



**Njau v Wamae (Tribunal Case E732 of 2021)**  
**[2023] KEBPRT 31 (KLR) (Civ) (17 February 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 31 (KLR)

**REPUBLIC OF KENYA**  
**IN THE BUSINESS PREMISES RENT TRIBUNAL**  
**CIVIL**  
**TRIBUNAL CASE E732 OF 2021**  
**GAKUHI CHEGE, VICE CHAIR**  
**FEBRUARY 17, 2023**

**BETWEEN**

**JIDRAPH MUIGAI NJAU ..... TENANT**

**AND**

**SAMUEL MAINA WAMAE ..... LANDLORD**

**RULING**

1. By a complaint dated 2<sup>nd</sup> December 2021, the tenant moved this Tribunal pursuant to Section 12(4) of Cap.301, Laws of Kenya complaining that the landlord intended to evict him unlawfully from the suit premises.
2. He also filed a motion of even date seeking restraining orders against the landlord, his employees and/or agents from evicting harassing or issuing unlawful demands or in any other way interfering with his possession and quiet enjoyment of the suit premises.
3. The suit premises is situate on plot no. 12715/2225 & 226 within Syokimau, Machakos County where the tenant operates a bar, butchery, car wash, garage and Wines & Spirits business.
4. The tenant accuses the landlord of issuing an illegal notice to vacate the suit premises. The notice is marked 'JK1' and a subsequent one dated 17<sup>th</sup> September 2021 marked 'JK2'. Fearing possible eviction, the tenant moved to this Tribunal to seek for protection.
5. The tenant deposes in his affidavit in support that the landlord is of the misguided belief that he would charge higher rent for the structures built by him on the suit premises after eviction.
6. The tenant deposes that the landlord's actions offend provisions of Cap. 301, Laws of Kenya and are as such illegal. It is for that reason that he seeks to stop the imminent eviction.



7. Interim orders were given by the Tribunal on 3<sup>rd</sup> December 2022 pending hearing inter-partes on 3<sup>rd</sup> January 2022.
8. The application is opposed through the landlord's replying affidavit sworn on 7<sup>th</sup> February 2022 wherein it is deposed that the parties herein entered into a lease agreement dated 1<sup>st</sup> July 2021 which prohibited transfer, letting, mortgaging or parting with possession of the premises without consent of the landlord.
9. It is deposed that sometimes in August 2021, the tenant breached clause 2(b) of the lease agreement by parting with possession of the premises and has been receiving monthly rent of Kshs.80,000/- from one Clifford Gachuhi Munyua who filed Mavoko MCCC No. E204 of 2021 (Clifford Gachuhi Munyua – vs- Gitonga Ringera T/A Viewline Auctioneers & Jidraph Muigai Njau) as per annexure 'SMW2'.
10. The tenant is said to have admitted in his statement of defense and counter-claim in the said suit that there was injection of Kshs.2 million by the plaintiff in the said suit which constitutes assignment of lease agreement and therefore a breach which entitles the landlord to terminate it.
11. The landlord learnt about the subtenant through the court case aforesaid. The said subletting was done without his consent as a result of which he served the termination notice dated 24<sup>th</sup> August 2021 which was subsequently withdrawn. He later served a statutory notice dated 15<sup>th</sup> September 2021 for termination of the tenancy on account of substantial breaches by the tenant.
12. Following the said notice, the tenant filed this case despite the pendency of the subordinate court case aforesaid. The tenant did not file a reference against the statutory notice to terminate tenancy and as a result, the landlord applied for his eviction vide Machakos BPRT No. E004 of 2022. The case in Mavoko court relates to a parcel of land known as L.R No. 12715/224 which the landlord says is vacant and meant to mislead the said court.
13. The tenant is accused of misleading this Tribunal in obtaining orders of 5<sup>th</sup> December 2021 and failed to serve the proceedings together with the same. As such, this suit is attacked as an abuse of court process brought with extraneous or ulterior motives.
14. The landlord deposes that the tenant admitted breach of fundamental term of the lease agreement and his application for eviction orders against him in Machakos BPRT Case No. E004 of 2021 ought to be allowed.
15. On 1<sup>st</sup> September 2022, the said case was consolidated with this case for hearing and the tenant was granted 14 days to file a response thereto together with submissions. The matter was fixed for mention on 28<sup>th</sup> September 2022 to confirm compliance.
16. The landlord's counsel filed submissions dated 29<sup>th</sup> March 2022 in BPRT No. E732 of 2021. The tenant on the other hand filed a replying affidavit to the landlord's application in Machakos BPRT No. E004 of 2022 sworn on 19<sup>th</sup> January 2023.
17. According to the tenant, he filed his reference vide Nairobi BPRT No. E732 of 2021 after the landlord issued him with a defective notice to vacate the suit premises. An order was issued herein on 3<sup>rd</sup> December 2021 restraining the landlord from evicting the tenant from the suit premises pending hearing and determination of the reference. The order was served on 13<sup>th</sup> January 2022.
18. The landlord filed a replying affidavit herein sworn on 7<sup>th</sup> February 2022 and went ahead to file another reference vide Machakos BPRT No. E004 of 2022 instead of allowing this matter to be concluded which has delayed determination of the dispute according to the tenant.



19. The tenant therefore prays that the subsequent reference be dismissed and the earlier one proceeds to hearing and determination based on the filed pleadings.
20. Based on the foregoing pleadings, the following issues arise for determination:-
- a. Whether the tenant is entitled to the reliefs claimed in the reference and application dated 2<sup>nd</sup> December 2021.
  - b. Whether the landlord is entitled to the reliefs claimed in the reference and application in Machakos BPRT No. E004 of 2022.
  - c. Who is liable to pay costs of the consolidated reference?
21. The genesis of the relationship between the two parties herein is an agreement for lease dated 1<sup>st</sup> July 2020 in respect of L.R No. 12715/5/2225(part) and 12715/5/2226 (part) together with the buildings and improvements erected thereon which is attached to the supporting affidavit of the landlord sworn on 20<sup>th</sup> January 2022 and marked 'SWM-1'.
22. The said agreement is executed by both parties and duly witnessed by Geoffrey M. Nyaanga Advocate and commissioner for oaths. Cause 2(d) thereof stipulates as follows:-
- (d) Not to transfer, let, mortgage or part with possession of the premises or any part thereof without the written consent of the lessor first hand and obtained provided always that the lessee being a person running a legal business then for the purpose of the sublease transfer of the beneficial interest in more than fifty per cent of the business interest of the lessee shall constitute an assignment of this lease and it is hereby expressly agreed and declared that upon any breach by the lessee of this covenant, the lessor may re-enter upon the premises without notice and thereupon the term hereby created shall terminate absolutely. As exception to this, is made for the salon listed as number 4 in clause 4(e) below. No other exception shall be made".
23. According to clause 4(e) of the said agreement, the premises are solely to be used for proposes of the lessee's business which business has been approved by the lessor as:-
- i. Bar and Restaurant (with a butchery)
  - ii. Garage.
  - iii. Car wash with service extension.
  - iv. Salon rented out.
  - v. Tailoring shop.
24. Sometimes on 24<sup>th</sup> August 2021, the landlord served a notice upon the tenant marked 'JK1' seeking to terminate the lease executed on 1<sup>st</sup> July 2020 with effect from 30<sup>th</sup> November 2021. The landlord subsequently served a notice to terminate tenancy dated 1<sup>st</sup> September with effect from 1<sup>st</sup> December 2021 on grounds that:-
- i. The tenant had committed other substantial breaches of the obligations under the tenancy or for any other reason connected with the tenant's use and management of the premises comprised in the tenancy.
  - ii. The landlord intends to occupy the premises for more than one year.
25. According to the tenant, the said notices are illegal and he seeks for injunction to restrain his eviction from the suit premises or interference with his possession and quiet enjoyment of the suit premises.



26. In response, the landlord accuses the tenant of breach of fundamental term in Clause 2 (d) of the lease agreement by subletting and allowing one Clifford Gichuhi Munyua to operate therefrom at a monthly rent of Kshs.80,000/- without his authority or consent. The said subtenant sued the tenant in Mavoko MCCC No. E204 of 2021 in terms of annexure 'SWW2' and in a defense and counter-claim filed in the said case, the tenant admitted that the subtenant injected Kshs.2 million which constitutes an assignment of the lease agreement contrary to clause 2(d) thereof.
27. The landlord filed Machakos BPRT No. E004/2022 on 20<sup>th</sup> January 2022 seeking for a mandatory injunction to issue against the tenant/Respondent to deliver vacant possession of L.R. No. 12715/2225 (Part) and 12715/2226 (Part) situate in Mavoko subcounty, Machakos County. He also seeks to be granted orders to forthwith enter, evict and repossess the suit premises with assistance of OCS, Athi River Police Station and his preferred Auctioneer.
28. The application is predicated upon a notice to terminate tenancy dated 1<sup>st</sup> September 2021. The tenant did not oppose the said notice and the same took effect on 1<sup>st</sup> December 2021 pursuant to Section 10 of Cap. 301, Laws of Kenya. The tenant did not however hand over vacant possession of the premises to the landlord.
29. According to the landlord, failure by the tenant to file a reference under section 6(1) of Cap. 301, Laws of Kenya in opposition to the termination notice crystalized his right to vacant possession on the effective date. It is on that basis that he seeks for eviction orders against the tenant who became a trespasser on the suit premises.
30. The tenant is accused of subletting the suit premises contrary to clause 2(d) of the lease agreement without the landlord's consent which extinguished his right of occupation of the suit premises.
31. I have considered the response by the tenant to the landlord's application and note that he has not alluded to any reference against the notice to terminate tenancy served by the landlord. He has also not denied the allegation of breach of fundamental term of the lease agreement contained in clause 2(d) thereof. He did not either deny that he was sued by the subtenant who seeks for injunction and compensation for costs incurred in constructing the garage.
32. I have looked at the agreement to lease and the pleadings filed in the said subordinate court case and I am convinced that the tenant is indeed in breach thereof and the landlord was therefore justified in serving the termination notice dated 1<sup>st</sup> September 2021. There having been no reference filed pursuant to section 6(1) of Cap. 301, Laws of Kenya, the notice took effect under section 10 of the Act and the tenant is disentitled to the orders sought in his reference and application dated 2<sup>nd</sup> December 2021. On the other hand the landlord is entitled to the orders sought in the application dated 20<sup>th</sup> January 2022 under Section 12(1) (e) as read with section 12(4) of Cap. 301 Laws of Kenya.
33. As regards costs, the same are in the Tribunal's discretion under section 12(1)(k) of Cap. 301 Laws of Kenya but always follow the event unless for good reasons otherwise ordered. I have no reason to deny costs to the landlord.
34. Consequently, the following final orders commend to me in the consolidated case;
  - a. The tenant's application and complaint dated 2<sup>nd</sup> December 2021 are hereby dismissed with costs to the landlord.
  - b. The landlord's application dated 20<sup>th</sup> January 2022 is hereby allowed and the tenant is hereby ordered to vacate from the suit premises known as L.R NO. 12715/2225(Part) and 12715/2226 (part) situate at Mavoko Sub-County, Machakos county and in default shall be



evicted therefrom by a licensed auctioneer who shall be provided with security by the OCS, Athi River Police Station.

- c. The tenant shall pay Kshs.50,000/- to the landlord as costs of the consolidated case together with any unpaid mesne profits equivalent to monthly rent set out in the terminated lease agreement.

It is so ordered.

**RULING SIGNED, DATED & DELIVERED THIS 17TH DAY OF FEBRUARY 2023.**

**HON. GAKUHI CHEGE**

**VICE CHAIR**

**BUSINESS PREMISES RENT TRIBUNAL**

**Ruling delivered in the presence of:**

Mwenda for the Tenant

No appearance for the Landlord.

