



**Okallo v Baraza (Tribunal Case E085 of 2023)
[2023] KEBPRT 696 (KLR) (1 December 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 696 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E085 OF 2023
J OSODO, CHAIR & GAKUHI CHEGE, MEMBER
DECEMBER 1, 2023**

BETWEEN

MARY ORONGA OKALLO LANDLORD

AND

EMMANUEL ODHIAMBO BARAZA TENANT

RULING

A. The Dispute Background

1. The landlady/applicant moved this tribunal by way of a reference under Section 12(4) of [Cap. 301](#), Laws of Kenya dated 21st August, 2023 with a complaint that the tenant herein had ignored and refused to pay rent for over 2 years despite constant reminders.
2. The landlady filed a Notice of Motion under a Certificate of Urgency dated 21st August, 2023 wherein she sought the following orders; -
 - i. That the application be certified urgent.
 - ii. That the tenant/respondent be ordered to vacate the premises namely Precious Seed Academy on property known as LR No. 8500 Block 111 PP No. 542 with immediate effect.
 - iii. That the OCS Langas Police Station does enforce execution of the above orders.
 - iv. That the costs of the application be borne by the respondent.
3. The application is supported by an affidavit of even date in which the landlord/applicant deposes as follows; -
 - i. That both parties entered into a tenancy agreement in which the tenant was to pay rent of Ksh. 26,000 per month and the tenant is currently in rent arrears of Ksh. 1,064,000 which had accumulated from 1st September, 2019 to 1st August, 2023.



- ii. That on 20th July, 2023, the landlady served the tenant with a notice for current rent balance but the tenant never responded. A copy of the said letter is annexed as “MOO 2”
4. The application was opposed vide a replying affidavit dated 27th September, 2023 in which the tenant/respondent deposes as follows; -
 - i. That both parties had an agreement that the tenant would be permitted to undertake developments on the aforementioned property for the proper running of the school.
 - ii. That after entering into the agreement, the tenant undertook significant developments on the said property including constructing classrooms, latrines, kitchen, staffroom area and fence. Photographs of developments are annexed as “EOB 2 (a) to (c)”
 - iii. That he made rental payments by depositing cash to the landlady’s Kenya Commercial Bank account and Co-operative Bank account.
 - iv. That in the year 2020, the school closed from March 2020 to October 2020 following the government directive owing to the Covid-19 Pandemic. Because of the said closure, the school was unable to pay rent for the entire period given that the school was not operational.
 - v. As a result, the tenant entered discussions with the landlady and she agreed to waive the rent for the period between March 2020 to October 2020. Furthermore, because the pandemic had not fully been contained by October 2020, the school was only able to take in pupils who were in class 6,7 and 8 for the period between October 2020 and December 2020.
 - vi. That the amount cited by the landlady has been grossly overstated and that the landlady ought to have supported her allegations with documentary evidence.
 - vii. That the tenant has made valiant efforts to pay substantial amounts to reduce the outstanding rent arrears and remains willing and desirous of clearing the outstanding amount and continuing the school in the aforementioned property if given time to make periodic payments. Copies of Mpesa statements and bank deposit slips from Co-operative bank are annexed as “EOB 3 (a) to (n)”
 - viii. That the tenant has not been served with any eviction notice in accordance with the Act.
5. The application was canvassed by way of written submissions and both parties filed their submissions with the tenant/respondent filing his submissions dated 27th September, 2023 and the landlady/applicant filing hers dated 5th October, 2023. We shall consider the submissions while dealing with the issues for determination.

B. List of Issues for Determination

6. The following are the issues for determination; -
 - a. Whether the landlady/applicant is entitled to the orders sought in the application dated 21st August, 2023.
 - b. Who shall bear the costs of the application?

Issue (a) Whether the landlord/applicant is entitled to the orders sought in the application dated 21st August, 2023.

7. The landlord/applicant herein is seeking that the tenant herein be evicted from the suit premises.



8. 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.”

9. In the instant case, the applicant/landlady has not denied that she has not issued a Notice to terminate tenancy as submitted by the tenant herein. The landlady in her submissions states that she reserves a right to evict the tenant because of non-payment of rent.

10. Even though the tenant has breached the terms of tenancy by not paying rent, the landlord ought to terminate the tenancy by following due process in accordance with the Act as held above.

11. We therefore find that the applicant’s insistence on the tenant vacating the suit premises contravenes Section 4(2) of *Cap. 301*, Laws of Kenya and the orders sought in the application are not merited.

12. In addition, Section 12(4) of *Cap. 301*, Laws of Kenya gives this Tribunal the following powers: -

“In addition to any other powers specifically conferred on it by or under the *Act*, a Tribunal may investigate any complaint relating to a controlled tenancy made to it by the landlord or the tenant and may make such order thereon as it deems fit”.

13. The foregoing section empowers this Tribunal to determine the issues raised by the tenant as well as those raised by the landlord.

14. We note that the landlady herein has a right to rental income. In the case of *Samuel Kipkori Ngeno and Another v Local Authorities Pension Trust (Registered Trustees) & Another* (2013) eKLR at paragraphs 9 and 12, the Superior Court held as follows:-

“9. A tenant’s first and main obligation is to pay rent as and when it becomes due for the landlord has the right to an income from his investment. Why would a tenant allow himself to fall into such huge arrears of rent?”

“12. The temporary injunction sought in the present application is an equitable remedy at the court’s discretion. He who comes to equity must come with clean hands. A tenant who is in huge arrears of rent is underserving of the court’s discretion. The court cannot be refuge of a tenant who fails to meet his principal obligation of paying rent as and when it becomes due”.

15. The tenant/respondent has not denied that he has rent arrears and has sworn in his replying affidavit that he is willing to clear the outstanding amount and is keen to continue running the school in the suit premises if he is given reasonable time to make periodic payments.



16. The tenant has also submitted that he has made significant developments on the suit premises including the construction of classrooms, latrines, kitchen, staffroom area and a fence.
17. In the tenant's submissions, he has brought to the tribunal's attention the provisions of the Children's Act and Article 53 (2) of the [Constitution](#) of Kenya which dictate that the best interests of the school's children must be taken into consideration, especially considering how disruptive any eviction would be to the said children. We agree with the tenant in that regard but also find that the landlady herein is equally entitled to rental income and the tenant is obligated to pay rent in accordance with the [Act](#).
18. The rent arrears submitted by the landlady is a whopping Ksh. 1,064,000 which the tenant/respondent claims to be grossly overstated. This tribunal is unable to ascertain the correct amount of rent arrears due to absence of statements of rent accounts by both parties and we shall direct that the main reference be heard on merit and that parties exchange statements of rent accounts for determination by the tribunal.

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

19. As regards costs, the same are in the Tribunal's discretion under section 12(1)(k) of [Cap. 301](#), but always follow the event unless for good reasons otherwise ordered. We shall order each party to bear own costs of the application.

C. Orders

20. In conclusion, the following final orders commend to us;
 - a) The application dated 21st August, 2023 is hereby dismissed.
 - b) The landlady/applicant is granted leave to issue a proper notice of termination of tenancy upon the tenant in the prescribed form under section 4(2) of [Cap. 301](#), Laws of Kenya.
 - c) Both parties shall file and exchange statements of rent account for determination of rent due by the tenant to the landlord within Thirty (30) days hereof.
 - d) Hearing of the main reference on the rent due shall be done on merit.
 - e) Both parties shall meet their own costs of the application.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 1ST DAY OF DECEMBER 2023.

HON. JOYCE AKINYI OSODO

(PANEL CHAIRPERSON)

BUSINESS PREMISES RENT TRIBUNAL

HON GAKUHI CHEGE

(MEMBER)

Ruling delivered in the presence of:

Obiria for Landlord/applicant

Kipkurui for Tenant/respondent

