



**Mtondoi v Hemed (Tribunal Case E308 of 2023)
[2024] KEBPRT 666 (KLR) (7 May 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 666 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E308 OF 2023
A MUMA, MEMBER
MAY 7, 2024**

BETWEEN

IBRAHIM MTONDOI TENANT

AND

AWADH HEMED LANDLORD

RULING

A. Parties and Representatives

1. The Applicant, Ibrahim Mtondoi, is the Tenant herein who rented space on the suit premises (“the Tenant”) which is erected on Plot No. Mombasa/Block XV/461 located at Mferejini Majengo (“the suit property”).
2. The firm of Omondi Waweru & Company Advocates represents the Tenant in this matter.
3. The Respondent, Awadh Hemed, is the registered owner of the suit property and hence the Landlord, who rented out the suit property to the Tenant (“the Landlord”).
4. The firm of Maulidi O.A Law Advocates represents the Landlord in this matter.

B. The Dispute Background

5. The Landlord issued a termination notice to the Tenant dated 11th October 2023 seeking to carry out renovations and payment of outstanding rent arrears as ordered against the Tenant on 21st July 2023.
6. Consequently, the Tenant filed a Reference and Application evened dated 7th December 2023 seeking restraining orders against the Landlord. Upon perusal of the said Application, the Tribunal certified the matter as urgent thereby issuing restraining orders pending hearing and determination.



7. During the hearing, Tenant was allowed to file a further affidavit and thereafter, Landlord to respond. Subsequently, parties were directed to file and serve submissions within 7 days each. The matter was then scheduled for hearing.

C. Tenant's Claim

8. In his Supporting Affidavit, the Tenant avers that the alleged termination notice issued upon him by the Landlord is illegal.
9. Regarding late payment of rent, the Tenant admits delay on his part citing financial constraints due to economic hardship. However, he complains that the Landlord has continuously frustrated his peaceful occupation on the suit property despite knowledge of financial woes as informed by the Tenant.
10. Upon service of court orders dated 21st July 2023 in Tribunal Case No. 109/2023, Tenant claims compliance in making payments of rent arrears in the sum of Kshs. 75,000/= as evidenced in the receipt attached to his Further Affidavit dated 20th February 2023. Despite these payments, Tenant claims that the Landlord continued issuing eviction notice giving rise to Tribunal Case No. E222/2023.
11. Further, the Tenant also complains of harassment from the Landlord thus interfering with his business. Therefore, Tenant seeks not to be evicted from the suit property since it would be prejudicial to his business relations with existing customers thus occasioning substantial loss.
12. The Tenant also requests to be allowed to continue occupying the suit property while paying monthly rent as well as deposits owed as rent arrears in installment. In the alternative, the Tenant requests to be allowed sufficient time to relocate.

D. Landlord's Claim

13. In response, the Landlord states that the Tenant has defaulted in rent payment despite issuance of notices. He also complains that failure by the Tenant to give vacant possession has barred the Landlord from making renovations as intended.
14. In view of this, the Landlord seeks intervention to prevent the Tenant from filing various legal actions as delaying tactics for payment of rent arrears.

E. Issues for Determination

15. Upon considering the application and submissions filed by both parties, I find that the following are the issues for determination:
- i. Whether the Landlord's Termination Notice dated 11th October 2023 is valid; and
 - ii. Whether the Tenant is in rent arrears.

F. Analysis and Findings

i. Whether the Landlord's Termination Notice dated 11th October 2023 is valid

16. Section 4(2) of The [Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#) Chapter 301 Laws of Kenya ("the Act") provides that:

“A landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the tenant, shall give notice in that behalf to the tenant in the prescribed form.”



17. Further, Section 7(1) (f) of the [Act](#) codifies Landlord’s right to terminate tenancy for purposes of renovation as:

“... the landlord intends to demolish or reconstruct the premises comprised in the tenancy, or a substantial part thereof, or to carry out substantial work of construction on such premises or part thereof, and that he could not reasonably do so without obtaining possession of such premises.”

18. Although this right is protected in law, the Act further stipulates that in exercising this right, the Landlord has to issue a notice in the prescribed form within a reasonable time.

19. Section 4(4) of the [Act](#) states that: -

“No tenancy notice shall take effect until such date, not being less than two months after the receipt thereof by the receiving party....”

20. In this case, the Landlord issued the Tenant with a termination notice in the prescribed form dated 11th October 2023. The notice was to take effect from 11th December 2023. By dint of the above provisions, the said notice was to take effect within the statutory period of exactly two months. As such the said notice is deemed to be in the correct form and within the prescribed statutory period.

21. Having considered the form of the termination notice, then the main question that begs for determination is on the substance of the said notice.

22. The Landlord seeks to terminate the tenancy for purposes of carrying out repairs and renovations. However, the Landlord has not filed any document in support of his claim for renovations such as development plans or proof of funds to carry out the repairs as evidence detailing the deplorable state of the building which requires repair as a result of wear and tear.

23. This Tribunal is guided by the decision of the court in *Fisher v Taylors Furnishing Stores Ltd* [1956] 2 All ER 78, where the court held:

There must, therefore, be an intention and it must be an intention which in point of time is related to the termination of the current tenancy. It seems to me that the intention must be to do one of the following things: (i) to demolish the premises comprised in the holding; or (ii) to reconstruct the premises comprised in the holding; or (iii) to demolish a substantial part of the premises comprised in the holding; or (iv) to reconstruct a substantial part of the premises comprised in the holding; or (v) to carry out substantial work of construction on the holding; or (vi) to carry out substantial work of construction on a part of the holding.

If the landlord proves an intention to do one of those things, and to do it on the termination of the current tenancy, he must then prove that he could not reasonably do it without obtaining possession of the holding.

24. The court further provided the threshold upon which landlords have to meet before they can satisfactorily be granted possession and stated as follows:

“For this purpose the Court must be satisfied that the intention to reconstruct is genuine and not colourable: that it is a firm and settled intention, not likely to be changed: that the reconstruction is of a substantial part of the premises, indeed so substantial that it cannot be thought to be a device to get possession; that the work is so extensive that it is necessary to get possession of the holding in order to do it; and that it is intended to do the work at



once and not after a time. Unless the Court were to insist strictly on these requirements, tenants might be deprived of the protection which Parliament intended them to have. It must be remembered that, if the landlord, having got possession, honestly changes his mind and does not do any work of reconstruction, the tenant has no remedy. Hence the necessity for a firm and settled intention.”

25. From the above analysis, it is not clear the intentions upon which the Landlord requires vacant possession for purposes of renovation. There is no evidence adduced on record that there exists a firm and real intention by the Landlord to put the premises to use. Therefore, I find that the Landlord has failed to convince this Honourable Tribunal that there is a need to evict the Tenant and require vacant possession of the suit property. As such the termination notice dated 11th October 2023 fails to give reasons for termination.

ii. Whether the Tenant is in rent arrears

26. The Landlord claims that the Tenant is in rent arrears of KShs. 78,000/= as ordered by this Honourable Tribunal on 21st July 2023. Further, the Landlord states that the amount escalates further due to this failure to pay by the Tenant.
27. In response to this claim, the Tenant has adduced payment receipts in the sum of KShs. 75,000/= as proof of partial payment of rental arrears.
28. On the issue of increased rent arrears, Section 3 (3) of the Act provides: -
- “The landlord ... shall keep a rent book in the prescribed form, of which he shall provide a copy for the tenant and in which shall be maintained a record, authenticated in the prescribed manner, ... the details of all payments of rent”
29. In light of the said provision, the Landlord has not adduced any record or document in support of the rent arrears in which he claims to be escalating. Further, the Landlord has neither specified the period nor the exact amounts owed against the Tenant as rent arrears due to a further increase or escalation from the amounts as ordered. Therefore, the Tribunal cannot address itself on the issue of escalated amounts owed as rent arrears due to lack of proof.
30. Having considered that the Tenant has shown willingness and intention to fully comply with the orders of the court with regards to payment of rent arrears, it would be a grave injustice to evict the Tenant without sufficient evidence of the intention to use the premises. In view of this, the Tribunal finds the Tenant is in default and is required to pay any outstanding arrears as ordered.

G. Orders

31. In the upshot, the Tenant’s Reference and Application dated 7th December 2023 is hereby allowed in the following terms:
- i. Tenant to clear any outstanding arrears as ordered on 21st July 2023 within 30 days from the date hereof landlord to provide a clear statement of arrears owing in 14 days;
 - ii. Tenant to keep paying rent to the Landlord as and when it falls due;
 - iii. That failure by the Tenant to comply with (i) and (ii) as ordered above shall accord the Landlord liberty to distress for rent arrears and take back vacant possession of the suit property;
 - iv. If necessary, the OCS Makupa Police Station to ensure compliance with (iii) above;



- v. The Landlord shall be at liberty to issue a fresh notice at a time when they are ready to provide proof of the intention to utilize the premises; and
- vi. Each party to bear their own costs.

HON. A MUMA - MEMBER

BUSINESS PREMISES RENT TRIBUNAL

**RULING DATED, DELIVERED AND SIGNED AT NAIROBI ON THIS 7TH DAY OF MAY 2024
IN PRESENCE OF MISS WAMBUI FOR THE TENANT AND NO APPEARANCE FOR THE
LANDLORD.**

