



**Kamua & another v Makale t/a Panorama Restaurant (Tribunal Case E299 of 2023) [2024] KEBPRT 380 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 380 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E299 OF 2023  
N WAHOME, MEMBER  
MARCH 20, 2024**

**BETWEEN**

**SIMON CHEGE KAMUA ..... LANDLORD**

**AND**

**ELGANT INVESTMENT (1996) LIMITED ..... AGENT**

**AND**

**M/S KHADIJA MAKALE T/A PANORAMA RESTAURANT ..... TENANT**

**RULING**

1. This Ruling relates to the filings in both Mombasa BPRT Case No. E278 of 2023 and E299 of 2023. The two files were by an order of this court made on the 17.1.2024 consolidated with file No. E278 of 2023 being the lead file.
2. By a further order of this court made on the same date, it was by concurrence of the parties directed to together hear the notice of Preliminary Objection dated 5.1.2024, the Application dated 30.11.2023 and the References by both parties dated 3.11.2023 and 30.11.2023 and deliver this consolidated Ruling.
3. The trigger of BPRT Case No. E278 of 2023 was the notice of termination by the landlord vide the letter dated 12.9.2023 which simply stated that;-

“I hereby wish to inform you that starting 1<sup>st</sup> January, 2024, I will be needing my business space for my own personal use. It is therefore brought to your attention that before the said date matures, you shall have vacated the premises.”

The said notice was signed off by Mr. Simon Chege Kamau described as Director of Dubs Homes and Properties.



4. The landlord was to further on the 18.9.2023 issue a fresh notice of termination this time round in compliance with Section 4(2) of the *landlord and Tenant (shops, Hotels and Catering Establishments) Act*, Cap 301 hereinafter “the Act” and Regulation 4(1) of the *Regulations to the Act*. The grounds of terminating the tenancy was said to be;-

“That on termination, the landlord intends to use the Business Premises for a period of more than one year and as such, he requires vacant possession.”

The said notice was signed by Simon Chege Kamau as the landlord.

5. In response to the two notices dated 12.9.2023 and 18.9.2023, the Tenant filed the said Reference dated 3.11.2023. She simply sought that

“we therefore request the Tribunal to investigate the matter and determine the issues involved.”

6. The landlord in opposition to the Reference by the Tenant filed a Replying affidavit sworn on the 1.12.2023 by one Aliet Savako who described herself as the manager of the Landlord/Respondent’s Managing Agents M/S Elegant Investments (1996) Ltd. She annexed a letter titled “Authority to Act” which simply read as follows;-

“I Simon Chege Kamau the undersigned do authorize Aliet Savako on behalf of my Elegant Investments (1996) Ltd/Agents to Act, swear and make affidavits and to take all necessary steps for the prosecution of this suit on my behalf.”

7. By the pleadings of both parties as aforesaid, the Reference by the Tenant dated 3.11.2023 should have proceeded to hearing. However, and inexplicably so, the landlord initiated Mombasa BPRT Case No. E299 of 2023 by filing his Reference dated 30.11.2023.

The same raised the following grievances;-

- i. The landlord has served the Tenant with a notice dated 18.9.2023 terminating her tenancy on 30.12.2023.
  - ii. That the landlord intends to use the business premises for a period of more than one (1) year starting from the 1<sup>st</sup> of January 2024.
8. The Reference therefore sought for the following orders;-

“a. The Honourable Tribunal do issue orders for immediate vacant possession of the shop the Tenant occupies upon the expiry of the notice as the landlord intends to use the premises as the landlord has been served with a notice by KENHA that they shall demolish the landlord’s business where the landlord operates a car wash which is just opposite the other business premises where the Tenant/Respondent operates a Restaurant.

b. The (*sic*) pray for enforcement of this orders by the Tribunal officer and/or the Area chief.”

9. In the company of the landlord’s reference was a notice of motion Application of the same date. It was brought under certificate of urgency. It replicates the prayers as sought in the Reference.



10. It is this Reference by the landlord which attracted the notice of preliminary objection by the Tenant dated 5.1.2024. It was on the following grounds:-
- a. The Application is misconceived, incompetent and fatally defective in law.
  - b. The Application seeks to pre-empt the hearing of this Reference on merit and to deny the Respondent/Tenant a right to access justice.
  - c. The Honourable Tribunal has no jurisdiction to entertain this Application by reason that the Applicants are not landlords to the Respondent within the meaning of the [landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#) Cap 301 of the Laws of Kenya.
  - d. The landlord's notice dated 18.9.2023 is defective, unlawful and violative of the provisions of the [landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#) Cap 301 Laws of Kenya and the Application dated 30.11.2023 is therefore incompetent and unenforceable.
11. Further to the notice of preliminary objection, the Tenant filed the Replying affidavit dated 6.2.2024. By this, the parties' pleadings closed in the consolidated files. Eventually, the Applicant/Tenant filed her submissions dated 6.2.2024 and whereas those of the Respondent/landlord are dated 26.1.2024.
12. At this point, I will proceed to highlight on the parties' respective cases.

#### **The case for the Tenant**

- i. The landlord filed BPRT Case No. E299 of 2023 when he knew of the existence of Case No. E278/2023, which is an abuse of the process of this court.
- ii. The notice of termination dated 18.9.2023 was only intended to harass and intimidate.
- iii. Simon Chege Kamau is not her landlord and has always met her cardinal obligations of timely payment of rent.
- iv. A car wash business cannot be set up on the 1<sup>st</sup> floor of a building where her business premises is located. One can only reach the 1<sup>st</sup> floor through store cases.
- v. Both Aliet Savako and Elegant Investments (1996) Ltd are strangers to these proceedings and the documents drawn by them are incompetent, null and void.

#### **The Case for the Landlord**

- i. It has served a notice of termination dated 18.9.2023 upon the Tenant and which was to take effect on the 1.1.2024.
  - ii. M/S KENHA had issued it with a notice to demolish the structures for its car wash business which were erected on a road reserve and needed to move the business to the premises occupied by the Tenant.
  - iii. M/S Aliet Savako had been authorized to take up all the proceedings relating to this matter.
13. The parties as earlier recognized filed their respective submissions. For the Tenant the following issues were canvassed:-
- a. That the notice dated 18.9.2023 did not indicate whether the same was to alter the terms of the tenancy or to terminate the same all together.



- b. The notice was addressed to Panarama Hotel instead of Khadija Makale and therefore rendered the same defective.
  - c. The description of the subject premises was not sufficiently defined contrary to the provisions of Section 4(2) of the [Act](#) as the notice of termination only gave the plot No. as 7186.
  - d. The Replying affidavit by Aliet Savako on behalf of the landlord and sworn on the 1.12.2023 was incompetent as she was a stranger to these proceedings.
  - e. The purported authority doanted to Aliet Savako by the landlord was not annexed to the Replying affidavit dated 1.12.2023.
  - f. Aliet Savako did not qualify to act for the landlord as she did not have a power of attorney.
  - g. There is no evidence to show that KENHA had issued a notice to demolish the premises where the landlord operated a car wash business.
  - h. The authority given by the landlord to Aliet Savako to act for him could not suffice as the former is a stranger to these proceedings.
  - i. By instituting BPRT Case No. E299/2023 the landlord was in breach of Section 6 of the [Civil Procedure Act](#) and the said suit had to be stayed.
14. The Tenant therefore sought that the landlord's suit and Application in BPRT Case No. 299 of 2023 be dismissed with costs and that her Reference in BPRT Case No. 278 of 2023 be allowed also with costs.
15. The landlord in his submissions raised the following issues;-
- (i) The termination notice dated 18.9.2023 was lawful and the ground for termination legitimate in that the landlord's business required to be moved to the premises occupied by the Tenant.
  - (ii) The relationship between the parties herein is a controlled tenancy under Section 2(1) of the [Act](#).
  - (iii) The landlord had delegated collection of rents on the demised premises to the 2<sup>nd</sup> Applicant/Respondent but the Tenant had refused to respect that decision by the landlord.
  - (iv) The Tenant had refused to sign a lease agreement with the 2<sup>nd</sup> Applicant/Respondent as directed and who was the landlord's agent. All the other tenants had complied.
  - (v) The demised premises have remained closed for the last 3 years.
16. The landlord therefore sought that its Reference and Application thereof dated 30.11.2023 be allowed with costs and that the Tenant's notice of Preliminary Objection dated 5.1.2024 and the Reference thereof dated 3.11.2023 be dismissed with costs.
17. On evaluating all the evidence on record, it is my view that the issues for determination in this matter are the following;-
- A: Whether the notice of Preliminary Objection dated 5.1.2024 is merited.
  - B: Whether the notice of termination of tenancy dated 18.9.2023 is lawful.
  - C: Whether the Tenant's Reference dated 3.11.2023 is merited.
  - D: Who should bear the costs of this suit.



**Issue No. A: Whether the Notice of Preliminary Objection dated 5.1.2024 is merited**

18. The main grievance in the notice of Preliminary Objection is that this court has no jurisdiction to entertain these proceedings for reasons that the Applicants are not the landlords to the Tenant under the Act. This argument is self-defeating in that it is the Tenant who first approached this tribunal by her Reference dated 3.11.2023. In it, she sought for the protection by this court being a Tenant to the landlord under the Act. By raising that issue, the Tenant is simply asking this court to dismiss her said Reference.
19. However, from evidence on record, the Tenant was paying her rents for the demised premises to Simon Chege Kamau. This was through the Mpesa money service. It was said that she had declined to pay the same to M/S Elegant Investments (1996) Ltd as directed by the landlord. Indeed, in her Replying affidavit sworn on the 6.2.2024, the Tenant states that the demised premises was let to her by Kamau and not Simon Chege Kamau. She has not offered any logical distinction between Kamau and Simon Chege Kamau.
20. In any event, she paid her rents to Simon Chege Kamau who from evidence forwarded same to M/S Elegant Investments (1996) Ltd. Section 2(1) of the Act defines a landlord as:-
- “In relation to a tenancy, means the person for the time being entitled, as between himself and the tenant, to the rents and profits of the premises payable under the terms of the tenancy.”
21. In this case, the Tenant has not in any way demonstrated that the person to whom she pays rent for the demised premises is not Simon Chege Kamau the 1<sup>st</sup> Applicant/Respondent herein.
22. The other grievance by the Tenant in the said notice of Preliminary Objection is that the notice of termination by the landlord dated 18.9.2023 is defective. Sadly, those defects have not been highlighted. A perusal of the same shows that it is compliant with Section 4(2) of the Act and Regulation 4(1) of the Regulations to the Act.
23. Section 4(2) of the Act provides that:-
- “A landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the tenant, any term or condition, 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.”
24. Regulation 4(1) of the Regulations to the Act provide that:-
- “A notice under Section 4(2) of the Act by a landlord shall be in form A1 in the Schedule to these Regulations.”
- Over and above the landlord satisfying the requirements of the law as stated hereinabove, he has also complied with Section 4(5) of the Act by providing the grounds on which he sought to terminate the tenancy being that:-
- “On termination, the landlord intends to use the Business Premises for a period of more than one year and as such he requires vacant possession.”
25. He further elaborated that he wanted to move his car wash business to the demised premises as its current site was on a road reserve and M/S KENHA had given notice to demolish the premises built therein and take possession. It is that ground for termination of the tenancy whose legitimacy this court will address later in this Ruling.



26. The Tenant has also raised the question of one Aliet Savako swearing affidavits in support of the case for the landlord. My simple answer to that is that an affidavit contains evidence. This can be proffered by any person in support of a case for either party in a suit. To give such evidence, one does not even require to be a party in such a suit or even authorization to render such evidence. Therefore, in totality, I do not find any merit in the notice of preliminary objection dated 5.1.2024 and the same is dismissed.

**Issue No. B: Whether the notice of termination dated 18.9.2023 is lawful**

27. As alluded to earlier in this Ruling, the same is compliant with Section 4 of the [Act](#) and Regulation 4(1) of the [Regulations to the Act](#). What is in doubt is whether there is provided any legitimate ground for termination of the same as envisaged by Section 4(5) and Section 7(g) of the [Act](#).
28. Section 4(5) provides that:-
- “A tenancy notice shall not be effective for any of the purposes of this Act unless it specifies the grounds upon which the requesting party seeks the termination, alteration or reassessment concerned and requires the receiving party to notify the requesting party in writing within one month after the date of receipt of the notice, whether or not he agrees to comply with the notice.”
29. On the other hand, Section 7(g) of the [Act](#) 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 year the premises comprised in the tenancy for the purposes of a business to be carried on by him therein, or at his residence.”
30. The premises occupied by the Tenant are on the 1<sup>st</sup> floor of the building. The Tenant has also alluded to the fact that the same is only accessible through a flight of stairs case. This is evidence that the landlord has not been able to rebut. I find it impossible that the landlord would be able to operate a car wash business on the 1<sup>st</sup> floor of a building.
31. Therefore, though the termination notice is compliant in form, the ground cited in support of the same cannot hold. I would therefore declare the notice as being unlawful. With that, the landlord’s Reference dated 30.11.2023 which in any event, I consider an abuse of the court process for reason it was filed with the knowledge of the existence of BPRT Case No. E278/2023 is also dismissed.

**Issue No. C: Whether the Tenant’s Reference dated 3.11.2023 is merited**

32. From the findings herein before, and in particular that the notice of termination dated 18.9.2023 is unlawful, it follows that the Tenant’s Reference aforesaid is successful. I would therefore allow the same.

**Issue No. D: Who should bear the costs of this suit**

33. I do not find any compelling reason to depart from the proviso to Section 27 of the [Civil Procedure Act](#) and I would award the costs of both suits to the Tenant. The same provides that:-
- “Provided that the costs of any action, cause or matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”



34. The landlord despite knowledge of the existence of BPRT Case No. E278 of 2023, still proceeded to file BPRT Case No. E299 of 2023. There was no justification for such conduct. The more reason why he should shoulder the costs.
35. In the final analysis, the orders that commend to me are the following:-
- a. That the Applicants notice of termination dated 18.9.2023 is declared unlawful and the Reference thereof dated 30.11.2023 is dismissed.
  - b. The Tenants notice of preliminary objection dated 5.1.2024 is dismissed as it is without any merit.
  - c. The Tenant's Reference dated 3.11.2023 is allowed and her tenancy is sustained unless otherwise disturbed in strict compliance with Cap 301.
  - d. The landlord shall pay to the Tenant costs assessed at Kshs. 20,000/= to be offset from the rent payable to the landlord.

Those are the orders of the court.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20<sup>TH</sup> DAY OF MARCH, 2024.**

**HON. NDEGWA WAHOME, MBS - MEMBER**

**BUSINESS PREMISES RENT TRIBUNAL**

Delivered in the presence of Aliet Savako, the 2<sup>nd</sup> Applicant/Respondent

Mr. Asige for the Tenant/Applicant - absent

