



Makau v Isika (Tribunal Case E516 of 2023)
[2023] KEBPRT 714 (KLR) (8 December 2023) (Judgment)

Neutral citation: [2023] KEBPRT 714 (KLR)

REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E516 OF 2023
GAKUHI CHEGE, CHAIR
DECEMBER 8, 2023
KENYA RE: TOWERS GROUND FLOOR

BETWEEN

FRANCIS MULWA MAKAU TENANT

AND

VERINICA MAINGI ISIKA LANDLADY

JUDGMENT

1. The Landlord herein served a tenancy notice dated 23rd February 2023 seeking to terminate the Tenant's tenancy in respect of Mitumba Stalls No. 192 B, Mitumba Market Formerly Unused Bus Park Machakos with effect from 1st June 2023.
2. The landlord cited two grounds of termination of tenancy to wit:-
 - a. That the tenant had defaulted in paying rent for a period of two months after such rent became due or payable and
 - b. That on termination of the tenancy, the landlord intends to occupy the said premises comprised in the tenancy for a period of more than one year for purposes of a business to be carried on by herself.
3. Being opposed to the notice, the tenant referred the notice to this Tribunal under Section 6(1) of Cap. 301, Laws of Kenya and swore an affidavit on 18th July 2023 confirming that he had been occupying the suit premises since the year 2013 and paying a rent of Kshs.2500/-. His initial Landlord was one Bernard Maingi Isika who is the late husband of the Respondent.
4. The tenant deposes that he had been paying rent regularly but fell into rent arrears after the country was faced with a national pandemic and there was no business going on. He paid the arrears after being



- sued at the Machakos Chief Magistrate's court. It is after paying the arrears that the landlord issued the termination notice.
5. According to the tenant, the landlord has not come to this court with clean hands as there was no proof of arrears of rent by way of statements or records for the two months claimed or the business she intends to carry out after terminating the tenancy.
 6. It is the tenant's case that the suit premises is a market space which shall remain a County Government property according to Part III of the Operation and Maintenance of Markets Principals (sic) of Allocation criteria Act No. 3 of 2016" marked "FMM1"
 7. The tenant deposes that the reasons given by the landlord for termination of the tenancy are mere allegations and an afterthought made to justify his eviction without good reason Contrary to the County Government of Machakos aforesaid Law.
 8. The Landlord filed a replying affidavit sworn on 9th August 2023 in opposition to the reference stating that matters of ownership and allotment of Mitumba Stall No. 192B is not an issue in this case as the suit premises was allocated to her deceased husband Bernard Maingi Isika on 10th April 2002 by the County Government of Machakos or its predecessor and had been paying ground rent thereto without fail.
 9. The landlord accuses the tenant of planning to grab the stall from her. The Regulations attached to the affidavit of the tenant are clearly a draft and does not oust the Tribunal's jurisdiction with regard to controlled tenancies.
 10. The tenant is accused of frustrating the landlord with non-payment of rent forcing her to move this Tribunal *vide* BPRT Case No. 1218 of 2019 and Machakos CM Miscellaneous No. E001 of 2020 to enforce rent payment.
 11. The Landlord filed a list of documents and further list thereof dated 14th July 2023 and 18th July 2023 respectively. Among the documents attached to the said lists is a consent order in BPRT No. 1218 of 2019, notice to show cause, decree and warrant of arrest in Machakos Miscellaneous Civil Application no. E001 of 2020 against the tenant.
 12. The tenant filed a further supporting affidavit sworn on 2nd August 2023 insisting that he has been occupying a stall belonging to Machakos County Government located at Machakos Mitumba Stall No. 192B from 2013 up to date paying ground rent up to 2022 and currently paying Kshs.2500/- per month.
 13. The tenant has annexed the County Government of Machakos Operation and Maintenance of Market (Rules of allocation Part IV) stating that any dispute for the market stall should be resolved via Alternative Dispute Resolution (ADR).
 14. The tenant complains that the landlord illegally increased rent through her lawyer from Kshs.1500/- to Kshs.2500/- *vide* annexure attached to the affidavit dated 27/4/2023. He deposes that he has been paying ground rent from 2013 upto December 2022 at Kshs.300/- per month to 2017 totalling to Kshs.14,400/- and Kshs.250/- from 2018 to 2022 (Kshs.15,000/-) which should be refunded to him.
 15. The tenant denies being in rent arrears having paid rent up to date and that the case of Machakos was placed in a abeyance after payment of the decretal sum.
 16. The matter proceeded by way of *viva voce* evidence with the landlord starting and replying on the filed affidavit and documents. The tenant also testified and relied on his filed affidavits and annexed documents thereto.



17. I am required to determine the following issues:-
- Whether the Tribunal has jurisdiction to adjudicate upon this matter.
 - Whether the tenancy notice ought to be upheld or dismissed.
 - Who is liable to pay costs of the Reference?
18. The suit premises herein is a Mitumba Market Stall no. 192B situate at Machakos Mitumba Market which was leased to the tenant by the current landlord's deceased husband in 2013. The tenant currently pay Kshs.2500/-. The tenant seems to deny or question the landlord's ownership of the suit premises by suggesting that the same is owned by the County Government of Machakos and any dispute in regard thereto should be adjudicated upon by the said County Government.
19. It is noted that the issue of ownership of the suit premises is not before us as it was introduced by the tenant in his further affidavit sworn on 18th July 2023 at paragraph 2 and 3 deposed as follows:
- " 2. That I have been occupying the Respondent/Landlord premises at Mitumba open air market stall no. 192, Machakos Town paying monthly rent of Kshs.2500/-.
 3. That in the year 2013, I approached the landlord who lent me the premises which was allocated to her husband one Bernard Maingi Isika and I immediately commenced my business paying her direct".
20. Consequently, it is clear that the issue of ownership of the premises is not in doubt. Equally, the issue of the monthly rent payable in respect of the suit premises is not in dispute as it is admitted at paragraph 2 of the affidavit of the tenant quoted above. A party is not allowed to approbate and reprobate at the same time and I hold that the issue do not arise for determination.
21. In regard to the issue of jurisdiction, the tenant has sought to rely on the "Machakos County Public Market and Stalls Act (No. 3 of 2016) Regulations which appears to be a draft. The same is annexed to the tenant's further affidavit of 2nd August 2023.
22. There is no dispute that the tenancy herein is controlled and that this Tribunal has the requisite jurisdiction to deal with the case before it. There is no evidence that the Regulations alluded to by the tenant were assented to by the County Governor neither is there evidence that they were ratified by the County Assembly of Machakos. There is no evidence that the same even if enacted would oust the jurisdiction of this statutory Tribunal which is established under Cap. 301, Laws of Kenya. I find and hold that this matter is properly before the court.
23. In regard to the notice to terminate tenancy, the landlord has availed evidence to show that there have been previous litigation between them over non -payment of rent *vide* BPRT No.1218 of 2019 and Machakos CM Misc. No.E001 of 2020 where the tenant was found to be indebted to the landlord. The tenant admitted being ordered to settle rent owing to the landlord in both case.
24. The Landlord issued a notice to terminate tenancy citing two grounds for the same. The first ground is non-payment of rent for more than two (2) months as at 23rd February 2023 which is in tandern with Section 7(1) (b) of Cap. 301, Laws of Kenya. The tenant in his further affidavit states that he is not in any arrears without annexing any evidence of rent payment for the period preceding the notice.
25. Section 108 of the Evidence Act Cap. 80 Laws of Kenya provides that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. The tenant



alleges to have paid rent for the entire period he has been in occupation of the suit premises without demonstrating that he was up to date with the same. He who alleges must prove.

26. The landlord has demonstrated through empirical evidence that the tenant has not been regular in rent payment and she has had to sue him in two previous cases to enforce payment. There was judgement in both cases whose documents have been exhibited. It is therefore clear that the tenant has been persistently delaying in payment of rent whenever it becomes due and payable. This ground is therefore proved on a balance of probabilities.
27. The second ground is that the landlord intends to occupy the said premises for a period of more than one year for the purposes of a business to be carried on by her. No evidence was tendered by the landlord on the nature of business intended to be carried on therein by her. She has not presented any evidence of business plan and availability of funds to start such business and this ground is therefore not established.
28. As regards costs, the same are at this Tribunal's discretion under Section 12(1)(k) of Cap. 301, Laws of Kenya but always follow the event unless for good reasons otherwise ordered. There is no reason why the landlord should not be awarded costs.
29. In conclusion, the following orders commend to me:-
 - (a) The tenancy notice dated 23rd February 2023 by the landlord terminating the tenant's tenancy over Mitumba Stall No. 192B, Mitumba Market, formerly unused Bus Park Machakos is hereby approved.
 - (b) The tenant shall vacate the suit premises and/or be evicted therefrom with the assistance of the OCS Machakos Police Station.
 - (c) The tenant shall pay all the rent arrears and the landlord shall be at liberty to use lawful means to recover the same before eviction of the Tenant.
 - (d) The tenant shall pay costs of Kshs.15,000/- to the Landlord in this case.

It is so ordered.

JUDGEMENT DATED, SIGNED & VIRTUALLY DELIVERED THIS 8TH DAY OF DECEMBER 2023.

HON. GAKUHI CHEGE

FOR: CHAIRPERSON

BUSINESS PREMISES RENT TRIBUNAL

Ruling read in the presence of:

Tenant present in person

Kituku for the Landlord

