



**Sila v Nzau & another (Tribunal Case E816 of 2023)  
[2024] KEBPRT 374 (KLR) (28 March 2024) (Judgment)**

Neutral citation: [2024] KEBPRT 374 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E816 OF 2023  
N WAHOME, MEMBER  
MARCH 28, 2024**

**BETWEEN**

**SIMON SILA ..... APPLICANT**

**AND**

**ANTONY MAKAU NZAU ..... 1<sup>ST</sup> RESPONDENT**

**CECILIA KATUNGE NZAU ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The parties in this matter have been before this court in Nairobi BPRT Case Nos. E1029/2022 and E066 of 2023 which were consolidated and heard by my Brother Hon. Muma. The subject matter was the demised premises occupied by the Applicant on Plot No. 126 Kitui.
2. By a Judgment delivered on the 7.6.2023, the court ordered the following; -
  - a. The upshot is that the Tenant's Reference dated 1.11.2022 in opposition to the notice of termination is hereby allowed.
  - b. The landlord's Reference and Application dated 20.1.2023 are hereby dismissed.
  - c. The Tenant shall keep paying rent as and when it falls due.
  - d. 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.
  - e. Each party shall bear their own costs.
3. In pursuit of order (d) in the Judgment of Hon. A. Muma, the Respondent filed the notice of termination dated 19.6.2023 and cited the following grounds;



- i. The Tenant has caused wanton damage to the premises which have exposed the building to be in a deplorable state of repairs and walls of the rooms are at risk of collapsing.
  - ii. The Tenant's way of operation and the neglect has caused the premises to depreciate in value and is not compatible.
  - iii. There is need for the landlord/lady to take actual possession of the building to reconstruct and repair which cannot be done with the Tenant in occupation.
  - iv. The notice was to be effective the 1.9.2023.
4. The Applicant on his part filed the Reference dated 14.8.2023 said to be brought under Section 6 of the landlord and Tenant (shops, Hotels and Catering Establishments Act) (Cap 301) hereinafter "the Act." He requested this court to;-
- To investigate the matter and determine the issues involved."
5. In further support of the Reference, he filed the supporting affidavit dated 26.9.2023 and thereafter filed a further affidavit dated 7.11.2023. His case is that;-
- a. The intentions of the Respondents are to evict him as borne out by the BPRT Case Nos. E1029/22 and E066/2023.
  - b. With the consent of the landlord, had carried out renovations on the premises and same were habitable.
  - c. The reasons for the termination in the previous notices was that "we intend to take over possession of the personal business use for a period of more than one year" which was not the case in the present notice.
  - d. The purported notice to carry out repairs dated 2.02.2022 was only brought to his attention curing the present matter. It was never mentioned in BPRT Case No. E1029/2022 and E066/2023.
  - e. He was ready to carry out any necessary minor repairs according to the law.
  - f. The toilets were in good order only that the Respondent had failed to refill a hole created to allow for exhaustion of the toilets.
  - g. He suggested that a Rent Inspector be sent to the demised premises to confirm the allegations of the Respondents as false.
6. On their part, the Respondents filed the Replying affidavits sworn on the 13.09.2023, 3.11.2023 and 7.12.2023 all sworn by the 2<sup>nd</sup> Respondent Cecilia Katunge Nzau. The Respondent's evidence is that;-
- (i) The Tenant does not cooperate with the Respondents and treats them with spite.
  - (ii) He has allowed the premises to go into disrepair and waste by defacing the same.
  - (iii) Has refused to meet his obligations as a Tenant by failing to keep the demised premises in tenantable condition.
  - (iv) The Tenant had refused to carry out repairs on the premises and the Respondents needed to take possession to effect the same.



- (v) The County Government of Kitui in a letter dated 2.2.2022 had listed the repairs required to be effected on the premises.
  - (vi) Denied that the Tenant had carried out any repairs in the premises.
  - (vii) The Tenant had been notified of the letter by the County Government.
  - (viii) The repairs required by the County Government were major repairs which could not be undertaken unless possession was granted.
  - (ix) During the pendency of the suit, the toilets at the demised premises also collapsed and this made the need for vacant possession more urgent.
7. By directions taken on the 29.11.2023, the parties agreed to canvas the Reference by way of written submissions. The Applicants submissions are dated 6.2.2024 whereas those of the Respondents are dated 7.2.2024.
8. The Tenant has reiterated the averments in his replying affidavit dated 26.9.2023 and the further affidavit sworn on the 12.1.2024 in whole. He added however that;-
- a. The notice of termination was not made in good faith which could be seen from the grounds of termination in the present notice and those in the previous notice.
  - b. The toilets were in good condition and the minor repairs required at the premises could be carried out by him.

#### **The Respondents submissions**

9. The Respondents reiterated their pleadings in the replying affidavits dated 13.9.2023, 3.11.2023 and 7.12.2023. They further submitted the following;-
- (i) The termination notice dated 19.6.2023 was in strict compliance with the law and in particular Sections 4(2), 4(4) and 7(1) of the Act.
  - (ii) The Tenant had failed to meet his obligations and that the termination notice should be upheld.
10. From the evidence of the parties, my view is that the issues for determination in this matter are the following;-
- A: Whether the notice of termination dated 19.6.2023 is lawful and/or is merited.
  - B: Whether the Reference dated 26.9.2023 is merited.
  - C: Who should bear the costs of this suit.
11. On the first issue of; whether the notice of termination dated 19.6.2023 is lawful and/or merited, I would wish to make reference to Section 9(3)(b) of the Act which provides that;-
- “In any other case, until after the expiration of twelve (12) months, after the date of the determination unless the Tribunal, at the time of the determination, specifies some shorter period.”
12. In the case of termination of tenancy like the present one, on a decision on a Reference emanating therefrom, no further notice can be issued within the space of one (1) year; unless the court orders



otherwise. In this matter Hon. A. Muma in granting such leave was categorical that the same was on condition that;

“The landlord shall be at liberty to issue a further notice at a time when they are ready to provide proof of the intention to utilize the premises.”

13. In the present termination notice, the Respondents have not expressed any intention to utilize and/or occupy the demised premises. I therefore find that the same is premature and would dismiss the same.
14. In case I am wrong on the above finding, I would evaluate the other grounds for the termination as cited by the Respondents. The same appear on the face of this judgment and need not reiterate the same. But in brief is that the Tenant has caused wanton damage to the demised premises and it was in deplorable state at the risk of even collapsing.
15. However, this alarming ground of termination is not borne out by the photos availed by both parties and by the report from the County Government of Kitui. The later was to the effect that;
  - (a) conditions of the premises; -
    - (i) minor cracks on the wall.
    - (ii) peeled off paint,
    - (iii) leaking roof,
    - (iv) Poorly arranged room
  - (b) Sanitary facility;-
    - (i) A pit latrine is provided. It is in a good state of repair.
  - (c) Recommendations:
    - (i) Repair the entire building,
    - (ii) Replace the leaking roof,
    - (iii) Ensure proper arrangement of the room,
    - v. Repair minor cracks on the wall; and
    - vi. Maintain high standards of hygiene
  - (d) conclusion

This office has no objection with the operations of the business as the management above requires.

16. From the above, what is required to be done at the demised premises does not call for termination of tenancy unless motivated by other considerations but not for such repairs. The schedule to the Regulations at clause V provides that;-

“The lessor shall be responsible for all repairs to roofs, main walls, main drains, main electric wiring and structures and shall be responsible for all necessary renewals to the premises.”



Clause (vi) provides that;-

“The lessee shall be responsible for all internal repairs and decorations, fair wear and tear excepted.”

17. This in my view does not require the Tenant to handover vacant possession in order for the same to be effected. The Tenant has indeed confirmed that if the letter by the County of Kitui had been availed to him, he could have long complied.

18. Section 7(1)(g) of the Act which the Respondents seem to have put reliance on in their termination notice provides that;-

“On termination of the tenancy, the landlords 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.”

19. The question then that begs for answer is whether the repairs and works required to be effected by the County Government of Kitui meet the threshold envisaged by Section 7(1)(f). I would answer the same in the negative.

In this, I further find comfort in the case of; Auto Engineering Ltd vs M. Gonella & Co. Limited [1978] eKLR where the court held that;-

“...First, it is correct that the holding of Section 7(1)(f) is “demolish or construct”, and not merely to effect repairs. The distinction 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 not obtain possession, and that is why this provision exists.”

20. The landlord has also indicated that the Tenant has allowed the demised premises to depreciate. It has lost value compared to other rooms within the premises. That he was therefore in breach of his obligations. I have not been shown the Lease Agreement between the parties and cannot therefore effectively conclude whether a breach sufficed or not.

21. Section 7(1)(.....) provides that;-

“Where, under the tenancy under which the Tenant holds for the time being the tenant has any obligations in respect of the repair and maintenance of the premises comprised in such tenancy, that the tenancy ought to be terminated in view of the state of repairs of the premises, being a state resulting from the Tenant’s failure to comply with the said obligations.”

22. The upshot of all these is that, the notice of termination of tenancy dated 19.6.2023 is declared illegal and of no legal effect.

#### **Issue No. B: Whether the Reference dated 26.09.2023 is merited**

23. The notice of termination having failed, it follows without doubt that the Reference has registered success. I would therefore uphold the Reference in terms that the Applicant shall be allowed quiet possession of the demised premises as manifested within plot No. 126/Kitui Township unless otherwise disturbed in strict compliance with the Act.



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

24. I have no cause to depart from the wisdom of Section 27 of the [Civil Procedure Act](#) and I award costs to the Tenant.
25. In the final analysis, I make the following orders;-
- a. That the notice of termination dated 19.6.2023 is illegal and of no legal effect nor consequence.
  - b. That the Reference dated 14.8.2023 is allowed in terms that the Tenant shall enjoy quiet possession unless otherwise disturbed in strict compliance with Cap 301.
  - c. That the Tenant is awarded costs at Kshs. 10,000/= to be offset from the rent payable to the Respondents.

Those are the orders of the court.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28<sup>TH</sup> DAY OF MARCH, 2024.**

**HON. NDEGWA WAHOME, MBS - MEMBER**

**BUSINESS PREMISES RENT TRIBUNAL**

Delivered in the presence of Mr. Muia for the Respondents

In the absence of the Tenant/Applicant

