



**County to County Choma Grill Limited v Wachira t/a Paddy Distributors (Tribunal
Case E028 of 2022) [2023] KEBPRT 1113 (KLR) (10 November 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 1113 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E028 OF 2022
CN MUGAMBI, CHAIR
NOVEMBER 10, 2023**

BETWEEN
COUNTY TO COUNTY CHOMA GRILL LIMITED TENANT
AND
JOYCE WANGUI WACHIRA T/A PADDY DISTRIBUTORS LANDLORD

RULING

The Landlord's notice of motion dated 27.4.2023

1. The landlord's motion dated 27.4.2023 seeks orders to terminate the tenant's tenancy in line with the landlord's notice to terminate tenancy dated 28.9.2022. The landlord has also sought an order of eviction against the tenant under the supervision of the OCS, Parklands police station, costs of the application have also been prayed for.
2. The landlord has deponed in her affidavit in support of the motion that the tenant took over the suit premises on L.R. No. 209/76/2 through a tenancy agreement dated 12.7.2019, under whose terms the tenant was to pay rent at the rate of Kshs. 300,000/= per month.
3. It is further deponed that the Respondent/tenant in clear breach of the terms of the tenancy agreement has failed to pay rent as a result of which the tenant now owes the landlord rent in the sum of Kshs. 2,276,135/=.
4. That consequently, the landlord issued the tenant with a notice to terminate tenancy dated 28.9.2022 and whose effective date was 1.1.2023.
5. The landlord has further deponed in her affidavit that the notice having lapsed, the tenant has no lawful reason to remain in the suit premises; and that the continued stay of the tenant in the premises is a denial to the landlord's enjoyment of rental income from the said premises.



6. The tenant's response to the landlord's application was majorly to the effect that County to County Grill Ltd was incorporated on 21.9.2019 and could therefore not have entered into any lease agreement on 12.7.2019 when it was non-existent.
7. The tenant has further deponed without prejudice that it was never served with the notice to terminate the tenancy as required by law.

The Tenant's notice of motion dated 9.6.2023

8. The tenant's motion dated 9.6.2023 has sought for orders that the landlord be enjoined from interfering with the tenant's quiet enjoyment of the suit premises pending the hearing of the reference. The tenant has also sought an order that the tribunal grants it leave to file the reference dated 7.6.2023 out of time. Police assistance and costs have also been prayed for.
9. The tenant, through Mr. Samson Njoroge Karoki, (a director of the tenant) has deponed that it only became aware of the notice to terminate its tenancy when its previous Advocates were served with the application dated 10.1.2023.
10. The tenant has disposed that, it was never given a chance to object to the landlord's notice to terminate tenancy.
11. The tenant depones that in the interim period, the parties have sought an out of court settlement and agreed on new terms of tenancy and pursuant to which the tenant has paid the landlord Kshs. 1,000,000/= on diverse dates between 23.5.2023 and 26.6.2023 and indeed the landlord acknowledged that the tenant wasthe issuance of a new lease.
12. That despite the acknowledge of payment, the landlord still insists that the tenant should meet the legal costs of the landlord's Advocates when it was not responsible for the said fees nor does the fees form part of the tenancy agreement.
13. The tenant depones that the landlord has contrary to the terms of the tenancy, taken over the roof top of the suit premises and placed chairs and desks therein.
14. That the tenant has renovated the suit premises at an estimated costs of Kshs. 3,547,596/= and the landlord cannot eject the tenant without refunding the said expenses or allowing the tenant to set it off against the rent.
15. That the tenant was never served with the notice to terminate or alter the terms of the tenancy and ought to be given the opportunity to file its reference out of time as the said reference raises weighty issues.
16. That the tenant is not in any rent arrears and intends to continue paying its monthly rental obligations.
17. The landlord in response to the tenant's application has deponed as follows:-
 - a. That the application for the prayers of injunction is *res judicata*, the same having been dealt with in BPRT Case No. E1012 of 2022 and the Tribunal therefore lacks jurisdiction to entertain the instant application.
 - b. That on 7.11.2022, the (tenant) Applicant, was personally served with the notice to terminate tenancy dated 28.9.2022 and which fact the tenant's director acknowledged under paragraph 6 of his supplementary affidavit sworn on 04.11.2022 in BPRT Case No. E1012 of 2022.
 - c. That despite such service, the tenant did not oppose the notice to terminate the tenancy and has not provided any reason whatsoever in law to explain its failure to oppose the notice.



- d. That the tenant has not demonstrated any wrong doing on the part of the landlord in issuing the termination notice and in seeking to enforce the same.
 - e. That the tenant has two other complaints filed at the Tribunal being BPRT Case No. E1012 of 2022 and BPRT Case No. 55 of 2021 which the tenant has never prosecuted to date.
 - f. That the tenant is clearly abusing the courts process and is solely on a fishing expedition.
 - g. That whereas it is true that there were out of court negotiations, it was also agreed in the said negotiations that the tenant would bear the legal costs for the landlord, the tenant is not candid to disclose that the said negotiations failed anyway.
 - h. That the payment by the tenant of the Kshs. 1,000,000/= was a personal loan to the landlord, unrelated to the tenancy.
 - i. That in any event, the tenant has not shown that it has paid the rent arrears of Kshs. 2,276,235/= being the rent arrears as at 15.9.2022.
 - j. That the Tribunal lacks jurisdiction to entertain the claim for compensation for purported renovations to the suit premises.
 - k. That according to clause 3)d) of the tenancy agreement, the tenant was not to make any alterations to the suit premises without the lessor's firm consent in writing and in reality, the tenant has never obtained any such consent and the tenant ought to bear the costs of any such renovations.
 - l. That the tenant has not satisfied the requirements for the grant of the orders it has sought.
18. The tenant in its further affidavit has deponed that the suit herein is not *res judicata* as the landlord's notice to terminate tenancy has never been determined before the Tribunal.
 19. The tenant further depones that if it is not allowed to file its reference, it stands to lose Kshs. 5,447,596/= expended in rent deposits and improvements upon the suit premises.
 20. That it is ridiculous to suggest that the Kshs. 1,000,000/= paid to the landlord was a personal loan contrary to what the real purpose for the payment was.
 21. That the tenant has continued to pay rent and the landlord has continued to accept the same between January 2023 and August 2023.
 22. That the Tribunal in its ruling of 6.4.2023, observed that the rent of Kshs. 2,276,235/= was not owing.
 23. The tenant has also deponed that the landlord owes it the sum of Kshs. 106,360/= on account of restaurant services rendered and which the Tenant ought to recover from future rent.

Analysis and determination

24. The issues that arise for determination in this application and which application I intend to determine together are;
 - a. Whether the tenant's application dated 9.6.2023 is *res judicata*.
 - b. Whether the tenant is entitled to an order of extension of time within which to file its reference in opposition to the landlord's notice to terminate tenancy dated 28.9.2022.
 - c. What orders ought to be granted in disposing of the two applications.



Issue A

25. The landlord has stated in its replying affidavit that the application for orders of injunction under prayer 2 and 3 of the application is *res judicata* for the reasons that the Applicant by way of an application dated 27.10.2022 filed in BPRT Case No. E1012 of 2022 sought the same orders of injunction concerning the same leased premises and involving the same parties and which application was dismissed vide a ruling delivered on 6.4.2023.
26. It is true that the tenant's application for orders of injunction was dismissed after due communication. The reasoning in the said ruling was that the tenant had admitted to owing the landlord rent in the sum of Kshs. 600,000/=. The Tribunal had in the same ruling observed that it was not possible to determine the exact amount of rent owing to the landlady without the benefit of a full hearing. The suit BPRT Case No. E1012 of 2023 has not been heard and the issue of the exact rent owing to the landlord therefore remains one to be determined in or during the hearing of that suit. That pendency did not stop the landlord from proceeding to recover any outstanding rent arrears. The instant suit is one for enforcing the landlord's notice to terminate tenancy. The tenant seeks to preserve the status quo while the reference it intends to file is determined in court. I think the circumstances are therefore different and the Tribunal has the jurisdiction to determine whether or not the status ought to be preserved pending the hearing of the intended reference if eventually the tenant succeeds in having its time to file reference extended.

Issue B

27. The thrust of the tenant's application for extension is on the one hand that it was never served with the notice to terminate its tenancy dated 28.9.2022 and secondly that the reference sought to be filed in objection to the notice raises very weighty issues. The landlord faced with this challenges has stated that the tenant was personally served with the notice to terminate tenancy as has been demonstrated in the tenant's supplementary affidavit sworn on 14.11.2022 at paragraph 6. I have had the advantage of reading the said affidavit and indeed at paragraph 6 thereof, it is deponed as follows:-

“That even as the landlady was served with the restraining orders dated 2.11.2022, she went ahead and served me on 7.11.2022 with a landlord's termination notice dated 28.9.2022 (here is attached evidence marked Exhibit4).”

At paragraph 7 of the same affidavit, the tenant depones as follows:-

“That the termination notice is contrary to our lease agreement because as per the lease agreement, the landlord should only issue me with a termination notice after the lease agreement has lapsed on or after 2029 and the lease agreement was signed in 2019. It is supposed to lapse in 2029 (here is evidence marked 45, Exhibit6, Exhibit7 and Exhibit 8).

28. Clearly, the tenant in his own admission, was served with the notice to terminate tenancy dated 28.9.2022 on 7.11.2022. I do not think the Tribunal needs any further evidence to establish the fact that indeed the tenant was served with the tenancy notice terminating his tenancy. It is also clear that the tenant is being dishonest and mean with the truth when its director states on oath that the notice to terminate tenancy was never served upon it.



29. I think what the landlord is doing in the circumstances is passing the rights to enforce the notice to terminate tenancy in line with the Tribunal's decision in BPRT Case No. E1012 of 2022 where at paragraph 36 the court observed;

“I have also seen the notice to terminate tenancy dated 28.9.2022. The proceedings herein have been commenced by way of a complaint under Section 12(4) of the Act (Cap 301). As such it is only open to the Tribunal to only determine the complaint arising as such.

If the landlord is desirous of enforcing the notice dated 28.9.2023, she is free to do so under separate proceedings. As it were, the landlady has no application pending before the Tribunal for determination.”

30. It is not in dispute that the tenant has not filed a reference to the Tribunal in opposing the landlady's notice to terminate tenancy dated 28.9.2023. I have also found as a fact that the tenant was served with the said notice. In the circumstances, the reason given by the tenant that it did not file the reference in time because it had not been served does not hold any waters. From the tenant's own affidavit, the only problem the tenant had with the termination notice was that the same was issued before the lapse of the tenancy in 2023, a reasoning which does not stand the test of law as far as termination notices are concerned under Section 4(2) of Cap 301.

31. What then are the consequences of the failure by the tenant to file its reference within the time frame provided for under the law, Cap 301?

Section 10 of Cap 301 in this regard provides as follows:-

“Where a landlord has served a notice in accordance with the requirements of section 4 of this Act, or a tenant and the tenant fails within the appropriate time to notify the landlord of his unwillingness to comply with such notice or to refer the matter to a Tribunal, then subject to Section 6 of this Act, such notice shall have effect from the date therein specified to terminate the tenancy or terminate or alter the terms and conditions thereof or the rights or services enjoyed thereunder.”

32. From the above provision of the law and applying the same to the circumstances of this case, the tenant having failed to file its reference (admittedly and factually), the tenancy relationship between the parties stood terminated from the “date therein specified...” being the 1st day of January 2023.
33. I do note that under the proviso in Section 6(1) of Cap 301, the Tribunal may for sufficient reason and/or such conditions as it may think fit permit a reference notwithstanding that the receiving party has not complied with any of the requirements of the said Section. One of the requirements of the said section is the filing of a reference to the Tribunal. The exercise of this power by the Tribunal is an exercise in discretion. The same ought to be exercised judiciously and/or said reasons. The tenant has not in my view given any reasons why it did not file its reference in opposition to the notice to terminate its tenancy. The suggestion by the tenant that it has never been served with the notice to terminate tenancy has already been found to be untrue. I am in the circumstances unable to exercise my discretion in favour of the tenant.

Issue C

34. In the circumstances, and based on the foregoing findings, I do make the following orders in disposing of the applications under consideration:

- a. That the tenant's application dated June 9, 2023 is dismissed with costs to the landlord.



- b. That the tenancy between the parties herein is terminated pursuant to the notice of termination of tenancy dated September 28, 2022.
- c. That the tenant shall vacate the suit premises on L.R. No. 209/176/2 within the next four months from today's date, Failing which the landlord will be at liberty to forcefully evict the tenant using a licensed auctioneers.
- d. The parties are at liberty to pursue any further claims against each other in the civil courts.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 10TH DAY NOVEMBER 2023.

HON. CYPRIAN MUGAMBI

CHAIRPERSON

10.11.2023

