



Birithu v Nkubitu (Tribunal Case 46 of 2020)
[2023] KEBPRT 1194 (KLR) (13 September 2023) (Ruling)

Neutral citation: [2023] KEBPRT 1194 (KLR)

REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE 46 OF 2020
CN MUGAMBI, CHAIR
SEPTEMBER 13, 2023

BETWEEN

KIMATHI BIRITHU TENANT

AND

FESTUS MUNGATHIA NKUBITU LANDLORD

RULING

Introduction

1. This matter arises out of the landlord's notice to terminate tenancy dated 9.7.2020. The tenant in objection to the notice to terminate tenancy has filed a reference to the Tribunal dated 28.7.2020.
2. On the face of the notice to terminate tenancy by the landlord, the grounds for termination are set out as follows:-
 - a. Failure to pay rent, water and electricity bills and delay in paying rent.
 - b. Failure to repair and maintain the premises.
 - c. Failure to comply with the [Public Health Act](#).
 - d. Landlord intends to occupy for his business and residence.
3. On 7.9.2022 when the matter came up for hearing and while actually in the course of the proceedings, Counsel for the landlord applied to be allowed to abandon all the other grounds for termination save for ground D thereof. The ground subject matter of these proceedings therefore, is the landlord's intention to occupy the premises for his business and residence.



The landlord's case

4. The landlord called three witnesses in support of his case. The landlord's and the witnesses evidence may be summarized as follows:

The landlord's evidence

5. The landlord, Festus Mung'athia testified that he is the proprietor of Plot No. 2457, NJIA Meru County (hereinafter the suit premises) and that Mr. Kimathi Birithu, the Respondent herein has been a tenant in the suit premises since 2011. The suit premises comprised of three rooms which hosted a hall, kitchen and store. The tenant occupied the fourth room as his sleeping quarters. The tenant was paying rent of Kshs. 13,500/=.
6. The landlord further testified that in March 2020, he informed the tenant that he wanted to increase rent, the tenant disagreed with the rent increment and instead said he would leave the premises by July 2020 which he did not do prompting the landlord to come to court. It was the landlord's evidence that he had now turned seventy years old and he would like to leave the suit premises to his children. The landlord who confirmed that he had served the statutory notice upon the tenant also indicated that he was not interested in any money from the tenant but only wanted him to vacate the premises.
7. On cross examination by Counsel for the tenant, the landlord confirmed that there was no written lease agreement between the parties and that he only started issuing receipts to the tenant in the year 2020. He further stated the rent increment was to push the rent up to Kshs. 31,000/=-, again there was no agreement for the increment.

The landlord told the court that the only reason he wanted the tenant out was because he wanted his children who are now grown up to take over the premises. the landlord also stated that he was not being malicious and he had no intention of running a hotel business.

Landlord's 2nd witness

David Muthee Mung'athia

8. David Muthee Mung'athia adopted his witness statement dated 8.6.2022. The said statement may be summarized as follows hereunder:-
 - a. That in 2018, the parties herein agreed to increase the rent from Kshs. 13,500/= to Kshs. 31,000/= but the tenant went back on his word on allegations that he had spent money carrying out renovations and repairs on the premises.
 - b. That at a meeting of Njuri Ncheke elders, the tenant insisted on being compensated for digging a pit latrine at the exorbitant price of Kshs. 213,000/=-. It was then agreed that the tenant would not pay rent for fourteen months but also that he should vacate the premises after the said period.
 - c. That the tenant threatened him and also assaulted his brother Peter Kobia Mung'athia who filed a criminal case against the said tenant.
 - d. That his siblings were considering the businesses they would carry out in the premises.
 - e. That the reference by his father is solely premised on the ground that the tenant has recouped his initial Capital and the landlord would now like to establish his family business in the premises.



- f. That the tenant has frustrated the landlord; that the landlord cannot even expand his own premises and has even intimidated tenants who have since left the premises occasioning the landlord loss of income.
- g. Upon cross examination by counsel for the tenant, the witness (David) stated that the agreement to increase the rent and which the tenant declined to abide by was verbal.

The witness in further response stated that the landlord wanted the tenant to vacate the premises so that the landlord's children can take over the premises. the witness further stated that he had no evidence to show that the tenant's business had been closed down.

The landlord's 3rd witness

Grace Makena

9. Grace Makena, a daughter of the landlord also adopted her witness statement dated 8.6.2022 as her evidence in chief. The said statement may be summarized as follows hereunder:-
 - a. That sometimes in the year 2011, her father the landlord herein, her brother Peter Mung'athia and cousin Jeremiah Kailemia agreed to vacate the suit premises to allow the tenant to start his business.
 - b. That the children of the landlord having now completed school, need to undertake their own businesses in the suit premises.
 - c. That the premises should serve as a retirement package for her ageing father.
 - d. That the tenant has completely disorganized the landlord's retirement plans and made the suit premises unoccupable resulting in further loss of income to her father.
 - e. Upon cross examination by the Counsel for the tenant, the tenant confirmed that the tenant had been in the suit premises since 2011. She further stated that she was not aware of any rent dispute between her father and the tenant before the year 2020. The witness also stated that they needed to take over the premises as their old father was not benefiting from it.

Landlord's 4th witness

Joseph Mukuni M'Mutirithia

12. Joseph Mukuni M'Mutirithia also adopted as his evidence in chief, his written statement filed in court and dated 8.6.2022. The said statement may be summarized as follows:-
 - (a) that the parties to this dispute sought his assistance in resolving this issue where the landlord agreed to give the tenant three months to leave. The matter later was taken before the Njuri Ncheke council of elders and the tenant was given one year to vacate the premises. The tenant has not left the premises yet and still pays the old rent of Kshs. 13,500/=.
 - (b) that he knows the landlord well and also that he is aware that the landlord has educated his children using rental income from the premises and his other businesses at the building.
13. Upon cross examination by Counsel for the tenant, the witness further stated that the landlord would like to change the users of the suit premises and give the said premises to his children who may not be interested in the hotel business. In his opinion it was only fair that the tenant vacates the suit premises.



The Tenant's case

14. The tenant did not call any witness but testified in objection to the notice to terminate his tenancy. He adopted his witness statement (undated) as his evidence in chief and also produced the documents in his list of documents as the tenant's exhibit Nos. 1-6. The tenant's statement may be summarized as follows hereunder:-
- (a) That he has been a tenant of the landlord herein since 2010 and they have had cordial relations until sometimes in the year 2018.
 - (b) that he runs a hotel business in the suit premises and it is his only source of income.
 - (c) That since 2010, he has established a customer base and if he is evicted his hotel business will collapse subjecting him to poverty as he has no other business.
 - (d) That he is aware that the landlord is being pushed by his children to evict him so that they can start their own business in the premises.
 - (e) That if he is allowed to continue with his business, he is ready and willing to continue paying rent and other bills promptly.
15. Upon cross examination by counsel for the landlord, the tenant confirmed that he received the notice to vacate which eventually led to the filing of this suit. He also stated that at the meeting of the elders, they confirmed that the landlord owed him Kshs. 228,000/=. The tenant also stated that it was not agreed at the meeting that he would vacate the premises.
16. The tenant confirmed that the landlord has other tenants in the rooms at the back of the premises and also that he did not chase away any tenant. The tenant also stated under cross examination that the landlord's children are the ones who want to have him evicted and they have been very unruly towards him.

It was the tenant's view that the notice issued to him was malicious and false. On the issue of rent, the tenant stated that he paid his rent on 12.2.2023 and that the issue of rent was never discussed with the elders, rather it is the landlord who kept raising the issue of rent increment.

Issues for determination

17. I had earlier observed that the landlord abandoned all his other grounds in the notice to terminate tenancy except ground D which was the landlord's intention to occupy the suit premises for his business and residence. In this regard, Section 7(g) of Cap 301 provides as follows (as a ground for termination of tenancy);
- “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.”
18. The issue that I need to determine therefore is whether the landlord has demonstrated sufficiently that he intends to occupy the premises for the purposes of a business to be carried out by him therein or at his residence. All through the landlord's evidence and that of his witnesses, what comes out clearly is that the landlord who is now ageing would like to wrestle the premises from the grip of the tenant and have his own children take over the premises for the purposes of carrying out their own businesses.



19. Does a “business to be carried out by the landlord” extend to also mean a business to be carried out by the children of the landlord? Can a landlord base his termination on the grounds that he intends to take back the premises for the purposes of use by his own children? While this kind of ground is not expressly stated in the relevant section, Section 7 of Cap 301, I do not think the section declares the grounds set out therein as the only grounds upon which a tenancy may be terminated. I do not find the section as declaring itself exhaustive of the grounds upon which termination can be sought. Section 7(1) for contextual purposes provides as follows:-

“While under Section 4 of this Act served a notice termination of a controlled tenancy on the tenants, the ground on which the landlord seeks to terminate such tenancy may be such of the following grounds as are stated in the aforesaid notice.” (underlining mine)

20. I am therefore of the view that there is nothing illegal or wrong about a proprietor of a premises who also doubles as the landlord seeking to terminate the tenancy of a tenant on the grounds that he intends for his family members to carry out businesses of their own therein. All the landlord needs to do is to comply with the provisions of Section 4(2) of the Act which provides as follows:-

“A landlord who wishes to terminate a controlled tenancy or to alter to the detriment of the tenant any term or condition in or right or service enjoyed by the tenant under such a tenancy shall give notice in that behalf to the tenant in the prescribed form.”

21. In the instant case, the notice under the aforesaid section was properly served. The tenant in objection thereto filed a reference to the Tribunal and hence these proceedings.

22. The tenant’s opposition to the notice to terminate his tenancy largely revolves around the allegation that he has over the years developed a client base which will collapse if he is evicted from the suit premises. While I appreciate this eventuality, the interests of the tenant must be weighed against those of the landlord and the protection of the interests of the tenant guided by sound interpretation of the law or simply put, the tenant can only be protected by the Tribunal to the largest extent possible provided by the law.

The tenant having been served with the mandatory notice to terminate his tenancy, I think it would be trampling on the rights of the landlord to deny him possession of the property for his own use in circumstances that would force him or his family members to rent alternative premises while they have a property they can call their own.

23. I have gone through the evidence on the record and I have not seen any reasonable challenge to the landlord’s intention to take back the premises for the purposes of a business to be carried thereon by himself or his family. I am in the circumstances satisfied that the landlord has established that one ground of termination and I approve the terms of the tenancy notice to that extent.

24. The tenant has been in the suit premises since 2010 or thereabouts. That is a period of more than ten years. No doubts the tenant has created a client base but I do not believe that the mere termination of the lease is going to destroy his client base and render him destitute, to think as such would mean that in tenancies when tenants have established a veritable client base, then such tenancies can never be terminated thus equating the rights of the tenant to hold the property to those of the proprietor or landlord.

25. I am minded of the fact that the tenant would need to move his business elsewhere, I am equally minded of the fact that the tenant has been aware of the landlord’s intention to take over the premises since July 2020 when the notice to terminate tenancy was issued. That said, I think that the period of one



hundred and twenty days would be more than sufficient to enable the tenant to procure alternative premises for his business if he is still desirous of carrying out the same business.

Final dispositions

26. In the final analysis, I make the following orders:-

- (a) That the tenancy between the landlord and the tenant is hereby terminated.
- (b) that the tenant shall render vacant possession of the premises within a period of one hundred and twenty days from the date hereof, Failing which the landlord shall be at liberty to evict the tenant using a licensed auctioneer.
- (c) That the landlord shall have the costs of the suit assessed at Kshs. 50,000/=.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 13TH DAY OF SEPTEMBER 2023.

HON. CYPRIAN MUGAMBI

CHAIRPERSON

13.9.2023

In the presence of;

Mr. Ondari for the tenant

In the absence of the landlord and his Counsel

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