



**Morumbwa v Wambura (Tribunal Case E157 of 2023)  
[2024] KEBPRT 1111 (KLR) (30 July 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 1111 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E157 OF 2023  
A MUMA, MEMBER  
JULY 30, 2024**

**BETWEEN**

**SHEM OSIAGO MORUMBWA ..... TENANT**

**AND**

**JOSEPHAT KIMANI WAMBURA ..... LANDLORD**

**RULING**

**A. Parties and their Representatives**

1. The Tenant, Shem Osiago Morumbwa (the “Tenant”), is the tenant of the premises which is the subject matter of the present suit.
2. The Firm of RM Machage & Co. Advocates represents the Tenant in this matter.
3. The Landlord, Josephat Kimani Wambura (the “Landlord”), is the proprietor of the premises on parcel number Nakuru Municipality Block LR Number 3/99 (Nakuru West).
4. The Firm of N. Ikua & Company represents the Landlord in this matter.

**B. Dispute Background**

5. The Tenant moved this Tribunal vide a reference dated 28th August 2023 opposing the Notice of Termination dated 21st June 2023 served by the Landlord in respect of the suit premises.
6. In response, the Landlord filed affidavits dated 10th February 2024 and 21st March 2024.
7. Consequently, the Tenant filed a Replying Affidavit dated 15th April 2024.
8. The Landlord filed a further affidavit dated 13th May 2024.
9. The Tenant filed their written submissions.



### C. Tenant's Claim

10. The Tenant's Reference dated 28th August 2023 opposes the notice of termination dated 21st June 2023 served by the Landlord for the said premises.
11. He avers that on or about 16th April 2021 he became a tenant at Shabab Area Premises known as Nakuru Municipality Block LR Number 3/99 (Nakuru West) paying a monthly rent of Kshs.5,000 payable in advance.
12. He further avers that the proceedings in BPRT No. E157 OF 2023 have not been commenced with any Fresh Notice for the Tribunal to commence any proceedings.
13. He submits that he was not issued with a fresh notice by the Landlord and that the Landlord has been relying on the Notice dated 21st June 2023 which has been dealt with and as such, it is *res judicata*.
14. He further avers that he has paid a total sum of KShs.135,000 being payments of:
  - I. KShs.40,000 covering the month of May 2021 to December 2021 vide a receipt dated 16th April 2021.
  - II. KShs. 60,000 covering the month of January 2022 to December 2022 vide a filtered M-Pesa statement.
  - III. KShs.25,000 covering the month of January 2023 to May 2023 as assessed by the court via the order issued on 20th June 2023 as the Notice dated 16th January 2023 was marked withdrawn.
  - IV. KShs.10,000 covering the month of June 2023 and July 2023 paid on 6th September 2023.
15. He further avers that the allegations that the Landlord wants to construct new buildings are untrue as the structural plans have not been approved; the building permit invoice has not been paid and no bank statement has been annexed to show that the Landlord has money to pay for the same.

### D. Landlord's Defence

16. The Landlord avers that a Ruling was delivered to the effect that he was at liberty to serve a fresh notice of termination on the Tenant herein in compliance with the provisions of section 4(2) of the [Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#), Cap 301.
17. He further avers that on 21st June 2023 the said notice was served on the tenant for which receipt was acknowledged by signing on the copy filed to court.
18. He avers that the reasons cited in the notice for seeking termination were, inter alia, that he intended to put up permanent structures on the demised premises proof of which has been the building permit invoice together with the payment receipt, a structural plan and the proposed cost of construction where to get the financing.
19. He further avers that an order was issued in BPRT No.E073 of 2023 to the effect that the Tenant was awarded costs of KShs.25,000 which costs were to be settled against the rent owed by the Tenant to the Landlord.
20. He avers that the said costs were offset against the rents for January 2023 to May 2023 which rents are KShs.5,000 per month.
21. He avers that after May 2023 the tenant only paid KShs.10,000, after being ordered to do so by the Court, towards rent for June and July 2023.



22. He avers that the Tenant has continued to occupy his premises without paying rent from August 2023 to March 2024 which rents are outstanding at Kshs.40,000.

#### **E. Issues for Determination.**

23. Having given full consideration to the reference and documentation placed before this Honourable Tribunal, I find that the issues that falls for determination are:
- a. Whether the suit before this Honourable Tribunal is *res judicata*
  - b. Whether the Tenant has breached the terms of the Tenancy Agreement
  - c. Whether the Tenant is in Arrears

#### **F. Analysis and Determination**

##### **Whether the suit before this Honourable Tribunal is *res judicata***

24. The substantive law on *res judicata* is found in Section 7 of the [Civil Procedure Act](#) Cap 21 which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”

25. In order to ascertain whether an issue in a subsequent application is *res judicata*, the court in [Kennedy Mokua Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende](#) [2022] eKLR stated that:

“...a court of law should always look at the Decision claimed to have settled the issues in question and the entire Application and the instant Application to ascertain;

- i. what issues were really determined in the previous Application;
  - ii. whether they are the same in the subsequent Application and were covered by the Decision.
  - iii. whether the parties are the same or are litigating under the same Title and that the previous Application was determined by a court of competent jurisdiction.”
26. In the present suit, it is clear that the Notice of termination dated 21st June 2023 is in contention. On the one hand, the Landlord has relied on the aforesaid notice and failed to issue a fresh notice despite the issuance of a Ruling by this Honourable Tribunal dated 13th November 2023; on the other hand, the Tenant contends that he has not been issued with a fresh notice as ordered by this Honourable Tribunal in the aforesaid Ruling.
27. As such, it is only prudent that this Honourable Tribunal addresses the above dispute in light of the aforementioned principles governing *res judicata*.



**i. What issues were really determined in the previous Application;**

28. In the previous suit, BPRT Cause No. E143 OF 2023: Josephat Kimani Wambura v Shem Osiago Morumbwa, the sole issue was whether the Landlord's notice of termination dated 21st June 2023 and to take effect on 1st September 2023 is enforceable vide application dated 9th August 2023.
29. In the present suit, upon perusal of the pleadings, the main issue is whether the suit before this Honourable Tribunal is *res judicata* (which includes whether the notice of termination dated 21st June 2023 is valid).
30. From the above, it can be depicted that the aforesaid notice forms the subject matter in both suits, despite it being directly and substantially in issue in the former suit.

**ii. Whether they are the same in the subsequent Application and were covered by the Decision.**

31. In BPRT Cause No. E073 of 2023: Shem Osiago v Josephat Kimani Wambura, the Tenant herein challenged the Landlord's notice to vacate dated 16th January 2023 on the basis that the notice was not in the prescribed form. As such the aforesaid notice was withdrawn vide this Honourable Tribunal's Orders dated 20th June 2024.
32. In light of the aforesaid Orders, the Landlord issued a fresh notice of termination dated 21st June 2024 and instituted BPRT Cause No. E143 of 2023: Josephat Kimani Wambura v Shem Osiago Morumbwa, in which the Tenant filed a preliminary objection to challenge the validity of the aforesaid notice.
33. Neither parties have presented the pleadings of the previous suit, however, upon reliance on the Ruling dated 13th November 2023, it is quite clear that this Honourable Tribunal dealt with the issue of validity of the aforesaid notice substantially.
34. The Honourable Tribunal stated that the Landlord's notice of termination was in the Prescribed form, Form A and it specified: a) the Landlord's premises occupied by the Tenant; b) the duration of the notice of termination of the tenancy and the date when the notice is to take effect; c) the grounds for termination of the tenancy; and d) the requirement that the Tenant should within one month notify the Landlord in writing whether or not the Tenant agrees to comply with the notice as from the date of receipt of the notice.
35. As such the form and substance of the aforesaid notice was compliant with the provisions of the [Landlord and Tenant \(Shops, Hotels, Catering Establishments\) Act](#) Cap 301 (hereinafter the "Act").
36. However, the Tribunal contended that the aforesaid notice could not take effect until the lapse of the stipulated timelines and pursuant to the provisions of Section 4(4) of the [Act](#).
37. In light of the issue at hand, the Tribunal made orders that:
  - i. The Notice of Preliminary Objection dated 21st August 2023 succeeds in its entirety.
  - ii. The Notice of Motion Application dated 9th August 2023 is dismissed with costs.
  - iii. The Tenant to comply with the terms of the tenancy agreement failure to which the Landlord is at liberty to issue a fresh notice as prescribed in law.
38. Flowing from the above it is clear that the Ruling dated 13th November 2023 dealt with the issue of the validity of the aforesaid notice directly and substantially and determined it fully in its entirety.



**iii. whether the parties are the same or are litigating under the same Title and that the previous Application was determined by a court of competent jurisdiction.”**

39. It is quite clear that the parties in the present and previous suit are the same, however, they are not litigating under the same title as the present suit has been instituted by the Tenant whereas the previous suit was instituted by the Landlord.

40. Furthermore, as per the Tenancy Agreement dated 16th April 2021, the tenancy duration spans for 5 years, thereby aligning with the requirements of a controlled tenancy outlined in Section 2 of the Act, which stipulates that:

“controlled tenancy” means a tenancy of a shop, hotel or catering establishment—

(b) which has been reduced into writing and which—

(i) is for a period not exceeding five years; or”

41. As such the previous Application was determined by a court of competent jurisdiction.

42. Based on the above analysis, the Tribunal asserts that it was incumbent upon the Landlord to diligently adhere to the Orders issued by this Honourable Tribunal (Hon. Makori) vide a Ruling dated 13th November 2023 and provide the Tenant with a fresh notice in the prescribed format as stipulated in the Act and the Tenancy Agreement dated 16th April 2021.

**b) Whether the Tenant has breached the terms of the Tenancy Agreement**

43. The Tenancy Agreement dated 16th April 2021 provides for the provision that the:

“The tenant shall not erect or add any permanent structures while under the lease”

44. The Landlord asserts that the Tenant has violated the provision of the Tenancy Agreement, as such, he has furnished this Tribunal with photographic evidence regarding the aforementioned structure. Conversely, the Tenant has failed to present evidence to counter this assertion.

45. Section 107 of the Evidence Act, Laws of Kenya, Cap 80 (hereinafter the “Evidence Act”) provides that:

1. 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.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

46. In consideration of the foregoing, it is evident that the burden of proof shifted to the Tenant, thereby imposing an obligation upon him to furnish this Tribunal with any evidence refuting the Landlord’s claim. Nevertheless, he has failed to provide with any evidence rebutting the Landlord’s assertion.

**c) Whether the Tenant is in Arrears**

47. The Tenancy Agreement dated 16th April 2021 provides for the provision that:

“The tenant shall pay the agreed rent of Kshs.5,000 to be paid monthly but not later than the 5th day of every, and the amount of deposit to be paid upon the execution of this Agreement”



48. The disputed rent arrears span from August 2023 to March 2024, during which the Landlord asserts that the Tenant failed to fulfill his obligations to pay the rent.
49. Conversely, the Tenant maintains that he does not have any outstanding arrears, citing the Tribunal's Ruling dated 13th November 2023, which explicitly declared no rent arrears during that period.
50. As provided in Section 107 of the [Evidence Act](#), whoever alleges the existence of facts bears the burden to prove that those facts exist.
51. In this case, the Landlord was required to submit to this Tribunal the statements of account or M-pesa records demonstrating the overdue payments during the specified period.
52. Conversely, the Tenant, who asserted that there were no outstanding arrears, was obligated to furnish this Tribunal with M-pesa statement evidencing payment of the same.
53. As such, neither party has provided any evidence in the form of M-pesa statements or statements of account demonstrating the existence of the rent arrears from August 2023 to March 2024.
54. Additionally, it is important to highlight that the Tribunal's omission to address the issue on rent in BPRT Cause No. E143 OF 2023 does not validate the claim that the Tenant is not in arrears.

#### **G. Orders**

55. In the upshot and based on the foregoing, the following orders shall abide:
  - a. The Notice of termination dated 21st June 2023 lacks a legal leg to stand upon as it was vacated by this Tribunal.
  - b. The Landlord is at liberty to issue a fresh Notice of termination as prescribed in the [Act](#) and in compliance with the Tenancy Agreement dated 16th April 2021.
  - c. The Tenant to pay any outstanding rent arrears failure to which the Landlord at liberty to distress for rent.
  - d. Each party shall bear their own costs

**HON A. MUMA - MEMBER**

**BUSINESS PREMISES RENT TRIBUNAL**

**RULING DATED, DELIVERED AND SIGNED AT NAIROBI ON THIS 30<sup>TH</sup> DAY OF JULY 2024  
IN THE ABSENCE OF THE PARTIES.**

