



**Kiura v Nzango (Tribunal Case E030 of 2024)
[2024] KEBPRT 1468 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 1468 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E030 OF 2024
N WAHOME, CHAIR & JOYCE MURIGI, MEMBER
OCTOBER 11, 2024**

BETWEEN

NYAGA KIURA LANDLORD

AND

SYLVESTER MUTWIWA NZANGO TENANT

RULING

1. The Ruling is on the Landlord's Application dated 17.04.2024. The same was moved under a certificate of urgency and sought for the following reliefs;-
 - a. Spent
 - b. That the Landlord/Applicant be granted leave to evict the Tenant/Respondent from the premises, he has occupied on Plot No. 1112/90 at Embu Town, Embu County.
 - c. That the OCS Embu police station do provide security and ensure peace prevails during the eviction.
 - d. That the costs of this Application be provided for.
2. Initially, the Landlord had issued to the Tenant a Termination notice dated 29.12.2023 and which was to take effect on the 1.03.2024. The grounds for the termination were cited as;
 - a. I intend to use the premises for my own personal use for a period of not less than one (1) year.
 - b. Ensure to clear all rent arrears and any rent due before you vacate."
3. When the Tenant was not responsive to the notice of termination aforesaid, the landlord filed the Reference of the even date with the notice of motion Application. In the Reference, the Landlord had grieved that;-

- i. Did not (sic) file an objection to the notice I served him dated (sic) 29.12.2024.
 - ii. Has accumulated Rent arrears of Kshs. 450,000/=.
 - ii. I pray for orders as prayed for in the notice of motion.”
4. The Landlord concluded his filings by the submissions dated 29.8.2024. In summary, the case for the Landlord is that;-
 - i. The Tenant was a serial rent defaulter and that as a result, he issued him with the Termination notice dated 29.12.2023.
 - ii. The Tenant never responded to the Termination notice as required by the law and the same took effect on the 1.03.2024 as notified.
 - iii. As at the 30.4.2024, the Tenant owed rent in arrears at Kshs. 450,000/=.
 - iv. For the reason of the rent arrears and the need by him to use the business premises for more than one year, he required the Tenant to give vacant possession.
5. The Landlord in support of his case, also relied on Section 107 of the Evidence Act, Section 4(4), 7(1) (g) and 10 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301) hereinafter “the Act” and the case of; Samuel Kipkorir Ng’eno & Another vs Local Authorities Pension Trust (Registered Trustees) & Another [2013] eKLR.
6. On his part, the Tenant/Respondent filed the Replying affidavit dated 5.06.2024 and also the submissions dated 13.9.2024. His case is that;
 - i. He had faced financial challenges with creditors which had negatively impacted on his business and therefore his inability to meet his rental payment obligations.
 - ii. He only owed Kshs. 210,000/= in rent arrears and not Kshs. 450,000/= as claimed by the Landlord.
 - iii. Had paid Kshs. 500,000/= as goodwill and which he was entitled to be refunded in case he was to vacate less the rent arrears of Kshs. 210,000/=.
 - iv. He was willing to settle the rent in arrears and only needed to get into an agreement with the Landlord on the same.
 - v. He needed to continue with his business and had no plans to vacate and therefore sought for protection by this court.
7. The Tenant also put reliance in support of his case on the Act herein, the Evidence Act and the case of; Evans Nyakwana vs Cleophas Bwana Ongaro [2015] EKLK and National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR.
8. Having perused the parties respective pleadings and submissions, it is our view that the issues for determination in this matter are the following;-
 - A: Whether the Landlord’s notice of Termination has merit.
 - B: How much in rent is owed to the Landlord by the Tenant.
 - C: Who should bear the costs

9. Before we even delve into the identified issues, it is important to appreciate that though both parties alluded to the existence of a Tenancy Agreement, the same was not availed to court by either of the parties. The same may therefore not be any useful in determination of the issues herein.
10. It is also our view that at this stage, we may not be able to determine the rent in arrears with the required clarity and also on the issue of the goodwill purportedly paid on the premises and the terms under which the same was paid. These are issues that may require evidential value for their determination.
11. Going back to the issues at hand, it is clear that the notice of Termination dated 29.12.2023 is compliant with Sections 4(2), 4(4) and 7(1) of the Act and Regulation 4(1) of the Regulations to the Act. This is on the question of form and content.
12. The main issue for our determination is whether the grounds cited under the notice of Termination do meet the threshold of the law as set under Section 7 of the Act. The first ground cited for such termination is that the Landlord “Intend to use the premises for my own personal use for a period of not less than one (1) year.”
13. This particular ground is anchored in Section 7(1)(g) of the Act which provides that;-

“Subject as hereinafter provided that on the termination of the tenancy, the landlord himself intends to occupy for a period of not less than one (1) year the premises occupied in the Tenancy for the purposes, of a business to be carried on by him therein, or at his residence.”
14. It is clear from the record that the Landlord has not disclosed what business he intends to set up at the premises. He has also not demonstrated any preparedness, either financial or otherwise to set up such business. In our view, the Landlord has not satisfied the requirements of the law to terminate the present tenancy on that ground.
15. In this, we find reliance in the case of; Auto Engineering Ltd. Vs M. Ganella & Company Ltd [1978] eKLR where the court in similar circumstances held that;-

“Apart from making a mere assertion that he intends to occupy the premises for a period of not less than one (1) year, the landlord’s intention can be gauged from surrounding circumstances which lead a court to find on a balance of probabilities that the landlord has established such an intention.”
16. We doubt that any intention can be drawn from the record to show that the Landlord has any intention to run any business.
17. In the case of; Hashim Omar Hashim vs Alliance Nominee Ltd [2020] eKLR, the court made a holding on the establishment of such an intention by the Landlord. It held that;-

“I do not think that in the instance of this case there is any doubt as to what business the landlord wishes to carry out, for it is clear that it is not for a short term rental. I am in the circumstances of this case, ready to infer that the landlord wishes to use the premises for more than one year, based partly on the reason that the landlord disclosed the nature of the business he intended to operate and the amount of money intended to be spent, which is Kshs. 20-30 million. I do not think that one would use this amount of money on this premises in order to use it for a period of less than one (1) year. I am satisfied, just as the chairman of the Tribunal was, that there was a genuine reason given by the Landlord for needing to have the premises to operate its own business.”

18. We therefore find that the Landlord has failed on that ground and the same cannot be the basis of termination of the Tenancy herein. The second ground of Termination cited by the Landlord is that;- “Ensure to clear all Rent arrears and any due rent before your vacate.”
19. In the Termination notice, the Landlord never indicated what were the rents in arrears if any, did not particularize the months that had not been paid for and there is no evidence on record that any effort had been employed to recover such rents. The issue of rent arrears at Kshs. 450,000/= only emerged in the Landlord’s notice of motion Application dated 17.4.2024.
20. This was denied by the Tenant who claimed that he was in rent arrears of seven (7) months at Kshs. 210,000/= and not Kshs. 450,000/= as alleged by the Landlord. This was contained in his replying affidavit sworn on the 11.7.2024. The Landlord did not respond to this assertion by the Tenant and it remains unchallenged.
21. The question that then begs determination by ourselves in the circumstances is whether the ground of termination on non-payment of rent by the Tenant is available to the Landlord. In our considered view, the ground is not compliant with Section 7(1) (b) of the Act. The same provides that;-
- “Where under Section 4 of the Act served a notice of termination of a controlled tenancy on the tenant, the grounds on which the landlord seeks to terminate such tenancy may be such of the following grounds as are stated in the aforesaid notice –
- a. That the Tenant has defaulted in paying rent for a period of two months after such rent has become due or payable or has persistently delayed in paying rent which has become due or payable.”
22. In this case, the Landlord merely made a sweeping statement to the effect that “Ensure to clear all rent arrears and any due rent before you vacate”, to us that was merely a communication to the Tenant and a pre-condition on his exit and not a ground of termination as known to the law.
23. Indeed, in his notice of motion, the Landlord did not offer any evidence to confirm that the Tenant had rent arrears at Kshs. 450,000/= or at all. The only saving grace was the Tenant’s own admission that he owed Kshs. 210,000/= in rent arrears for the months of between December 2023, and June, 2024.
24. Despite the admission by the Tenant, we find that the question of rent arrears was not a valid ground for the termination of the tenancy herein. We would therefore dismiss the ground as well.
25. The Tenant has admitted to having run rent arrears to Kshs. 210,000/= by June, 2024. When the rents for the months of July, August, September and October, 2024 are factored in at Kshs. 30,000/= per month, the admitted rent arrears would be Kshs. 330,000/= that is in the event that the Tenant has not settled any part thereof since June, 2024.
26. Therefore, in our view, the question of the actual rent arrears in this matter should proceed to full trial. The same should also apply to the issue of the purported goodwill paid on the premises and which was reportedly refundable.

B: Who should bear the costs of the Application

27. This is an ideal case where the costs should abide the outcome of the Reference herein.
28. In the final analysis, we make the following orders;-
- a. That the notice of termination of tenancy dated 29.12.2023 is declared illegal and of no effect.

- b. That the Tenant shall settle the undisputed rent arrears for the months of December, 2023 and October, 2024 both months inclusive at Kshs. 330,000/= within thirty (30) days of the date hereof and in default the Landlord shall be at liberty to levy distress in recovery thereof at the cost of the Tenant.
- c. That the parties shall comply with order 11 of the Civil Procedure Rules and exchange their respective evidence and documents within thirty (30) days of the date hereof.
- d. That the costs of this Application shall abide the outcome of the Reference.

Those are the orders of the court.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 11TH DAY OF OCTOBER, 2024.

HON. NDEGWA WAHOME, MBS

PANEL CHAIRPERSON

BUSINESS PREMISES RENT TRIBUNAL

AND

HON. JOYCE MURIGI

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

Delivered in the presence of Mr. Guto Ochoki for the Tenant/Respondent and M/S Mwinja holding brief for Mr. Njeru Thiga for the Landlord/Applicant

Court: Mention on the 14.11.2024 to confirm compliance and take a date for hearing of the Reference.

HON. NDEGWA WAHOME, MBS

PANEL CHAIRPERSON

BUSINESS PREMISES RENT TRIBUNAL

AND

HON. JOYCE MURIGI

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

BPRT CASE NO. E030 OF 2024 (EMBU) 5