



**Osoro v Musili & 2 others (Tribunal Case E222 of 2024)  
[2024] KEBPRT 1108 (KLR) (Civ) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 1108 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
CIVIL  
TRIBUNAL CASE E222 OF 2024  
J OSODO, CHAIR & GAKUHI CHEGE, MEMBER  
JULY 31, 2024**

**BETWEEN**

**BARNABAS OMAE OSORO ..... APPLICANT**

**AND**

**JOSHUA N'THENGES MUSILI ..... 1<sup>ST</sup> RESPONDENT**

**ANGELINA MUSILI ..... 2<sup>ND</sup> RESPONDENT**

**BENCOM PROPERTIES LTD ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**A. Dispute Background**

1. The tenant/applicant moved this Tribunal vide a Reference dated 13<sup>th</sup> February 2024 under Section 12(4) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301, Laws of Kenya with a Complaint that on or about 12<sup>th</sup> February 2024, the 3<sup>rd</sup> respondent without any justification served the tenant with an illegal notice of termination of tenancy despite the tenant paying his rent dutifully without fail.
2. The tenant/applicant also filed a Notice of Motion under a certificate of urgency dated 13<sup>th</sup> February 2024 in which he sought for the following orders; -
  - i. That the application be certified urgent
  - ii. That the tribunal issues a temporary injunction restraining the respondents from interfering with the tenancy at the suit premises.
  - iii. That the tribunal issues a permanent injunction restraining the respondents from interfering with the tenancy at the suit premises.



- iv. That the tribunal be pleased to order that the notice by the respondent is illegal and of no consequence.
  - v. That the tribunal be pleased to order that expenses spent on constructing the suit premises be credited to the applicant's account as rent paid in advance.
  - vi. That the O.C.S Mlolongo Police Station do ensure compliance.
  - vii. That the costs of the application be borne by the respondent.
3. The applicant simultaneously filed a supporting affidavit of even date in which he deposes as follows; -
- i. That he has been at the suit premises since 1<sup>st</sup> April 2019 and has been faithfully paying rent without fail.
  - ii. That on taking up occupation of the suit premises, he constructed the suit premises at a cost of approximately KES. 1,800,000 with the written authority of the 1<sup>st</sup> respondent and has been paying rent at a monthly rate of KES. 30,000. A copy of the tenancy agreement is annexed as "OBO 1".
  - iii. That during the subsistence of the tenancy, it was previously agreed that the tenant was to recover the amount spent in the construction from the monthly rent at a rate of KES. 15,000.
  - iv. That on or about 12<sup>th</sup> February 2024, the 3<sup>rd</sup> respondent, without any justification served him with an illegal notice of termination of tenancy. A copy of the notice is annexed as "OBO 2".
  - v. That the tenancy agreement dated 21<sup>st</sup> February 2019 commenced on 1<sup>st</sup> April 2019 and has therefore not expired to warrant the 3<sup>rd</sup> respondent's actions.
  - vi. That during Covid-19 pandemic, he and the 1<sup>st</sup> respondent verbally agreed to extend the tenancy agreement on the basis of the government directive on closure of restaurants to accommodate the lost income and time.
  - vii. That he has not recovered the total costs spent in the construction of the suit premises.
4. On 20<sup>th</sup> February 2024, the tribunal issued interim orders of injunction against the respondents pending the hearing of the application.
5. The application is opposed vide a replying affidavit dated 14<sup>th</sup> March 2024 in which the respondents depose as follows; -
- i. That a tenancy agreement was signed with the applicant on 21<sup>st</sup> February 2019 for a term of 5 years 3 months and was set to commence on 1<sup>st</sup> April 2019 and terminate on 30<sup>th</sup> June 2024.
  - ii. That rent would be KES. 15,000 payable directly to the landlord through Mpesa or bank account provided by the landlord and the balance of KES. 15,000 was to be retained by the tenant to recoup construction costs of KES. 800,000.
  - iii. That the said amount was to be recouped for a period of 54 months, that is within four and a half years and thereafter the rent payable was to escalate at the rate of 10%.
  - iv. That the amount of KES. 1,800,000 quoted by the tenant is not correct.
  - v. That the tenant agreed to pay for utility bills and services used during occupancy.



- vi. That the tenant is currently in rent arrears and has approached this tribunal with unclean hands. A copy of messages asking for rent payment is annexed as “JNM 2”.
  - vii. That in the year 2023, the tenant only paid a sum total of KES. 28,000, therefore, the tenant has rent arrears of KES. 157,000 for the year 2023. Copy of Mpesa statement is annexed as “JNM 3”
  - viii. That in the current year 2024, the tenant has only paid KES. 15,000 in February after the landlord engaged the 3<sup>rd</sup> respondent to follow up on rent arrears.
  - ix. That the landlord has issued the tenant with a notice to vacate. A copy of the 6 months’ notice is annexed as “JNM 4”.
  - x. That the parties did not verbally agree on extension of the lease.
  - xi. That the circumstances the applicant obtained a temporary injunction is through material non-disclosure of facts and the same should be set aside and/or varied.
6. The tribunal ordered that the matter be canvassed by way of written submissions and only the respondents complied by filing their written submissions dated 27<sup>th</sup> May 2024. We shall consider the said written submission while dealing with the issues for determination.

#### **B. Issues for determination**

7. That following are the issues for determination; -
- a. Whether the notice to vacate dated 1<sup>st</sup> March 2024 is valid and lawful.
  - b. Whether the tenant/applicant is entitled to the orders sought in the application dated 13<sup>th</sup> February 2024.
  - c. Who shall pay costs of the application?

#### **Issue (a) Whether the notice to vacate dated 1<sup>st</sup> March 2024 is valid and lawful.**

8. The landlords herein issued a notice to vacate dated 1<sup>st</sup> March 2023 which is annexed to the respondents’ replying affidavit.
9. In the case of *Manaver N Alibhai t/a Diani Boutique v 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.”

10. In the instant case, we have perused the lease agreement dated 21<sup>st</sup> February 2019 which indicates that the lease period is 5 years and 3 months starting from 1<sup>st</sup> April 2019. It however contains a termination clause making it a controlled tenancy.



11. Having confirmed that the tenancy herein is controlled, the foregoing Superior Court decision applies and the notice to vacate issued being not in the prescribed form under Cap 301, Laws of Kenya is invalid, null and void.
12. We therefore find that the respondents'/landlords' insistence on the tenant vacating the suit premises contravenes Section 4(2) of Cap. 301, Laws of Kenya and it is in this regard that we find that the Notice to Vacate the suit premises dated 1<sup>st</sup> March 2024 is null and void ab initio.
13. The tenant/applicant in his supplementary affidavit dated 13<sup>th</sup> February 2024 refers to a notice to terminate tenancy issued on 12<sup>th</sup> February 2024 by the 3<sup>rd</sup> respondent. The said notice was issued in the form of a text message and the same also contravenes Section 4(2) of Cap 301 laws of Kenya and the same is also illegal.

**Issue (b) Whether the tenant/applicant is entitled to the orders sought in the application dated 13<sup>th</sup> February 2024.**

14. The tenant/applicant approached this tribunal seeking orders of injunction (both temporary and permanent) against the respondents as well as orders that the expenses incurred in constructing the premises be credited to the his account as rent paid in advance.
15. As stated in the respondents' written submission, the principles upon which injunctive relief may be granted are well settled in the locus classicus case of *Giella v Cassman Brown & Co. Ltd* [1973] E.A 385, which outlined as follows; first, an applicant must show a prima facie case with a probability of success, secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. And thirdly, if in doubt, the court will decide an application on the balance of convenience.
16. The tenant in his supporting affidavit alleges to have incurred construction costs of the leased premises at KES. 1,800,000, but has not tendered any evidence in support of this claim.
17. We agree with the respondents/landlords in their submissions that the tenant has not filed any evidence of the said allegations. In addition, the tenant has not filed any rent account statements or evidence of rent payment as ordered by the court, therefore we shall consider the respondents' filed statement of rent accounts filed herein. It is trite law that "he who alleges must prove"
18. The tenant/applicant has not demonstrated that he will suffer loss and damage that cannot be adequately compensated by an award of damages and the balance of convenience does not tilt in his favor.
19. According to the respondents/landlords in their replying affidavit as well as written submissions, the tenant has fully recovered his construction costs but the tenant refuses to pay the rent as agreed which is KES. 30,000 per month. That the full construction amount was recouped after the expiry of 54 months as agreed.
20. Following the analysis above, as well as the Mpesa statements tendered by the respondents, we find that the tenant is indeed in rent arrears and is not deserving of the orders sought in the application. We shall therefore order that that the tenant pays any rent arrears owing, failure to which the landlord shall be at liberty to recover the same using lawful means.



**Issue (c) Who shall pay costs of the application?**

21. 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 landlords/respondents.

**C. Orders**

22. In conclusion, the following final orders commend to us; -
- a. The application dated 13th February 2024 is hereby dismissed with costs.
  - b. The reference dated 13th February 2024 is settled in terms.
  - c. The tenant shall pay all rent arrears owing to the landlord within 30 days hereof, failure to which the landlord shall be at liberty to recover the same using lawful means.
  - d. The landlords are at liberty to issue a proper notice to terminate tenancy in the prescribed form in accordance with Section 4(2) of Cap 301 Laws of Kenya.
  - e. Costs of KES. 30,000 to the landlord.

It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 31ST DAY of JULY 2024.**

**HON. JOYCE AKINYI OSODO**

**(PANEL CHAIRPERSON)**

**BUSINESS PREMISES RENT TRIBUNAL**

**HON GAKUHI CHEGE**

**(PANEL MEMBER)**

**In the absence of parties**

