



**Kilonzo v Muathe (Tribunal Case E1102 of 2023)
[2024] KEBPRT 359 (KLR) (22 March 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 359 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E1102 OF 2023
J OSODO, CHAIR & GAKUHI CHEGE, MEMBER
MARCH 22, 2024**

BETWEEN

PATRICK MUISYO KILONZO TENANT

AND

JOHN MUISYO MUATHE LANDLORD

RULING

A. Dispute Background

1. The tenant/applicant moved this tribunal vide a reference under Section 12 (4) of the [Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#) Cap 301 dated 7th November, 2023 with a complaint that the landlord/respondent herein has been harassing and threatening to forcefully evict him from the suit premises despite having made a rent overpayment.
2. The tenant/applicant simultaneously filed a Notice of Motion under a Certificate of urgency dated 7th November, 2023 in which he sought the following orders; -
 - i. That the application be certified urgent.
 - ii. That pending the hearing and determination of the application, the respondent be restrained by an order of temporary injunction from evicting or in any way interfering with the applicant/tenant's occupation of the business premises known as Plot No 57 Mwatate Butchery.
 - iii. That the reference in the matter be admitted out of time.
 - iv. That pending the hearing and determination of the reference, the respondent be restrained by an order of temporary injunction from evicting or in any way interfering with the applicant's/tenant's occupation of the business premises known as Plot No 57 Mwatate Butchery until the rent overpayments is spent.



- v. That the orders be enforced by OCS Tala Police Station.
 - vi. That costs of the application be borne by the landlord/respondent.
3. The tenant/applicant filed an affidavit of even date in support of the application in which he deposes as follows; -
- i. That he is the tenant at the suit premises/parcel of land known as Plot No 57, Tala Town operating a butchery known as Mwatate Butchery through a verbal agreement entered sometimes in 2007.
 - ii. That sometime towards December 2022, the respondent started threatening to evict the tenant from the suit premises claiming that the tenant had accrued rent arrears without considering that he had indeed paid rent in excess amounting to Kshs 982,120 over the years.
 - iii. That due to the harassment, the tenant filed a reference under Tribunal Case No E086 of 2023. A copy of the pleadings is annexed as "PMK-1".
 - iv. That the matter was heard and determined and the court delivered a ruling in the favor of the tenant and further found and held that the tenant had made rent overpayment of not less than Kshs 425,760 which was yet to be spent. A copy of the ruling is annexed as "PMK-2".
 - v. That upon delivery of the ruling, the landlord/respondent instituted a similar matter at the small claims court in Machakos under Commercial Claim number E398 of 2023 claiming for items he has leased in the tenant's business, a matter which had been determined by this court. A copy of the pleadings is annexed as "PMK-3".
 - vi. That the respondent has further issued a notice of termination of tenancy dated 3rd November, 2023 which makes a reference to another notice dated 15th August, 2023 which the tenant has never been served with.
 - vii. That in the notice dated 3rd November, 2023, the landlord had threatened to forcefully evict the tenant instigating the filing of the application herein. A copy of the notice is annexed as "PMK-4".
 - viii. That the tenant has duly paid rent and made improvements on the suit premises and is bound to suffer irreparably if evicted.
 - ix. That the business is the tenant's only source of income.
4. The landlord/respondent filed a replying affidavit to the application together with submissions dated 11th January, 2024. The landlord deposes as follows in his replying affidavit; -
- i. That the landlord/respondent did not threaten the applicant.
 - ii. That at no time during the 16 years tenancy did the tenant overpay rent.
 - iii. That at no time during the pendency of the tenancy did the landlord issue a receipt for rent payment to the tenant.
 - iv. That in Tribunal Case No BPRT E086 of 2023, ruling under Order No (b), it states that the applicant continues paying rent as and when it falls due.
 - v. That the applicant has not been paying rent since 1st January, 2023 up to 31st December, 2023 contrary to the ruling.



- vi. That the respondent's former advocate wrote to the tenant, through his advocate to arbitrate over the issues related to the suit premises but the tenant refused.
 - vii. That pursuant to Cap 301, the landlord/respondent issued an eviction notice expressed to take effect on 1st November, 2023 which was served by a person from the office of the Assistant Chief, Tala Location, in the presence of the landlord, which the tenant has not objected.
 - viii. That the tenant owes the landlord Kshs 760,000 for the accrued furniture and other items in the butchery hire charges since 2007 to 31st January, 2024. Related thereto, the landlord filed a claim at the Machakos Small Claims Court (Case No E398 which is ongoing)
 - ix. That on 21st June, 2023, the landlord went to the butchery seeking to be paid rent but the tenant said with finality that he would not pay.
5. The tenant/applicant then filed a supplementary affidavit dated 20th January, 2024 in which he deposes as follows; -
- i. That the honorable tribunal directed the tenant to be paying rent when it falls due although paragraph 29 of the ruling in E086 of 2023 stated that the court concludes that the amount of Kshs 425,760 was yet to be spent.
 - ii. That the tribunal also made a finding that the applicable rent per month is Kshs 5,000 in paragraph 25 of the ruling and that the tenant was therefore not in any rent arrears and therefore the attempt by the landlord to evict the tenant is illegal.
 - iii. That the tenant was never served with the landlord's notice to terminate or alter terms of tenancy but was only served with a letter from A. G Kimani & Co. Advocates dated 3rd November, 2023 which was referring to an earlier notice which the tenant is not aware of.
 - iv. That the tenant does not owe the landlord Kshs 760,000 claimed and that the claim in Machakos Small Claims Court Case 398 of 2023 is awaiting judgement.
6. The court ordered the application to be canvassed by way of written submissions and both parties complied with the tenant/applicant filing his dated 20th January, 2023 and the landlord/respondent filing his dated 5th February, 2023. We shall consider both submissions as we deal with the issues for determination.

B. Issues for determination

7. The following are the issues for determination; -
- a. Whether the notice to terminate tenancy dated 15th August, 2023 is valid and lawful.
 - b. Whether the tenant/applicant is entitled to the orders sought in the application dated 7th November, 2023.
 - c. Who shall bear the costs of the application?

Issue (a) Whether the notice to terminate tenancy dated 15th August, 2023 is valid and lawful.

8. Section 4(2) of Cap. 301, Laws of Kenya stipulates that 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 to the tenant in the prescribed form.



9. A cursory look at the Notice to terminate tenancy dated 15th August, 2023 reveals that the notice is in the prescribed form according to the Act. Service of the notice herein is however denied by the tenant/applicant.
10. The tenant/applicant in his supplementary affidavit deposes that he was never served with the notice to terminate tenancy but was only served with a letter from A. G Kimani & Co. Advocates dated 3rd November, 2023 which was referring to an earlier notice which the tenant is not aware of. The earlier notice in this case is the said Notice to terminate tenancy dated 15th August, 2023.
11. According to Section 107 of the Evidence Act Cap 80 Laws of Kenya, he who alleges must prove. The burden of proof therefore lies with the Landlord to show that he indeed served the said notice.
12. Upon perusal of the documents in this file, we find that no evidence has been tendered to prove service of the notice to terminate tenancy dated 15th August, 2023 apart from the landlord's claim in his replying affidavit wherein he deposes that the tenant was served in person by a person from the office of the assistant chief. There is no affidavit of service from the said person.
13. We concur with the persuasive case of Kirima Bus Services Ltd v Joseph Kariuki Gichimu t/a Tausi Enterprises & Peacock Enterprises Civil Case No 667 of 2010 [2013] eKLR wherein Odunga J. held as follows on the burden of proof where service is denied;

“The Plaintiff contends that the Notice was duly served on an employee of the Defendant. The Defendant has however denied that the alleged employee was its employee and that no such notice was served. Section 107(1) of the Evidence Act provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. Clearly therefore the burden was on the Plaintiff to prove its allegation that the Defendant was duly served. What is a person who is not served with such notice expected to do? In *Jayantilal R. Shah v Hussein Nanji Padamsbi & 5 others* Civil Appeal No 5 of 1982 [1984] KLR 531 the Court of Appeal held that a party who contends that he did not receive a particular letter by post can do no more than to deny the receipt of it, and bare though the denial appears by itself, it is capable of raising a triable issue. Although that decision arose from an application for summary judgement the same principle applies to a situation where the Defendant contends that he was not served in which case the burden is on the Plaintiff to prove otherwise. As was held by Visram, J (as he then was) in *Mbura and others v Castle Brewing Kenya Limited and another* [2006] 1 EA 185, the Evidence Act provides that an act is not proved when it is neither proved nor disproved. [Emphasis added]”

14. Applying the above decision to the instant case, this tribunal finds that even though the Notice to terminate tenancy is in the prescribed form according to the applicable Act, lack of proof of service thereof makes the said notice null and void.

Issue (b) Whether the tenant/applicant is entitled to the orders sought in the application dated 7th November, 2023.

15. The tenant/applicant came to this tribunal seeking protection from the landlord/respondent who has been harassing and threatening to evict him despite having made a rent overpayment.



16. The issue of rent overpayment was already determined in a previous case involving the parties herein in BPRT E086 of 2023 annexed as “PMK-2” where this Tribunal held as follows in a ruling delivered on 19th June, 2023; -

- “ 25. Relying on the evidence adduced before this court, the amount that both parties acknowledge as an overpayment is KShs. 329,760 which was advanced to the Landlord as legal fees. The parties executed an agreement to have the amount allocated as rent from January 2018 at the rate of KShs. 5,000
26. This means that the amount catered for rent for about sixty-five months which roughly translates to five years. Since January 2018, five years would lapse in December 2022.”

The ruling further states in paragraph 29,30 and 31 as follows; -

- “ 29. Having determined that the amount of KShs. 329,760 was to apply to December 2022 This court concludes that the amount of KShs. 425,760 is yet to be spent.
30. The court further noted that both parties have acknowledged of amounts advanced to the landlord weekly. However, there is no evidence of how this agreement was reached, the duration for which it was to last and whether the same would be allocated as rent.
31. At this stage, this court is unable to determine without more evidence, the total amount of overpayment to the landlord”
17. From the said Tribunal ruling, it is clear that indeed there was an overpayment of rent by the tenant/ applicant to the landlord, however, the exact amount could not be determined due to lack of evidence thereof.
18. We shall order that the matter herein proceeds by way of viva voce hearing in order to determine the amount of rent overpayment in this matter.

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

19. 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 that the costs of the reference shall abide the outcome of the reference.

C. Orders

20. In conclusion, the following final orders commend to us-
- The Notice of Termination of Tenancy dated 15th August, 2023 issued by the landlord is invalid.
 - Prayers 4 and 6 are hereby granted pending the hearing of the main reference.
 - The matter shall proceed by way of *viva voce* hearing and parties shall comply with Order 11 of the Civil Procedure Rules and file all statements of rent payment/overpayments together with evidence of rent payment for the period in dispute within the next 30 days hereof.
 - Costs of the application shall abide the outcome of the reference.



It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 22ND DAY OF MARCH 2024.

HON. JOYCE AKINYI OSODO - PANEL CHAIRPERSON

BUSINESS PREMISES RENT TRIBUNAL

HON GAKUHI CHEGE - MEMBER

In the presence of:

Parties absent.

