



**Kihara v Kariuki (Tribunal Case E133 of 2022)
[2023] KEBPRT 468 (KLR) (7 September 2023) (Judgment)**

Neutral citation: [2023] KEBPRT 468 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E133 OF 2022
P MAY, VICE CHAIR
SEPTEMBER 7, 2023**

BETWEEN

JECINTA NYAWIRA KIHARA TENANT

AND

PAUL MWANGI KARIUKI RESPONDENT

JUDGMENT

1. The present proceedings were commenced vide the reference filed by the tenant dated October 28, 2022 opposing the notice of termination that the landlord had served upon her. The present proceedings were therefore precipitated by the notice of termination dated September 12, 2022 and which was to take effect on December 1, 2022. The landlord had stated in the said notice that he intended to use the premises for a period not less than 2 years.
2. The landlord states that the tenant defaulted in making payments after filing their objection to the notice of termination thus prompting the landlord to move the Tribunal vide the application filed under certificate dated January 23, 2023. The application sought for orders compelling the tenant to pay the outstanding rent arrears. The application was compromised on April 11, 2023 whereby directions were issued and the reference set down for hearing.
3. The hearing of the reference proceeded on June 5, 2023 whereby the parties testified in support of their respective positions. I will summarize the case of each party hereunder:
4. The landlord was the first to testify. He adopted his witness statement and tendered his evidence in chief. He was cross examined by the tenant's advocate. He stated that he was the registered owner of the demised premises and that he had received numerous complaints against the tenant including from the chief. He stated that the rent was inclusive of electricity bill but the same was capped at Kshs 500 per month but the tenant had exceeded the same forcing him to seek the intervention of Kenya Power as the tenant had become unruly.



5. It was the landlord's testimony further that the Applicant had dug pit latrine and the cost was to be recovered from the rent payable. The landlord admitted to having written a letter to the county government seeking to have the tenant denied a liquor license.
6. The landlord stated that he had always acted within the purview of the law as evinced by his actions of respecting the orders of the Honourable Tribunal. He therefore prayed that the notice be upheld and the tenant be ordered to vacate the premises.
7. The tenant relied on the replying affidavit sworn on April 13, 2023. She stated that she had always paid rent as when it fell due and the allegations that she had fallen into arrears were misleading.
8. Having set the above background, it is clear that the sole issue for determination is the validity of the notice of termination issued on September 12, 2022. Section 7 of Cap 301, does provide for various instances that the landlord may be allowed to terminate a tenancy. One of them is where the landlord intends to use the premises and this is provided for under Section 7 (1) (g) which is drawn as follows :-

7. 'Grounds on which landlord may seek to terminate tenancy

- (1) Where under section 4 of this 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—
- (g) 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 year the premises comprised in the tenancy for the purposes, or partly for the purposes, of a business to be carried on by him therein, or at his residence.'

9. It will thus be seen that a landlord can terminate a tenancy where the landlord intends to occupy the premises for a period of not less than one year to carry out his business.
10. In principle, I agree that a good landlord's notice ought to specify that the landlord intends to use the premises for a period of more than one year, because if the period is less than one year, then the tenant may wish to contest it. However, in the instance of this dispute the landlord did not disclose both in their pleadings nor during the hearing of the reference how they intended to use the premises.
11. In order to succeed in a claim of vacant possession, this Honourable Tribunal must be satisfied that the Landlord himself intends to occupy the suit premises for a period of not less than one year. The criteria for determining the landlord's intention were dealt with in the case of; [*Auto Engineering Ltd Versus M Gonella & Company Limited \(1978\) eKLR*](#) where the Court held:

' Apart from making a mere assertion that he intends to occupy the premises for a period of not less than one 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.'

12. Indeed, in finding that the Landlord had established a clear and settled intention to occupy the suit premises, the Environment and Land Court in the case of; [*Hashim Omar Hashim versus Alliance Nominee Limited \[2020\] eKLR*](#) stated as follows:

' 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 for 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 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. The notice given, which was six months, was also sufficient, and I think that it was now incumbent upon the appellant to seek alternative ways of operating his restaurant business without the bungalow in question.'

13. A similar position was upheld by the Court in [*James Kariuki Kithinji versus Dominic Ntongai \[2020\] eKLR*](#), where the Court in noting that the Landlord had established a clear intention to commence a business in the suit premises stated as follows:

' The act does not state that a detailed account should be given regarding the nature of the intended use of the premises by the landlord. It was therefore sufficient for the respondent to demonstrate that he intended to put up a business and use the suit premises. As regards the first issue, I find that the respondent gave evidence before the tribunal stating that he had registered a company and was intending to carry out a business. He was to use the suit premises as an office and a show room for the products he was to be selling. He provided details of his registered company.'

14. The above notwithstanding, according to Section 107 of the [*Evidence Act*](#) Cap 80 Laws of Kenya, it is trite law that he who alleges must prove. The burden of proof therefore lies with the Landlord to show that he intends to occupy the suit premises for a period of not less than one year for the purposes of a business to be carried on by him therein, or at his residence.
15. I am not persuaded that the Landlord is acting in good faith and that he genuinely intends to put the premises into his own use. It is my finding that the Landlord has not indicated a firm and clear intention that he intends to put the demised premises into his own use, and further that the said use can only be conducted at the demised premises.
16. From the pleadings filed it is clear that the tenant had previously defaulted in paying her rent. This is in blatant disregard of her cardinal obligation. The landlord has proven that the rent arrears had gotten to an all-high figure of Kshs 24,000.
17. From the foregoing findings and analysis, the notice of termination dated September 12, 2022 is quashed and the Tribunal shall issue the following orders:
- a. The tenant's reference dated October 28, 2022 is allowed.
 - b. The landlord shall tabulate and serve the tenant with an updated statement of accounts within 3 days. The tenant shall upon receipt of the statement clear any outstanding rent arrears within 7 days. In default the landlord shall be at liberty to levy distress without any reference to the Tribunal.
 - c. Each party shall bear their own costs.

RULING DATED, SIGNED & DELIVERED VIRTUALLY THIS 7TH DAY OF SEPTEMBER 2023

In the presence of:-

No appearance of parties



HON. P. MAY

VICE CHAIR

PARA 7.

9.2023

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