



**Odhiambo v Ongiri & another (Tribunal Case E052 of 2024)
[2024] KEBPRT 767 (KLR) (Civ) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 767 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
CIVIL
TRIBUNAL CASE E052 OF 2024
A MUMA, MEMBER
MAY 23, 2024**

BETWEEN

EDWARD ODHIAMBO APPLICANT

AND

LILIAN ONGIRI 1ST RESPONDENT

MY SPACE PROPERTIES LIMITED 2ND RESPONDENT

RULING

A. Parties and Representatives

1. The Applicant, Edward Odhiambo, is the Tenant herein who rented space known as shop 4 and 5 respectively (“the Tenant”) which is erected on Plot No. 10564/II/MN located at Bamburi along Bamburi Naivas-Ratna Road the suit property”).
2. The firm of Onyari & Co. Advocates represents the Tenant in this matter.
3. The 1st Respondent, Lilian Ongiri, is the Landlady and the registered owner of the suit property who rented out the suit property to the Tenant (“the Landlady”) and the 2nd Respondent is My Space Properties Limited, as the Agent herein of the Landlady.
4. The firm of J.O. Magolo & Company represents the Respondents in this matter.

B. The Dispute Background

5. The Landlord issued a termination notice to the Tenant dated 22nd January 2024



premised on the grounds that the Tenant allegedly destroyed the premises walls without the Landlady's authorization while also allegedly carrying out business in contravention to the agreed terms between the parties.

6. Consequently, the Tenant filed a Reference and Application evened dated 13th February 2024 seeking restraining orders against the Landlady and suspension of the termination notice. Upon perusal of the said Application, the Tribunal certified the matter as urgent thereby granting restraining orders against the Respondents from interfering with the tenancy of the suit premises pending hearing and determination of the application.
7. Upon hearing on 4th March 2024, the Honourable Tribunal directed the Landlady to file a response within 14 days and the Tenant to file a further response in 7 days together with submissions. On 18th April 2024, parties confirmed compliance and the matter was slated for Ruling on 22nd May 2024.

C. Tenant's Claim

8. The Tenant states that they entered into a duly executed tenancy agreement with the Landlady. The Tenant submits that the term of the agreement was 2 years commencing 2021. He further submits that the use of the suit property was for commercial purposes.
9. Additionally, the Tenant contends that the suit property was in a deplorable state upon taking up possession. The Tenant submits that he previously undertook repairs on the mutual understanding that the same would be offset from rent.
10. In his Supporting Affidavit, the Tenant avers that the alleged termination notice issued upon him by the Landlord is illegal.
11. Regarding rent arrears, the Tenant submits that this is an afterthought since he is not in any rent arrears as at the material date when termination notice was served.
12. The Tenant also submits that prior to instituting this suit, he had filed an application seeking orders to rescind the Landlady's notice to illegally increase monthly rent from Kshs. 15,000/= to Kshs. 28,000/=. The Tribunal in case no. BPRT 076/2023 granted the application in favour of the Tenant and awarded costs.
13. Upon notifying the Landlady of the said court orders, the Tenant submits that the Landlady refused to accept rent despite requesting to be furnished with relevant account details. Consequently, the Tenant submits that the monthly rent paid until January 2024 has been recalled.
14. The Tenant also complains that the Landlady filed a miscellaneous application no. 342 of 2023 seeking to unlawfully evict the Tenant through auctioneers.
15. Further, the Tenant also complains of harassment from the Landlord thus interfering with his business which has occasioned substantial loss.
16. Therefore, the Tenant prays for grant of injunctive orders against the Respondents as sought in their application together with invalidation of the termination notice.

D. Landlady's Claim

17. In response, the Landlady admits that the Tenant had previously communicated the nature of business he intended to operate upon taking up possession. However, the Landlady retorts that the Tenant interrupted the peaceful occupation of the neighbouring tenants.



18. Subsequently, the Landlady avers that the Tenant failed to pay rent thereby necessitating issuance of the termination notice dated 22nd January 2024 which is annexed to her Replying Affidavit.
19. The Landlady alleges that the Tenant demolished a side wall without authorization for purposes of running his business.
20. The Landlady avers that the Tenant left and the suit property remains under lock and key. As such, the tenancy relationship has ceased to exist.
21. On issue of rent payment, the Landlady denies instructing the Tenant to deposit the amounts with any third party and the attempt to pay the 2nd Respondent was to avoid accountability. The Landlady admits that the Tenant is in arrears of Kshs. 300,000/=.

E. Jurisdiction

22. The jurisdiction of this Honourable Tribunal is contested by the parties.
23. Section 12 of the *Landlord and Tenant Shops Hotels and Catering Establishments Act* Cap 301 Laws of Kenya (hereinafter “the Act”) which states as follows:
 1. A Tribunal shall, in relation to its area of jurisdiction have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in addition to and without prejudice to the generality of the foregoing shall have power—
 - (a) to determine whether or not any tenancy is a controlled tenancy;
24. The Tribunal notes that the term of the Tenancy Agreement in question was for a fixed term of 1 year from 5th April 2021 to 5th April 2022. Notably, the Agreement was in relation to shop number 5 and not shop number 4. Upon the expiry of the period, the contract was terminated. Since then, there has not been adduced any contract in writing as signed between the parties in relation to both shops. However, the Tenant has continued occupying the suit property while paying monthly rent as previously.
25. Section 2 of the Act defines a controlled tenancy as;
 - a. which has not been reduced into writing; or
 - b. which has been reduced into writing and which—....
26. By dint of the foregoing, Tribunal is satisfied that it has the jurisdiction to hear and determine the dispute in question in tandem with the Act.

F. Issues for Determination

27. Upon considering the application and submissions filed by both parties, I find that the following are the issues for determination:
 - i. Whether the Landlady’s Termination Notice is valid; and
 - ii. Whether the Tenant is in rent arrears.



G. Analysis and Findings

i. Whether the Landlady's Termination Notice is valid

28. Section 4(2) of the Act provides that:

“ A landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the tenant, shall give notice in that behalf to the tenant in the prescribed form.”

29. Further, Section 7(1) (f) of the Act states as:

“ ... the landlord intends to demolish or reconstruct the premises comprised in the tenancy, or a substantial part thereof, or to carry out substantial work of construction on such premises or part thereof, and that he could not reasonably do so without obtaining possession of such premises.”

30. Although this right is protected in law, the Act further stipulates that in exercising this right, the Landlord has to issue a notice in the prescribed form within a reasonable time.

31. Section 4(4) of the Act states that: -

“No tenancy notice shall take effect until such date, not being less than two months after the receipt thereof by the receiving party....”

32. In this case, the Landlady issued the Tenant with a termination notice in the prescribed form dated 22nd January 2023. The notice was to take effect from 1st June 2023. By dint of the above provisions, the said notice was to take effect within the required statutory period. As such the said notice is deemed to be in the correct form and within the prescribed statutory period.

33. Having considered the form of the termination notice, then the main question that begs for determination is on the substance of the said notice.

34. The Landlady seeks to terminate the tenancy on grounds that the Tenant has destroyed the walls without consent. However, the Landlady has not filed any document detailing the deplorable state of the building which requires repair.

35. This Tribunal is guided by the decision of the court in *Fisher v Taylors Furnishing Stores Ltd* [1956] 2 All ER 78, where the court held:

There must, therefore, be an intention and it must be an intention which in point of time is related to the termination of the current tenancy. It seems to me that the intention must be to do one of the following things: (i) to demolish the premises comprised in the holding; or (ii) to reconstruct the premises comprised in the holding; or (iii) to demolish a substantial part of the premises comprised in the holding; or (iv) to reconstruct a substantial part of the premises comprised in the holding; or (v) to carry out substantial work of construction on the holding; or (vi) to carry out substantial work of construction on a part of the holding.

If the landlord proves an intention to do one of those things, and to do it on the termination of the current tenancy, he must then prove that he could not reasonably do it without obtaining possession of the holding.



36. The court further provided the threshold upon which landlords have to meet before they can satisfactorily be granted possession and stated as follows:

“For this purpose the Court must be satisfied that the intention to reconstruct is genuine and not colourable: that it is a firm and settled intention, not likely to be changed: that the reconstruction is of a substantial part of the premises, indeed so substantial that it cannot be thought to be a device to get possession; that the work is so extensive that it is necessary to get possession of the holding in order to do it; and that it is intended to do the work at once and not after a time. Unless the Court were to insist strictly on these requirements, tenants might be deprived of the protection which Parliament intended them to have. It must be remembered that, if the landlord, having got possession, honestly changes his mind and does not do any work of reconstruction, the tenant has no remedy. Hence the necessity for a firm and settled intention.”

37. From the above analysis, it is not clear the intentions upon which the Landlord requires vacant possession. Additionally, the Landlady admits knowledge of the nature of business the Tenant intended to carry out thereby failed to raise any objection of the use. Therefore, I find that the Landlady has failed to convince this Honourable Tribunal that there is a need to evict the Tenant and require vacant possession of the suit property. As such the termination notice dated 22nd January 2024 is not valid.

ii. Whether the Tenant is in rent arrears

38. The Landlady claims that the Tenant is in rent arrears of a sum of KShs. 300,000/= which is a sum of monthly rent of Kshs. 30,000/= compounded in a period of 10 months. This is contrary to the alleged orders issued in Tribunal Case No. E076/2023 in which the Tribunal allegedly declined the notice by the Landlady to increase rent from Kshs. 15,000/= to Kshs. 28,000/=. There is no copy of the said Ruling on record to buttress this claim.

39. The Tribunal places reliance on Section 12 of the Act which states as:

A Tribunal shall, in relation to its area of jurisdiction have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in addition to and without prejudice to the generality of the foregoing shall have power—

- (a);
- (b) to determine or vary the rent to be payable in respect of any controlled tenancy, having regard to all the circumstances thereof;

40. The Landlady has not adduced any evidence on the basis upon which he seeks to increase rent from Kshs. 15,000/= to Kshs. 30,000/=.
41. In response to this claim, the Tenant has adduced payment receipts as proof of payment of monthly rent to the Landlady. Therefore, the Tribunal cannot address itself on the issue of rent arrears due to lack of proof.
42. Having considered the evidence, it would be a grave injustice to evict the Tenant without sufficient evidence of the intention to use the premises.
43. On the issue of restraining orders to be granted against the Respondents, the orders are overtaken by events as such they lack merit.



Orders

44. In the upshot, the Tenant's Reference and Application dated 13th February 2024 is hereby partially allowed in the following terms:

- i. Tenant to clear any outstanding arrears within 14 days from the date hereof;
- ii. Tenant to keep paying rent at the sum of Kshs. 15,000/= to the Landlord as and when it falls due;
- iii. That failure by the Tenant to comply with (i) and (ii) as ordered above shall accord the Landlord liberty to distress for rent arrears and take back vacant possession of the suit property;
- iv. Landlord is restrained from attaching or selling Tenant's distrained property;
- v. The Landlord shall be at liberty to issue a fresh notice at a time when they are ready to provide proof of the intention to utilize the premises; and
- vi. The Tenant shall have costs.

HON. A MUMA - MEMBER

BUSINESS PREMISES RENT TRIBUNAL

Ruling dated, delivered and signed at Nairobi on this 23rd day of May 2024 in presence of Otuoma for the Tenant No appearance for the Landlord.

HON. A MUMA - MEMBER

DIVISION - BUSINESS PREMISES RENT TRIBUNAL

