



Mokaya t/a Otange Booking Office v Aliashur Babyshoot (Tribunal Case E055 of 2023) [2023] KEBPRT 1115 (KLR) (24 November 2023) (Ruling)

Neutral citation: [2023] KEBPRT 1115 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E055 OF 2023
P MAY, MEMBER
NOVEMBER 24, 2023**

BETWEEN

TABITHA MORAA MOKAYA T/A OTANGE BOOKING OFFICE TENANT

AND

ALIASHUR BABYSHOOT LANDLORD

RULING

1. The tenant approached the Tribunal by filing the reference dated 31/1/2023 challenging the landlord's notice of termination dated 10th January, 2023. The tenant proceeded to file a notice of preliminary objection dated 14th July, 2023 on the following grounds:
 - a. The tenant's notice dated 10th January, 2023 is defective
 - b. The said Notice be struck out with costs to the tenant
 - c. The tenant's reference dated 31st January, 2023 be allowed with costs.
2. As practice dictates, the hearing of the notice of preliminary objection took precedence over the reference. The landlord opposed the preliminary objection through the Replying Affidavit sworn on 18th August, 2023 by one Hussein Ali Baiashut who gave a brief but concise chronology of how the tenancy arose, the lapse of the tenancy and the unfruitful negotiations to extend the same by raising the rent payable which led to the contested notice.
3. The parties elected to canvass the preliminary objection by way of written submissions. I have considered the same together with the annexed authorities in support of the respective positions and would proceed as follows:



4. A preliminary objection was referred in the case of *Mukhisa Biscuits vs. West End Distributors* as follows:

“Preliminary objection is in the nature of what used to be a demurrer. It raises prove points of law which is agreed on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any facts have to be ascertained or if what is sought is the exercise of Judicial discretion.”

5. Further, in the case of *David Karobia Kiiru Vs. Charie Nderity Gitoi & Another* (2018) eKLR at paragraph 12, the court stated as follows:

“For a preliminary objection to succeed, the following tests ought to be satisfied firstly, it should raise a point of law secondly it is agreed on the assumption that all the facts pleaded by the other side are correct and finally it cannot be raised if any that has to be ascertained or if what is sought is the exercise of Judicial discretion. A valid preliminary objection should if successful, dispose of the suit.”

6. A cursory look on the preliminary objection filed by the tenant does not describe with precision the specific provision of the law that the notice issued by the landlord breached. It only states that the said notice is defective and leaves the Tribunal to wander in deciphering the illegality. Even though the tenant has attempted to expound on the grounds in their submissions, it is this Tribunal’s finding that a preliminary objection should point the specific provision of the law that a party has contravened and be comprehensive as possible so as to allow the opposing party an opportunity to respond adequately. It should not be lost that our legal system did away with trial by ambush and thus in such situations a party has a duty to make full disclosure.
7. The notice that is being challenged is the one that was issued by the landlord dated 10th January, 2023 through the firm of Mulago- Arika & Co. Advocates. The landlord in their submissions has strongly stated that the preliminary objection is premature, misconceived, vexatious and an obvious abuse of the process of the Tribunal. The landlord has further reiterated that the tenant makes a general averment that the notice served upon the tenant is defective.
8. The process of termination of controlled tenancy is settled as provided under Section 4(2) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* Cap 301 Laws of Kenya (hereinafter referred to as the “Act”) which states 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 in that behalf to the tenant in the prescribed form.”

9. Additionally, Section 4(4) provides that no tenancy notice shall take effect until such date, not being less than two months after the receipt thereof by the receiving party, unless the terms and conditions of the tenancy provide for a period exceeding two months or the parties to the tenancy agree in writing to a lesser period of notice.
10. The two requirements therefore for a valid notice of termination of the tenancy is first, that the notice shall be in the prescribed form and secondly, that the notice shall not take effect until after expiry of two months, or such notice period as may be agreed by the parties. This was emphasized in the case of; *Munaver N Alibhai T/A Diani Boutique v South Coast Fitness & Sports Centre Limited* [1995] eKLR.



11. The Tribunal has assessed the notice against the above provisions of law and it is clear that the notice is valid. The tenant's assertions that the same is defective is a mere speculation only meant to prolong the litigation cycle of the present dispute. The error on the dates in the notice period does not change much as whichever date is taken to be the effective date falls outside the mandatory notice period.
12. Having made the above finding, it is therefore clear that the reference is moot as the same was founded on the same grounds as the preliminary objection which is the validity of the notice of termination issued. The same is therefore ripe for dismissal.
13. Before I pen off, it is prudent to address the question of which party bears the costs of these proceedings. It is trite law that costs follow an event. While costs ordinarily is granted at the discretion of the Tribunal, the successful party can only be denied an award of costs where there are plausible reasons to do so. In the present proceedings, the landlord is deserving to be compensated.
14. In the end, and pursuant to the powers of the Tribunal under Section 12 of CAP 301, the following orders commend itself:
 - a. The tenant's notice of preliminary objection dated 12th July, 2023 and the reference dated 31st January, 2023 are hereby dismissed.
 - b. The tenant shall forthwith vacate the demised premises within 7 days from the date hereof but shall pay any outstanding rent arrears within the said period.
 - c. The landlord is awarded costs of the reference assessed at Kshs. 100,000/-.

RULING, DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24TH DAY OF NOVEMBER 2023.

HON. PATRICIA MAY
MEMBER

