



**Mukopi v Kinywa (Tribunal Case E006 of 2022)
[2024] KEBPRT 596 (KLR) (27 March 2024) (Judgment)**

Neutral citation: [2024] KEBPRT 596 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E006 OF 2022
N WAHOME, MEMBER
MARCH 27, 2024**

BETWEEN

CORNELIUS KHAEMBA MUKOPI APPLICANT

AND

ISAAC KINYWA RESPONDENT

JUDGMENT

1. This is a judgement on the reference by the Landlord/Applicant dated the 5th January 2024. The same is said to be founded on Section 12(4) of the Landlord and Tenant (Shop, Hotels and Catering Establishments) Act (Cap. 301) hereinafter the Act.
2. The grievance in the said reference was that:-

“The Tenant has not filed any reference to oppose the termination notice served on him dated 4th October 2023 and has expired. I request the rent tribunal court and OCS Kimilili Police Station to order the Tenant to pay rent arrears and vacate the business premises”.
3. Before the reference was the Notice of termination of tenancy dated 4th October 2023. The termination was to take effect on the 1st January 2024. The ground for the termination was that:-

“I want to do major renovations to the Business premises. I request the Rent Tribunal Court and OCS Kimilili Police Station to order the Tenant to pay all rent arrears and vacate the business premises Renovation to start”.
4. Further to the above, the Landlord filed an affidavit sworn on the 4th January 2024 by one Kisembe Kiliswa to confirm that the Notice of termination aforesaid was duly served upon the Respondent on the 4th October 2023.



5. Also filed with the reference was the letter dated 5th January 2024 by the Applicant requesting this Tribunal to confirm whether the Respondent had lodged any reference with it. The tribunal by its letter dated 5th January 2024 confirmed that the Respondent one Isaac Kinywa had not filed any reference with it.
6. On service with the applicant's pleadings, the respondent filed the replying affidavit sworn on the 12th January 2024 and he controverted all of the applicant's pleadings. In particular he asserted that:-
 - i. He had not been served with any court proceedings by the Applicant and only noted of the existence of this suit by a prompt from the Judiciary's filing system.
 - ii. The Affidavits of service filed by the Applicant were mere forgeries and requested that the process server be summoned for cross-examination.
 - iii. He had been a long serving Tenant initially of the Applicant's deceased father and later of the Tenant paying Kshs.14,000/- per month.
 - iv. Catered for electricity and water bills the later which was in his names and had even constructed a toilet at the premises.
 - v. The suit was in bad faith and sought to be allowed a peaceful stay in the premises.
7. The Applicant filed a supplementary affidavit sworn on the 23/2/2024 in response to the respondent's aforesaid replying affidavit. He testified that:-
 - i. The demised premises what gifted to him by his late father and that he received all the rents from the entire building.
 - ii. He had served the respondent with all the documents including the termination notice and court processes.
 - iii. The Respondent never constructed any toilet at the demised premises.
 - iv. The Tenant should deliver vacant possession to allow for renovations at the premises to be undertaken.
8. Over and above the pleadings the Applicant rendered oral testimony and called two (2) witnesses. The Respondent on his part testified and closed his case. The landlord who testified as LW1 testified to the effect that:-
 - i. He stayed in Kimilili Subcounty of Bungoma County and was a pastor and a business person in charge of the demised premises,
 - ii. The Tenant should vacate the demised premises to allow him room to renovate the same.
 - iii. He had issued a termination notice but the Tenant had paid rent to date.
 - iv. He had lost faith in the Tenant as he had built structures and installed a water meter without his consent.
 - v. The renovations he wanted to carry out was to install tiles, replace ceiling boards and repaint the premises.
9. LW2 was Ambrose Waswa Mukopi. He is a Brother to the Applicant and also lived at Kimilili in Bungoma County. He testified that:-



- i. The Respondent was a tenant to his brother and had been given a termination notice to allow for renovations on the demised premises.
 - ii. The plot was owned by his Brother and that it is the later who built the contested toilets.
 - iii. He did not know when the respondent became a tenant in the demised premises.
10. The LW3 was Eunice Nelima Bakoya. She is a step mother to the landlord. She testified that:-
- i. The plot had shared water and electricity. The meters were in the names of her deceased husband.
 - ii. The deceased had allowed the Respondent to farm behind the plot.
 - iii. The Applicant was now the landlord and both parties need to amicably settle their issues.
 - iv. The Respondent had rented one room but partitioned the same into two.
 - v. At this point the Applicant closed his case.
- The Respondent testified as TW1 and his evidence was that:-
- i. He was a businessman within Kimilili Town in Bungoma County where he operated a hotel business.
 - ii. Reiterated that he had never been served with the termination notice dated 4/10/2024 nor with the court processes.
 - iii. He only learnt of the court proceedings through notifications by the court.
 - iv. Everything he did at the premises was with the consent of the deceased original owner and had no rent arrears.
 - v. He had rented two (2) rooms but surrendered one to the Applicant at Kshs.20,000/- which was yet to be paid to him
 - vi. The Applicant was to pay him Kshs.5,000/- for the constructed toilet which had not materialized at the date of the court appearance.
 - vii. The Applicant had no intention of renovating the premises as the room he had surrendered to him had not been renovated and that he the Tenant had recently renovated the same.
 - viii. The Applicant merely wanted to bring in a new tenant so that he could charge higher rent.
 - ix. He procured the sand, nails and iron sheets for construction of the toilet.
 - x. The Applicant had written him a message to increase rent from Kshs.6000/- to Kshs.10,000/- which he objected to
11. On evaluating the evidence on record, it is my view that the issues for determination are the following:-
- A. Whether the reference dated 5/1/2024 is lawful.
 - B. Whether the Notice of termination dated 4/10/2024 is in compliance with the law.
 - C. Who should bear the costs of this suit.



12. On Whether the reference dated 5/1/2024 is lawful, I would wish to refer to Section 10 of the Act which states that:-

“Where a Landlord has served a 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 or alter the tenancy, or alter the terms and conditions, thereof or the rights or services enjoyed thereunder”.

13. Regulation 5 of the Regulations to the Act provides that:-

“Reference to the Tribunal under Section 6(1) or Section 12(4) of the Act shall be in forms B and C in the schedule to these Regulations”.

From the foregoing, I doubt that the Applicant is properly before this court having commenced these proceedings under Section 12(4) of the Act and not Section 6 thereof. Am of the view that foundation is critical in any proceedings before court. In this case, the foundation laid by the Applicant under Section 12 (4) of the Act cannot support the reliefs sought which are plainly under Section 6 of the Act. I would therefore dismiss the reference.

14. In the event that I am wrong on that point, I proceed to evaluate the 2nd issue which is whether the notice of termination dated 4/10/2023 is compliant with the law. At the outset, it is my view that same is compliant with Section 4(2) and Section 4(4) of the Act and Regulation 4(1) of the Regulations thereof.

15. The only issue is whether the ground cited by the applicant can support the said notice. The Applicant stated that “I want to do major renovation to the business premises”. The applicant further listed the renovation works that he needed to carry out in his exhibit marked “CKM-5” as:-

- i. Floor screening,
- ii. Tiles installation,
- iii. Painting and
- iv. Ceiling board replacement.

16. Section 7(1) (f) provides a ground on which a landlord may seek to terminate tenancy. The ground is the one closest to the one cited by the landlord herein. It provides that:-

“On the termination of the tenancy 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”.

17. It is my view that the landlord has not satisfied this ground in anyway whatsoever. There is not even the slightest hint that the Applicant intended to demolish or carry out substantial work of construction. The intended works as listed herein before are minor works which can be effected in few days.

18. Indeed evidence on record is that the Applicant has not renovated the room already surrendered to him by the respondent and has also not issued a termination notice to the other tenant within the same building as the demised premises. I therefore tend to agree more with the Respondent that the only



motivation for the notice was due to his refusal to pay increased rent and that the Applicant therefore wanted to install a new tenant at a higher rent.

19. In the case of Auto Engineering Ltd – vs- M. Gonella & Co. Ltd (1978) e KLR the court held that:-
- “First, it is correct that the wording of Section 7(1)(f) is “demolish or reconstruct” and not to merely effect repairs. The distraction can of course be important for while mere repairs may not necessarily mean that the Landlord needs possession of the premises, an intended demolition or reconstruction of a substantial part of the premises would in all probability be frustrated if the landlord could obtain possession, and that is why this provision exists”.
20. In the instant case, it is my view that the Applicant does not need vacant possession of the demised premises to effect the proposed renovations. There only needs simple understanding with the Respondent to allow for the actualization of the same. That is if at all the same bonafide without occasioning any disturbance to the tenants business.
21. I therefore find that the ground cited for termination of the tenancy has no merit and would declare the termination notice dated 4/10/2023 unlawful.
22. It is also important to touch on the service of the termination notice and other processes thereof. I doubt that same were served on the Tenant. These are parties that regularly met even before pastors of the church. Parties who were in constant communication. The least I would have expected is service in the presence of those other third parties or a plausible reason given that the Tenant had declined to sign the documents. The process server is silent on whether the Tenant agreed or refused to sign the documents in issue. If this was the only issue to determine the present reference, I would still have given the benefit of doubt to the Tenant.
23. The third issue is on who should bear the costs of this suit. I do not find any reason nor justification to depart from the wisdom of Section 27 of the Civil Procedure Act. Costs follows’ the event. The event is that the Respondent is the successful party. He is awarded the costs of this suit.
24. In the final analysis, the orders that commend to me are the following:-
- i. The reference dated 5/1/2024 and the notice of termination of tenancy dated 4/10/2024 are declared to be unlawful and without any merit.
 - ii. The Tenant is awarded costs assessed at Kshs.20,000/- to be offset from rent payable on the demised premises.

Those are the orders of the court.

JUDGEMENT DATED, SIGNED AND VIRTUALLY DELIVERED AT NAIROBI THIS 27TH DAY OF MARCH, 2024.

HON. NDEGWA WAHOME, MBS

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

JUDGEMENT delivered in the absence of the parties. Court to notify the parties.

HON. NDEGWA WAHOME MBS

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

