.1.2024 is brought on the grounds;-
“That upon the termination of the tenancy, the landlord intends to occupy the premises comprised in the tenancy for the purposes of a business to be carried on by the landlord therein and as her residence.”
2. The Tenant in opposition to the notice to terminate his tenancy filed a Reference under Section 6(1) of Cap 301 dated 1.3.2024.
3. The Reference proceeded for hearing on 17.7.2024 when the parties testified and closed their cases.

The Landlady's case

4. The Landlady Rose Musengya Ndolo sought to and was allowed to rely on her statement dated 29.4.2024 as her evidence in chief. The statement which was adopted by the Tribunal may be summarized as follows;-
 - a. That she is one of the administrators of the Estate of the deceased Raphael Peter Ndolo who was her husband.



- b. That the suit premises consist of three-4 bedroom residential houses and 3 shops at the front face of the building.
 - c. That the Tenant occupies the 4-bedroom house at the ground floor and has sublet the common parking area into a shop and nyama choma base.
 - d. That the suit premises is categorized as for residential usage.
 - e. That the Tenant has no tenancy agreement with the Landlady or her late husband as he purchased the tenancy from another Tenant, the late Geoffrey Gachathi.
 - f. That after her husband's death, the landlady communicated to the tenant her intention to occupy the house.
 - g. That the suit premises would be ideal for the landlady and her large family of eight children and grandchildren with the children occupying the first floor houses and the landlady occupying the ground floor while she carries out business in the shops facing the front of the premises.
 - h. That the Landlady did serve the notice to terminate tenancy upon the Tenant, the notice being the one dated 9.08.2023.
 - i. That the Tenant was aware of the Landlady's intention to take over the premises when he took out trade licenses for the year 2024 but only did so to complicate issues between the parties.
 - j. That the Tenant's bar business has brought insecurity to the other Tenants.
 - k. That the Tenant has cordoned off the common toilets for the shops and taken over the parking spaces by constructing metallic grills in areas not forming part of his tenancy and the structural integrity of the building has now been compromised by the additional kitchen and sitting area structures erected outside the building.
 - l. That the Tenant has demolished one of the walls on one side of the bedrooms causing a crack on the first floor.
 - m. That the two Tenants on the first floor of the suit premises have vacated citing the unsuitability of the bar business run by the Tenant.
 - n. That the Tenant can easily run his business elsewhere and it is unconscionable for the Tenant to continue to deprive the Landlady of a place to accommodate her family.
 - o. That the Tenant has only paid rent up to March 2024 and not June 2024 as he alleges.
5. The Landlady in addition to the statements I have summarized above also produced the documents in her list of documents as her exhibits 1-6.
 6. The Landlady in her oral testimony further testified that the Tenant in the year 2023 agreed to vacate the premises but came to court after the Tenant erected a gate in the premises.
 7. The Landlady also testified that she cannot occupy the houses on the first floor while the Tenant continues to run a bar on the ground floor and that further, her neighbors do not also want the bar in the suit premises.
 8. Upon Cross Examination by Counsel for the Tenant, the responses of the Landlady may be summarized as follows;-
 - a. That whereas she has a limited grant, it is yet to be confirmed.



- b. That the Tenant was given the shop and a three-bedroom house and although the Landlady got him out of the shop, he still pays rent for the entire premises.
 - c. That the Landlady has not shown that she has the money to carry out a business in the suit premises and she has not identified the business she wants to carry out.
 - d. That there is one empty shop in the premises and the Landlady has not started any business in that shop.
 - e. That the house in Magongo is a family house.
 - f. That the Landlady has not given/shown any documentary evidence that she has eight children, no birth certificates during the hearing.
 - g. That there are two three bedroom units in the suit premises which are vacant.
 - h. That the Tenant found other Tenants who later left the premises.
 - i. That the Landlady has no evidence that the Tenant hereby was a nuisance to other Tenants
 - j. That the Tenant pays rent from the 1st of every month although the notice by the Landlady required the Tenant to vacate the premises on 5.04.2024.
 - k. That the Tenant has paid rent up to September, 2024 which the Landlady confirms to have received.
 - l. That the Landlady does not have a problem with the Tenants in the other two shops.
 - m. That the Landlady would like to take up the premises for residential purposes.
 - n. That the Landlady did not have any evidence to prove that herself and her children were paying rent elsewhere neither did she have any evidence to show that the place she was staying in was so small.
9. On Re-examination, the Landlady made the following clarifications;
- a. That the initial Tenant was Geoffrey and he is the one who gave the present Tenant the suit premises.
 - b. That the said Geoffrey also used the rear house- which tenancy he sold to the Tenant.
 - c. That she has not opened a business because she has no access to the premises.
 - d. That there is no door to access the room upstairs.
 - e. That the premises has a common entrance.
 - f. That the Landlady is ready to occupy the premises.

The Tenant's case

10. The evidence of Mr. Patrick Mucheru the Tenant is to be found in his witness statement which he adopted as his evidence in chief. The Tenant also produced the documents in his list of documents as exhibits 1-9. The statement of the Tenant dated 15.4.2024 may be summarized as follows;-
- a. That his tenancy in the suit premises was from the 1st day of the month to the last day of the month and he pays the rent of Kshs. 20,000/= per month which is fully paid up to the month of June, 2024.



- b. That the Tenant confirms receipts of the notice to terminate his tenancy dated 30.1.2024 and effective 5.4.2024.
 - c. That the Tenant verily believes that the Landlady has no intention of using the premises for her own business and or residence.
 - d. That the Tenant was given the suit premises to run a bar and a shop and is currently running the said business and has paid all licenses for the year 2024.
 - e. That a report done by a rent Inspector on 7.12.2023 confirmed that the Tenant was running a bar and restaurant business in the suit premises.
 - f. That the Tenant has no other place to carry out his business which is the sole source of his livelihood and that of his employees.
 - g. That the Landlady has other premises where she is leasing and she also has other premises wherein she can carry out her business.
 - h. That the Landlady has not demonstrated any intention that she is indeed in need of the premises as per the notice.
11. The Tenant further testified orally;
- a. That by the 5th of every month, he has already paid the rent for that month.
 - b. That there are two units upstairs which have been vacant for a long time.
 - c. That in December, 2023, the Landlady and her relatives came and stayed in the suit premises for a few days.
 - d. That the Tenant is aware that the Landlady has another house at Magongo Hakika and he knows the house because he has taken a cheque there.
 - e. That the notice to terminate tenancy is malicious.
12. Upon Cross Examination by Counsel for the Landlord, the Tenant's responses may be summarized as follows;-
- a. That his tenancy which is verbal commenced in the year 2016 and the Tenant found in the premises a business belonging to Geoffrey Gachathi.
 - b. That the Tenant purchased the business from the said Geoffrey Gachathi at approximately Kshs. 800,000/=.
 - c. That the Tenant was introduced to the deceased husband of the current Landlady by the deceased Mr. Gachathi and from whom he purchased the business of a bar and restaurant in the suit premises.
 - d. That the suit premises was being used as a bar and customers were being served from inside.
 - e. That the premises have always been used for commercial purposes and although the Tenant has a caretaker, he does not live there.
 - f. That the Landlady first asked the Tenant to move out of the suit premises in the year 2021 and when the Tenant did not move out, the Landlady served him with a notice to vacate the premises.



- g. That if given time, the Tenant would vacate the premises.
 - h. That the Nyama choma space belongs to the Tenant and customers eat meat from there. The benches there are not permanent.
 - i. That the suit premises has one entrance.
 - j. That the Landlady can live upstairs.
 - k. That the business closes at eleven in the night and the bar business has always run even as there were Tenants on the first floor upstairs.
 - l. The Tenants never complained about the bar to the Tenant herein or to the police.
13. On Re-examination, the Tenant confirmed that he has been licensed to operate the business in the suit premises.

Analysis and determination

14. Both parties have filed submissions which I have read and will consider in this Ruling.
15. The issues that arise for determination are in my view the following:-
- a. Whether the Landlady has established her intention to occupy the suit premises for the purposes of a business to be carried on by herself therein and as her residence.
 - b. Whether the Landlady is entitled to the orders of termination of tenancy as sought in her notice to terminate tenancy.
 - c. Who should bear the costs of this suit.

Issue A: Whether the Landlady has established her intention to occupy the suit premises for the purposes of a business to be carried on by herself therein and as her residence.

16. The thrust of the Landlady's case is that she intends to use the premises for her own business and also to provide accommodation for her large family, her children and the grandchildren. It is the contention of the Landlady that the Tenant's bar business is a nuisance and cannot be carried out while her children are in the same premises. It is generally agreed that the suit premises comprises of 3, 4 bedroom residential units. It is also agreed that the Tenant occupies the unit on the ground floor while the two units on the first floor are vacant. The Landlady also confirmed that one of the shops facing the street is unoccupied. The Landlady has also confirmed that she lives with her family in a residence owned by the family of her deceased husband. When pressed by Counsel for the Tenant, the Landlady stated that she had no evidence that she had the money to carry out the business and that indeed she had not identified the business she intended to carry out.
17. Although the Landlady attempted to blame the Tenant for the alleged vacation of the premises by previous Tenants on the first floor, she confirmed that she had no evidence of the allegations that the Tenant had been a nuisance.
18. On the allegation that the Tenant's business is a nuisance, it is important to note the admitted fact that the Tenant purchased the bar and restaurant business from one Mr. Geoffrey Gachathi (now deceased) and has since been running the business of a bar and restaurant. The Landlady and her deceased husband therefore all along knew that the Tenant was carrying on the business of a bar and restaurant and for which the Tenant is licensed.



19. If indeed the Landlady needs the Tenant's unit for a business, that business and the financial ability to carry out the said business has not been demonstrated. The Landlady has also not shown why she cannot use the shop which is vacant for the business she intends to carry out and she has not stated that the vacant shop is unsuitable for her business.
20. And even if the Landlady intended to use the Tenant's unit as a residential unit for her family, there is no explanation given by the Landlady why she cannot use the two units on the first floor which are similar to the one occupied by the Tenant and which admittedly have been vacant for a long time.
21. The intention of the Landlady to occupy the premises for own business or residence cannot therefore be said to be established by the circumstances of this case as set out above. In the case of; Auto Engineering Ltd vs M. Ganella Co. Ltd [1978] eKLR, quoted by the Landlord in her submissions, the court held;

“Apart from making a mere assertion that he intends to occupy the premises for a period of not less than one year, the Landlord's intention can be gauged from surrounding circumstances which lead a court to find on a balance of probabilities that the Landlord has established such an intention.”

22. It is my finding that the Landlady has sufficient alternative space to carry out any business she wishes to carry out and further that the units on the first floor afford the Landlady adequate alternative space for the residential purposes she alleges. I further do find that the Tenant does not need to cede possession of the premises he occupies in order for the Landlady to reside in the two units on the first floor or to carry out other business especially in the vacant shop facing the street.
23. I however find fault with the Tenant carrying on business on the space outside the unit he occupies. The benches and the grill built outside the rented premises clearly obstruct the free passage to the units in the first floor and I find that the said structures are illegal, temporary and ought to be removed forthwith so that there is free access at the parking space for the residents of the first floor.
24. On this issue, I therefore return a finding that the Landlady has not established a firm and genuine intention to occupy the premises currently occupied by the Tenant either for her own business or for residential purposes.

Issue B: Whether the Landlady is entitled to the orders of termination of tenancy as sought in her notice to terminate tenancy.

25. Consequent to the findings at paragraph 24 above, it is obvious that the Landlady is not entitled to the orders of termination of tenancy as sought in her notice to terminate tenancy.

Issue C: Who should bear the costs of this suit.

26. In the circumstances of this case, I will order each party to bear their own costs.

Disposition

27. In disposing of this matter and following from the above findings, I hereby make the following orders;-
 - a. That the notice by the Landlady to terminate tenancy dated 30.1.2024 is not proved and shall be of no effect.
 - b. That the Tenant shall remove all the structures outside the demised premises and more particularly in the open space leading to the first floor of the suit premises.



- c. That the Tenant shall not use the open space outside the demised premises for the business of an open Nyama choma or for any other business.
- d. That the Tenant shall not in any way obstruct the access to the first floor of the suit premises.
- e. That each party shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 4TH DAY OF OCTOBER, 2024

HON. CYPRIAN MUGAMBI - CHAIRPERSON

BUSINESS PREMISES RENT TRIBUNAL

Delivered in the presence of Mr. Omwenga for the Tenant and Ms. Kimuli for the Landlady.

