



**Ochieng v Mwangi (Tribunal Case E291 of 2024)
[2024] KEBPRT 797 (KLR) (4 June 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 797 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E291 OF 2024
N WAHOME, CHAIR & JOYCE MURIGI, MEMBER
JUNE 4, 2024**

BETWEEN

SOCRATES OCHIENG LANDLORD

AND

PETER THUKU MWANGI TENANT

RULING

1. The Landlord originated these proceedings by way of the reference dated 29th February 2024. The same was said to be anchored on Section 12(4) of the Landlord and Tenant (Shops, Hotels and Catering establishments Act) (Cap 301) hereinafter “the Act”. The statement of complaint read as follows:-

“Complaint Relating to Non-payment of Rent by the Tenant thus breaching the terms of the Tenancy. In that he has neglected and or failed to pay rent amounting to Kshs.985,000/- as at 29th February 2024”.
2. The Reference was said to have been informed by the notice of termination of tenancy dated 30th November 2023 and allegedly served on the Tenant on the 1st December 2023. An affidavit of service to support the service was annexed to the reference. It is sworn by one Aggrey Wafula a court process server on the 19th February 2024.
3. With the reference was the notice of motion application dated 28th February 2024 and founded on a certificate of urgency of even date. The motion sought for the following reliefs:-
 - i. Spent
 - ii. That an order do issue directing the Respondent/Tenant to grant vacant possession of the parcel of land reference L.R No. 15686/Kahawa Wendani.



- iii. That an order do issue directing the Respondent/Tenant to pay rent arrears and accruable interest due to the Applicant/Landlord amounting to Kshs.985,000/-.
 - iv. That OCS Kawaha Sukari Police Station help in the enforcement of the orders.
 - v. That the cost of this Application be provided for.
 - vi. Any other order that the Honourable Tribunal may deem fit to grant in the circumstances.
4. The gravamen of the landlord's application is that:-
- a. The tenant is a serial rent defaulter who was in rent arrears of Kshs.985,000/- when this suit was originated on the 29th February 2024.
 - b. He had also not responded to the notice of termination dated 30th November 2023 as required by the law and the same took effect on the 1st February 2024.
 - c. The tenancy has been subsisting for the last 19 months as at 28th February 2024 and the total accrued rent is Kshs.1,235,000/- with a rent payment of only Kshs.274,250 (Mpesa statements were attached).
 - d. Denied that the Tenant had paid to him or that he carted away building materials worthy Kshs.400,000/- owned by the Applicant.
 - e. The Tenant was properly served with the notice of termination through Telephone no. 0711XXX100 which he had given as his no in BPRT case No. 280 of 2023. This was in his supporting affidavit sworn on the 14th March 2023.
 - f. Accused the Tenant and his counsel of mischief to defeat the ends of justice. The cases of *Rander v Worsely* and *Abraham v Jutsum* were referred to support the proposition but no citation was given.
 - g. On his part, the Tenant filed the Replying Affidavit sworn on the 19th March 2024. His case is that:-
 - a. He had paid his rents on time and had put up permanent developments on the suit premises at a cost of Kshs.4,000,000/-.
 - b. Had rent arrears of Kshs.363,000/- but which were to be set off against his building materials worth Kshs.400,000/- taken away by the landlord.
 - c. That telephone No.0711XXX100 was unknown to him.
 - d. He is the one who had filed BPRT case No. E280/2023 where the landlord never participated and was ordered to re-open the premises and pay costs of Kshs.15,000/-.
 - e. That no rent arrears are owed to the landlord. It is the landlord who owed him Kshs.36,750 (annexed "PMT1" which is alleged rent payment records through the Mpesa service).
 - f. The rent due on the premises between March, 2023 when the premises were re-opened vide BPRT case No. 280/2023, is Kshs.780,000. He has paid Kshs.416,750 leaving a balance of Kshs.363,250. If offset against the costs of the said materials at Kshs.400,000/- the landlor still owes him Kshs.36,750.



- g. The Tenant cited the cases of *Syenda Mohammed Burhannudin Sabeel v Mohammedally Hassanally* (1980) eKLR, *Kangaro v Kenya commercial Bank Ltd & Another* (2004) e KLR 126 as cited in *Patrick Mwangi & Another v Housing Finance co. Ltd* (2013) e KLR in support of his case.
- h. Having taken cognizance of all the pleadings by the parties, the evidence offered and the respective submissions, we are of the view that the determination of this matter turns on the issue of this court's jurisdiction. The jurisdiction of this court is donated by Section 2(1) of the Act. The same reads the following:-

controlled tenancy means a tenancy of a shop, hotel or catering establishment.

- a. Which has not been reduced into writing or
- b. Which has been reduced into writing and which
 - i. Is for a period not exceeding five years or
 - ii. Contains provision for termination otherwise than for breach of covenant, within five years from the commencement thereof".

7. The act under the same Section 2(1) defines a hotel, shop and catering establishment as follows:-

- (i) "Hotel means any premises in which accommodation or accommodation and meals are supplied or are available for supply to five or more adult persons in exchange for money or other valuable consideration"
- (ii) "Catering establishment means any premises on which is carried out the business of supplying food or drink for consumption on such premises by persons other than those who reside and are boarded on such premises" and
- (iii) "Shop means premises occupied wholly or mainly for the purposes of a retail or wholesale trade or business or for the purpose of rendering services for money or money's worth".

8. The Tenant at paragraph 4 of the Replying Affidavit sworn on the 19th March 2024 at Clause 4 thereof avers that:-

"In response to paragraphs 4,5 and 6 I state that I leased the premises and put up a permanent development worth Kshs.4,000,000/- being a church".

9. Further in his submissions at Clause 3 thereof, the Tenant states that:-

"The Tenant admits being in a tenancy agreement with the landlord over the subject property herein. He however avers that he leased the premises and put up a permanent development worthy Kshs.4,000,000/- being a church"

10. We have also noted that in BPRT case No. 280 of 2023 where the Tenant was the Applicant and the Respondent was the Landlord, the former in the unopposed proceedings had on the certificate of urgency thereof dated 14th March 2023 stated thus:-

"The plaintiff states that the suit premises is used as church and since the gate was locked, it has stalled church service for over a month now".



11. The Tenant had further in the notice of motion thereof and dated 8th March 2024 at ground No. 4 stated thus:-

“That the Applicant/Tenant and his church members are now stranded and at the mercies of this Honourable Tribunal to grant the orders sought”.

12. On his part, the Landlord in defining the status of his Tenant stated the following at paragraph 2 of his submissions dated 12th April 2024:-

“That on 7th August 2022, the Applicant and the Respondent entered into an agreement whereupon the Applicant leased to the Respondent the premises where the Respondent set up a church”.

13. There is therefore not in doubt whatsoever that the relationship between the parties was for the rental of a church. By whatever stretch of imagination, we are of the view that a church can never fall within the definition of a shop, hotel or catering establishment as defined and envisaged under Section 2(1) of the Act.

14. Indeed a church can never be an establishment where services, goods and other discourses are offered at a fees or consideration. Jesus Christ himself was actually angry when he found his house (church) having been converted into a place of business. John 2 verses 15-17 speaks to that issue thus:-

“Jesus put together a whip out of strips of leather and chased them out of the Temple stampeding the sheep and cattle, upending the tables of the loan sharks, spilling coins left and right. He told the dove merchants (get your things out of here, stop turning my father’s house into a shopping mall” That is when his disciples remembered the scripture, “zeal for your house consumes rule”.

15. The Upshot of all these is that the court does not have the wherewithal to entertain these proceeding for want of jurisdiction. In [*total Kenya Ltd v Drimcon Kenya Ltd*](#) (2022) eKLR the environmental and land court in similar circumstances held that:-

“I am in full agreement with the above. Premises used for manufacturing goods do not fall within the ambit of premises falling under Cap. 301. As I had earlier mentioned, the premises herein was let out for purposes of drum manufacturing. This is an industrial purpose priority. It is neither a shop, hotel, nor a catering establishment”.

16. in appreciation of the bidding holding in the case of [*Owners of Motor Vessel ‘Lillians v Caltex Oil \(Kenya Ltd*](#) (1989) eKLR we would down our tools and take no further step in this matter. the court had this to say:-

“where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before court the moment it holds the opinion that it is without jurisdiction”.

17. In the final analysis the orders that commend to us are the following:-

- (i) That the proceedings herein are struck out for want of jurisdiction.
- (ii) That each party will bear own costs of the suit.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 4TH DAY OF JUNE, 2024.



HON. NDEGWA WAHOME, MBS HON. - PANEL CHAIRPERSON

HON. JOYCE MURIGI - MEMBER

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Ruling delivered Mr. Marai for the Tenant/Respondent, M/S Onguso Ochongo are for the Landlord/
Applicant represented by Josiah Manyieka.

HON. NDEGWA WAHOME, MBS HON. - PANEL CHAIRPERSON

HON. JOYCE MURIGI - MEMBER

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