



**Marubu v Thuita (Tribunal Case E543 of 2024)
[2024] KEBPRT 1289 (KLR) (4 September 2024) (Judgment)**

Neutral citation: [2024] KEBPRT 1289 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E543 OF 2024
GAKUHI CHEGE, CHAIR & J OSODO, MEMBER
SEPTEMBER 4, 2024**

BETWEEN

ESTHER NJERI MARUBU APPLICANT

AND

FRANCIS WAHOME THUITA RESPONDENT

JUDGMENT

A. Dispute Background

1. The landlord/applicant moved this Tribunal vide a Reference dated 8th May 2024 under Section 12(4) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301 with a complaint that the tenant had refused to vacate the suit premises after being served with a tenancy notice dated 9th February 2024.
2. The landlord/applicant simultaneously filed a notice of motion under certificate of urgency dated 8th May 2024 in which she is seeking in material part for vacant possession of the suit premises situate on Plot No. B2, Komarock, Nairobi. She further seeks for leave to break into the premises to gain access with the assistance of the OCS, Kayole Police Station.
3. The application is supported by the grounds on the face of it and an affidavit of even date in which the applicant deposes that she served a legal termination notice upon the tenant on 9th February 2024 under Section 4(2) of Cap 301, Laws of Kenya. The tenancy notice, as well as the screenshot of the WhatsApp messenger to 07216999922 forwarding it to the tenant are annexed to the landlord's affidavit as exhibits.
4. The landlord states that she intends to use the business premises occupied by the tenant to conduct her own business which cannot be done without obtaining possession. The notice took effect on 1st May 2024 as the tenant did not oppose it but however continued to remain in possession of the suit premises. It is for that reason that the landlord seeks for orders of vacant possession against the tenant.



5. The application was considered ex-parte on 13th May 2024 when the landlord was directed to serve the same upon the tenant for hearing inter-partes on 4th June 2024. On the said date, the matter was adjourned to 19th June 2024 as the landlord was having internet connectivity issues. The tenant was granted time to secure the services of an advocate to assist him to file a reference under Section 6 of Cap 301, Laws of Kenya.
6. The tenant filed a replying affidavit sworn on 23rd May 2024 in which he deposes that he received the tenancy notice on 14th May 2024. He further deposes that the notice was not sufficient and that he was involved in another case with the landlord over increment of rent in respect of the same premises from Kshs 18,000/= to Kshs 21,000/=. The said matter was decided in his favour.
7. The tenant deposes that the current application by the landlord is malicious and frivolous. It is the tenant's case that the landlord has come to court with unclean hands. He deposes that his family entirely relies on the business conducted in the suit premises.
8. The tenant also filed a reference dated 11th June 2024 purportedly under Section 6 of Cap 301, Laws of Kenya. We hasten to note that no leave was sought nor granted to the tenant to file the reference out of time.
9. On 19th June 2024, the tenant did not attend court and the matter was therefore adjourned to 29th July 2024 for hearing. Both parties were granted 28 days to comply with Order 11 of the Civil Procedure Rules.
10. However, only the landlord filed her witness statement dated 23rd July 2024 in which she reiterated the contents of the affidavit sworn in support of her application. She also attached an affidavit of service sworn by Jefferns K. Kitemi (process server) on 10th February 2024 stating that he served the tenancy notice upon the tenant on the same date.
11. The landlord further relies on her bank account statement and business permit to demonstrate her intention to conduct business in the suit premises. The business permit is dated 19th February 2024 and is expressed to expire on 18th February 2025. It authorizes sale of building materials.
12. When the matter came up for hearing, both parties chose to rely on their filed documents. They reiterated what is contained in their affidavits.
13. The landlord in addition filed submissions in support of her case. We shall consider the submissions together with the issues for determination.

B. Issues for determination

14. The following issues arise for determination; -
 - a. Whether the notice to terminate tenancy dated 9th February 2024 ought to be approved or dismissed.
 - b. Whether the tenant's reference dated 11th June 2024 is competent.
 - c. Whether the landlord/applicant is entitled to the orders sought in the application dated 8th May 2024.
 - d. Who shall bear the costs of the application?



Issue (a) Whether the notice to terminate tenancy dated 9th February 2024 ought to be approved or dismissed.

15. The landlord herein issued a notice to vacate dated 9th February 2024 which is annexed to the applicant's supporting affidavit.

16. Section 4(2) of Cap 301, Laws of Kenya provides as follows;

“(2) 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.”

17. In the case of Manaver N Alibhai t/a Diani Boutique – vs- South Coast Fitness & Sports Centre Limited Civil Appeal No. 203 of 1994 it was held as follows: -

“The Act lays down clearly in detail, the procedure for the termination of a controlled tenancy. Section 4(1) of the Act states in very clear language that a controlled tenancy shall not terminate or be terminated and no term or condition in or right or service enjoyed by the tenant of any such tenancy shall be altered otherwise than in accordance with specified provisions of the Act. These provisions include the giving of a notice in the prescribed form. The notice shall not take effect earlier than 2 months from the date of receipt thereof by the tenant. The notice must also specify the ground upon which termination is sought. The prescribed notice in form A also requires the landlord to ask the tenant to notify him in writing whether or not the tenant agrees to comply with the notice.”

18. We have perused the notice to terminate tenancy issued by the landlord herein and noted that the same is in the prescribed form and fully complies with Section 4 of Cap 301, Laws of Kenya.

19. The tenant deposes that he only saw the tenancy notice on 14th May 2024. He does not disclose where he saw the notice and has not disputed that the said notice was served upon him via WhatsApp messenger which is one of the recognized methods of service under Order 5 Rule 22B of the Civil Procedure Rules, 2010. The landlord on the other hand has presented an affidavit of service by Jefferns K. Kitemi in which he deposes that service of the notice was effected on 10th February 2024. The tenant did not dispute the contents of the said affidavit of service and we have no reason to doubt that indeed service of the tenancy notice was effected in the manner set out therein.

ISSUE (b) Whether the tenant's reference dated 11th June 2024 is competent.

20. Section 6(1) of Cap 301, Laws of Kenya provides as follows;

“

“(1) A receiving party who wishes to oppose a tenancy notice, and who has notified the requesting party under section 4(5) of this Act that he does not agree to comply with the tenancy notice, may, before the date upon which such notice is to take effect, refer the matter to a Tribunal, whereupon such notice shall be of no effect until, and subject to, the determination of the reference by the Tribunal:



Provided that a Tribunal may, for sufficient reason and on such conditions as it may think fit, permit such a reference notwithstanding that the receiving party has not complied with any of the requirements of this section.”

21. The tenant herein filed a reference dated 11th June 2024 purportedly under Section 6 of Cap 301, Laws of Kenya. As noted earlier, no leave was sought nor granted to the tenant to file the reference out of time in line with the proviso to Section 6(1) above. It therefore follows that the tenant’s reference having been filed out of time without the requisite leave is incompetent and bad in law.

22. Section 10 of the same statute provides as follows;

“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 the tenancy, or terminate or alter the terms and conditions, thereof or the rights or services enjoyed thereunder.” (emphasis added).

23. In the case of Saheb Vs Hassanally (1981) eKLR the Court of Appeal analyzed the foregoing section and held as follows;

“In my opinion, it is clear that under the terms of 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.”

To be valid a tenancy notice must comply with the provisions of section 4, including the requirements of the use of the prescribed form, of setting out the statutory grounds for relief and of due service. The learned judge was wrong in this case to investigate the grounds relied upon in the notice, but even then, he should have given judgment for the appellant on the ground that was conceded, namely that the landlord required the occupation of the premises for the purposes of his business (section 7 (1) (g)). The learned judge was in error in not awarding possession of the premises to the appellant in accordance with section 10, without making any inquiry into the validity of the grounds relied upon.” (emphasis added)

24. Based on the foregoing analysis, it is clear that the tenant cannot seek to challenge the grounds of termination of tenancy based on an incompetent reference. He slept on his rights and cannot now turnaround and say that he became aware of the tenancy notice on 14th May 2024 whereas evidence of electronic service has been tendered before us by the landlord to prove otherwise.

Issue (c) Who shall bear the costs of the application?

25. Under Section 12(1)(k) of Cap. 301, Laws of Kenya, costs of any suit before this Tribunal are in its discretion but always follow the event unless for good reasons otherwise ordered. We shall order costs of the application to the landlord/applicant.

C. Orders

26. In conclusion, the following final orders commend to us; -

- a. The notice to terminate tenancy dated 9th February 2024 is hereby approved.
- b. The Landlord’s application dated 8th May 2024 is allowed in terms of prayers 2 & 4 thereof.



c. Costs of Kshs 30,000/= are awarded to the landlord against the tenant.

It is so ordered.

**JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY THIS 4TH DAY of
SEPTEMBER, 2024.**

HON GAKUHI CHEGE - PANEL CHAIRPERSON

BUSINESS PREMISES RENT TRIBUNAL

HON. JOYCE A. OSODO - PANEL MEMBER

In the presence of:

Landlord present in person

Tenant present in person

