



**Kariuki v Wainaina (Tribunal Case 5 of 2021)
[2023] KEBPRT 1285 (KLR) (23 May 2023) (Judgment)**

Neutral citation: [2023] KEBPRT 1285 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE 5 OF 2021
CN MUGAMBI, CHAIR
MAY 23, 2023**

BETWEEN

JOHN NYAMU KARIUKI TENANT

AND

ESTHER W WAINAINA LANDLORD

JUDGMENT

1. The landlord herein served a notice of termination of tenancy dated 28th November 2020 upon the tenant on grounds that on termination, she intends to demolish or reconstruct the premises comprised in the tenancy or substantial part thereof and to carry out substantial work of reconstruction on the premises which could not reasonably be done without obtaining possession.
2. The notice was issued under section 4(2) of Cap 301 Laws of Kenya in the prescribed form and has expressed to take effect on 31st January 2021.
3. The tenant being opposed to the notice, filed a reference on 21st January 2021 under Section 6(1) of Cap 301, Laws of Kenya.
4. On 7th June 2022, both parties were directed to comply with order 11 of the Civil Procedure Rules and the matter was fixed for hearing on 13th July 2022. The parties did not comply and as a result the matter was adjourned to 23rd August 2022.
5. On 23rd August 2022, the tenant applied for adjournment and the matter was therefore fixed for hearing on 6th September 2022.
6. The landlord filed her witness statement dated 2nd August 2022 together with a list and bundle of documents which were adopted during the hearing. The tenant also filed a witness statement dated 5th September 2022 which he also relied upon during the hearing on 6th September 2022.



7. It was the evidence of the landlord that she received complaints from the tenants in her commercial building who demanded renovations thereof. As a result, she applied for necessary approvals to give way for substantial works. It required the tenants to vacate the affected rooms. This included the tenant herein.
8. As a result, the landlord issued notice to terminate tenancy upon the tenant herein in respect of Room No. 16 in the building erected on L.R. No. 6585/9/11, Nyahururu Municipality otherwise known as “REST HOUSE” with effect from 31st January 2021. The reason for terminating the tenancy was to enable her carry out substantial work repairs and modernization or reconstruction of the old building to make it meet business needs of the tenants and Public Health Standards.
9. The repairs included demolition of some parts of the building, plumbing works and electrical work which could not be done with some tenants occupying the premises. The structure on the said land parcel according to the landlord is old which was built during the Colonial period. The landlord had been modernizing the building in phases. The front part which was a hotel was reconstructed and partitioned into offices and a few business premises. The back side which used to be guest rooms was demolished and a two storey apartment with the ground and first floor already complete. The second floor is still incomplete.
10. The front and back parts of the building use the same amenities like water and electricity which needed separation. The 22 offices on the front part of the building’s ground and first floor use one water meter and one electricity meter. As a result, the landlord issued notice to vacate to some tenants to enable her do electrical and plumbing works so that each tenant could have his/her water and power meter. Some of the tenants were issued with verbal notices and they complied.
11. In regard to the case at hand, the landlord avers that she issued notices to four (4) tenants in Rooms Nos. 15, 16, 19 and 20 and all the other three vacated but the tenant herein opposed the notice and filed the instant reference. The notice is therefore not discriminatory.
12. The landlord produced the following documents in support of her case:-
 - i. Approval of alteration of existing building from National Construction Authority (NCA).
 - ii. Payments to KPLC for the quotation of additional load to accommodate more meters.
 - iii. Copies of notices to vacate issued to other tenants.
 - iv. Bills of quantities for plumbing and electrical installation.
 - v. Receipts for some of the items purchased.
 - vi. Photographs of the premises for both the front part offices and back part residential houses.
13. It is therefore the contention of the landlord that the ground for termination is merited and ought to be allowed to enable her continue with the pending construction.
14. On his part, the tenant contends that the building is fully occupied and there is no vacant room or space in the said building awaiting the purported reconstruction or construction. He further contends that no construction or reconstruction was/is currently taking place in the said building. The photographs showing construction works according to the tenant relate to the year 2020 and that the last building and construction works were completed in the year 2021. The said works involved construction of additional two floors at the rear of the building which was completed and the same are currently occupied.



15. It is the tenant's contention that no similar notices in the prescribed form were served upon the other tenants in the said building and the ones attached to the list of documents are not in the prescribed form. As such, the landlord's notice is impugned as being discriminatory.
16. It is the tenant's contention that Rooms 15, 19, 20 and 21 are fully occupied and have been occupied even when the constructions works was going on in respect to the additional floors at the rear of the said building.
17. After both parties testified in this case, it was agreed by consent to file and exchange submissions which direction was complied with. I shall advert to the submissions while dealing with the issues for determination.
18. Based on the pleadings and evidence in this case, the following issues arise for determination:-
 - a. Whether the tenancy notice dated 28th November 2020 ought to be approved or dismissed.
 - b. Who is liable to pay costs?
19. The landlord served the tenant with notice to terminate tenancy pursuant to Section 4(2) of the *Landlord and Tenant (shops, hotels and catering Establishments) Act* Cap 301, Laws of Kenya on the grounds that she intended to demolish or reconstruct the premises comprised in the tenancy. She also cited the ground that she intended to carry out substantial work of reconstruction on the premises which could not reasonably be done without obtaining possession. The said grounds are in tandem with the provision of Section 7(1)(f) of Cap 301, Laws of Kenya.
20. In her witness statement and evidence tendered before this Tribunal, the landlord stated that she intended to fix water pipes through the tenant's premises as there was no water for the tenant's shops including the salon and barber shop in the building. The water pipes are supposed to pass through the tenant's shop as it was on the route of the pipes. This cannot happen when the tenant is in occupation. There are other 4 tenants to be affected by the piping works. She had informed them about it. She required two months to finish the renovations.
21. The landlord also testified that she needed to fix electricity supply but the tenant's shop wiring had not been done. This will also benefit other tenants who were getting their electricity supply form a submeter. Each tenant is required to have own meter. The tenant was free to come back after completion of the proposed renovations.
22. On cross examination, the landlord stated that Room Nos. 15, and 17 were vacant and are next to the tenant's premises. The other tenants had agreed to move. She stated that the piping works cannot pass by the verandah as they have to connect the other rooms for other tenants.
23. It is submitted on behalf of the tenant that the landlord's claim in her oral evidence that the tenancy premises are required for installation of water pipes to supply water to the other premises in the said building is not in her witness statement. The other tenants were not called as witnesses by the landlord to corroborate her evidence. The notices served upon the other tenants were not in the prescribed form stipulated under Section 4(2) of Cap. 301, Laws of Kenya according to the tenant.
24. It is argued that the fact that only the tenant herein was served with the prescribed notice meant that the notice was discriminatory. It is submitted that failure to call an expert for instance an Engineer, plumber or water works expert on where the pipes were to pass through the tenant's premises left the landlord's case unproved.



25. It is further submitted that construction works in the landlord's building was completed in the year 2021 which was confirmed by the landlord in her oral testimony. No construction or reconstruction was pending on the front part of the building where the tenancy premises are located.
26. According to the tenant, he already had electricity in his premises through a submeter installed by the landlord and it was doubtful that installation of electricity meter would amount to reconstruction of the premises. The tenant's counsel urged the Tribunal to apply an objective test in determining whether the landlord's intention to reconstruct the premises is genuine and that the landlord had a reasonable prospect of giving effect to her intention to reconstruct the premises. This she had failed to do according to the tenant's counsel.
27. It is further submitted that the building has corridors where the water pipes can be laid and installed but that the landlord stated that it would cost more to use the said corridors. It is argued that it is not absolutely necessary for the tenant to vacate the premises for installation of water pipes which can be installed along the corridors of the subject building. It was not demonstrated that the tenant had to vacate for purposes of installing electricity meter to his premises as no design or plan for such installation was produced to demonstrate so.
28. The tenant fears that once he vacates the premises, this Tribunal will not have jurisdiction and the tenancy will cease and there will be no control of what happens after he vacates. It is thus submitted that the landlord's notice to terminate tenancy has no merits and the reference ought to be allowed.
29. On the other hand, the landlord's counsel submits that, based on the evidence and documents exhibited by the landlord, there was a clear indication that there was intention to commence reconstruction immediately. She had the means to carry out the reconstruction.
30. The plumbing works would involve digging a trench inside the tenant's premises to accommodate pipes that will supply water to the building. The salon and barber shops required water, a fact confirmed by the tenant. The salon business used water from the toilets as there was no water inside the business premises. All tenants use the washing sinks inside the toilets as there was no sink outside or water point outside the said facility.
31. It is submitted that although the other rooms had been vacated, they were leased out on condition that the new tenants would vacate upon this case being concluded as it was not economically viable to keep them vacant in the pendency of this case which has taken long to hear and determine.
32. I have considered the evidence and submissions tendered by both parties and note that the standard of proof required in a civil case is on a balance of probabilities. This degree of proof was discussed in the case of; *Palace Investment Ltd. Vs Geoffrey Kariuki Mwenda & Another* [2015] eKLR, wherein the court of Appeal observed as follows:-

“Denning J in *Miller vs Minister of Pensions* [1947] 2 ALL ER 372 discussing the burden of proof had this to say:-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the Tribunal can say, we think it more probable than not, the burden is discharged, but if the probabilities are equal, it is not- This burden on a balance of probabilities means a win however narrow. A draw is not enough. So in any case in which a Tribunal cannot decide one way or the other which evidence to accept where both parties.....are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”



33. In the instant case, the landlord has provided evidence that she obtained all necessary approvals from the relevant authorities in regard to the construction and reconstruction works on the building standing on L.R. No. 6585/9/11, NYAHURURU MUNICIPALITY otherwise known as “REST HOUSE”. It was confirmed even by the tenant that she commenced work and indeed erected a two storey building at the rear of the premises. The landlord testified that she intended to redo the water and electricity supply to the office premises and shops on the front section of the building and that she needed possession of the premises occupied by the tenant to lay the water pipes for supply of water to the adjacent shops. She also needed to do wiring for the tenant’s shop having completed the same for the other premises but the tenant resisted.
34. It is not inconceivable that the landlord would require possession of the tenant’s premises for the said works to be undertaken. The tenant’s contention that the landlord ought to use the corridors to install water is not backed by any expert report and it is not for him to dictate where the water works should be located in the landlord’s building.
35. The landlord has clearly indicated that all the other tenants agreed to vacate the premises without putting up a fight and that they were only allowed back when the case was found to be taking long on condition that they would vacate once the works recommenced. I have no doubt that the landlord was entitled to do that as it was not economically viable to keep the premises vacant for the time this case has been in court.
36. In the premises, I am convinced that the landlord has demonstrated a genuine intention to undertake the proposed works which in my view fits the definition under Section 7(1)(f) of Cap 301, Laws of Kenya and I shall therefore uphold the notice to terminate the tenancy.
37. Costs of every action before this Tribunal are at its discretion under Section 12(1)(k) of Cap 301, but always follow the event unless for good reasons otherwise ordered. I have no reason to deny costs to the landlord being the successful party.
38. In conclusion, the following orders commend to me in this matter:-
- a. The landlord’s notice to terminate the tenant’s tenancy dated 28th November 2020 is hereby approved.
 - b. The tenant shall vacate from the suit premises on L.R. No. 6585/9/11, NYAHURURU MUNICIPALITY otherwise known as “REST HOUSE” and in default shall be evicted therefrom by a licensed Auctioneer appointed by the landlord who shall be provided with security by the OCS NYAHURURU POLICE STATION (if need be).
 - c. The landlord is awarded costs of Kshs. 50,000/= against the tenant’s further reference.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 23RD DAY OF MAY 2023

HON. CYPRIAN MUGAMBI

CHAIR PERSON

PARA 23.

05.2023

In the presence of;



Mr. Kinyua for the tenant

Mr. Nderitu Koro for the landlord

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