



**Muia v Nzilani (Tribunal Case E1112 of 2023)
[2024] KEBPRT 1735 (KLR) (18 December 2024) (Judgment)**

Neutral citation: [2024] KEBPRT 1735 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E1112 OF 2023
GAKUHI CHEGE, CHAIR & J OSODO, MEMBER
DECEMBER 18, 2024**

BETWEEN

JEHOSHEPHAT MUIA TENANT

AND

JOSYLYN NZILANI LANDLORD

JUDGMENT

A. Dispute Background

1. The tenant/applicant moved this Tribunal vide a Reference dated 27th October 2023 pursuant to Section 6(1) & 12(1)(i) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Cap 301, Laws of Kenya seeking for orders that: -
 - I. Subject to the Tenant's continued payment of rent to the Landlady, an Order of Permanent Injunction issues restraining the Landlady either by herself, agents or representatives from interfering with her business, evicting, terminating the controlled tenancy agreement or in any manner whatsoever interfering with or limiting her access, occupation and/or use of the premises located in Room 2-Plot 293- Mlolongo occupied by the tenant's business.
 - II. In the alternative to prayer No. I above, an order directing the landlady to, within timelines set by the Tribunal, refund to the tenant the sum of Kshs.502.400/=, being the amount of money used by her and owing in construction of the toilet for public use on the lease premises herein, thus a claim for special damages.
 - III. In the alternative to prayers I and II above, the tenant be allowed to manage the toilet for public use until the whole construction costs of Kshs.502,400/= is recovered.
 - IV. Further to prayer III above, an order to issue restraining the Landlady from implied and /or express termination of the controlled tenancy herein and an order directing the Landlady to



grant the tenant peaceful enjoyment of the premises pending recovery of the construction costs herein.

V. Interest on judgment sum from the date of filing the reference herein.

VI. Costs of this Reference be borne by the Landlady.

2. The tenant pleads that on or about 24th April 2022, he rented the Landlady's premises located in Mlolongo Town within Mavoko Sub-County, Machakos County, known as Room 2, Plot 293, Mlolongo (hereinafter 'the suit premises'), wherein the tenant operates a computer Cybercafé, printing and photocopying business without any written tenancy agreement. He pleads that he has been paying rent as and when required.
3. As at the date of the Reference, the tenant was paying Kshs.15,000/= per month as rent to the landlady. The tenant complains that he made structural improvements on the suit premises through construction of a public toilet with the full consent of the landlady.
4. However, the landlady has since notified the tenant of her intention to terminate the tenancy via a letter dated 12th September 2023, without paying the tenant due compensation for the structural improvement made on the premises.
5. Before constructing the said toilet, the Tenant had approached the landlady and informed her of his intention to construct the same for use by members of the public at a fee as the suit premises is situated along a public road in Mlolongo town.
6. As such, the public toilet was intended to generate income and to be managed and controlled by the tenant. The landlady accepted the offer and asked the tenant to use the tenant's own funds in the construction and the landlady would refund to the tenant the amount of money spent in construction of the toilet.
7. During the construction period, the landlady would visit the suit premises from time to time to confirm and supervise the ongoing construction of the toilet. The landlady would occasionally send the tenant small amounts of money as compensation towards the construction of the public toilet.
8. Upon completion of the construction, the tenant informed the landlady that the total construction cost was Kshs.584,580/= and he requested for refund thereof prior to commencement of the management and income generation of the project.
9. By the time of filing this reference, the landlady had sent to the tenant, a total of Kenya Shillings Eighty-Two Thousand One Hundred and Eighty (Kshs.82,180/=), as compensation towards the construction cost.
10. The landlady however declined to refund the balance of the construction costs in the sum of Kshs.502,400/= despite numerous mediation sessions including by the Chief, Mlolongo Location.
11. The tenant received a notice to vacate the premises from the landlady via a letter dated 12th September 2023, on the grounds that, the premises had been sold to a third party. The Tenant avers that he has fulfilled all his obligations including payment of rent to the Landlady and has no accruing liabilities owing to the Landlady.
12. He accuses the landlady of breach of agreement and pleads that with the consent, encouragement, assurance and constant supervision of the Landlady, he extensively improved and developed the premises and more specifically construction of the toilet for public use.



13. According to the tenant, the landlady claims to have sold the premises to a third party without compensating him for the balance of the said public toilet construction costs in the sum of Kshs.502,400/= to his detriment.
14. The tenant believes that the hostile takeover of the toilet and failure by the landlady to pay the balance of Kshs.502,400/= used in the extensive improvements of the suit premises amounts to arbitrary deprivation of the tenant's property which unjustly enriches the landlady in breach of the controlled tenancy herein.
15. The tenant therefore seeks for an order of injunction to issue restraining the Landlady from implied and/or express termination of the controlled tenancy herein and an order directing the Landlady to grant the tenant peaceful enjoyment of the premises.
16. The tenant's efforts to amicably resolve the matter with the landlady have been unsuccessful thereby necessitating the filing of this suit.
17. The landlady filed her response and counter-claim dated 18th March 2024 wherein she avers that the tenancy between her and the tenant needed not be in writing under Section 2 of Cap. 301, Laws of Kenya and she proceeds to accuse the tenant of failure to pay rent after being served with notice to terminate his tenancy under Section 4 of the said statute.
18. It is the landlady's contention that she initiated the toilet project before the tenant rented the space in the suit premises. She contends that the toilet project is separate from the rented premises. At the time of issuance of the termination notice, the tenant had only constructed the walls which was compensated through the money sent by her to him.
19. The landlady avers that she engaged a valuer who wrote a report of the improvements giving a value of Kshs 123,000/=. It is the landlady's case that she did the ground work, planning and setting up of the toilet to an advanced stage before the tenant moved into the premises.
20. She denies the alleged breaches of the agreement and objects to issuance of the injunction orders sought by the tenant as the same would be prejudicial to her. She counter-claims that she has since sold off the suit property to a third party as per the sale agreement produced before the Tribunal and that she is required to give vacant possession to the buyer. As such, she had an obligation to give notice to the protected tenants under the controlled tenancy even if they had lost that status.
21. The Landlady pleads that after the sale was concluded, she issued the tenants with a three (3) months' notice to vacate the suit premises pursuant to Section 4(2) of Landlord & Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301 and that the notice was to take effect on 1st October, 2023.
22. The Landlady further pleads that, it has not been disputed by the Tenant that the three months' termination notice was issued to him in accordance with Section 4 of the Act. The Landlady avers that the tenant failed to comply with the tenancy termination notice and blatantly refused, ignored and/or failed to comply with the same. She pleads that she stands to suffer irreparable damage if the tenant is allowed to continue with his unlawful occupation of the suit premises as she is causing the landlord irreparable loss and damage as well as inconvenience to the new owner of the suit premises.
23. The Landlady further pleads that subject to Section 6 of the Act, the notice ought to take 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 by the tenant thereunder.
24. The Landlady pleads that she gave an appropriate notice to the Tenant indicating that the suit premises had been sold to a third party who is to take over vacant possession thereof as the new owner and as



such, the tenant is not entitled to further protection by way of injunction in view of expiry of the notice period.

25. The Landlady pleads that it would offend all notions of justice, if her rights were to be prejudiced or affected by the tenant's unlawful conduct. The Landlady therefore prays for the discharge of the interim orders issued herein having been made on the basis of false information, frivolity and vexation. The Landlady prays that the Reference be dismissed with costs and judgment be entered in her favour by issuance of an order for the Tenant to hand over the physical possession of the suit premises to her.
26. She further seeks that the Honourable Tribunal be pleased to issue orders against the tenant to pay unspecified rent arrears plus costs and interest.
27. The tenant filed a response dated 14th June 2024 to the landlady's counter-claim joining issue with the same and denying all the allegations set out therein and reiterates the contents of his reference. He avers that he is not a party to the sale agreement and that he is only claiming refund of monies used in the construction of the public toilet.
28. The landlady also filed a witness statement dated 16th March 2024 repeating the averments contained in her response to the reference and counter-claim and we therefore need not rehash the same. She also filed a witness statement by one Ian Macharia Mwangi recorded on the same date wherein he states that he has been the landlady's tenant in the suit premises since April 2022 and that the tenant herein went into the premises after him.
29. According to the said witness, the landlady had started constructing the toilet and by the time the tenant went there, the project was at the final stages of construction as the ground work and foundation were already set. The two repeated the contents of their statements as evidence when they testified before us.
30. The matter proceeded by way of viva voce evidence and after close of both parties' cases, each filed submissions. The landlady's submissions are dated 24th September 2024 while the tenant's submissions are dated 11th September 2024. We have read and taken the submissions into consideration in arriving at our decision herein.

B. Issues For Determination

31. The following issues arise for determination;
 - a. Whether the tenancy notice issued by the landlord to the tenant ought to be approved or dismissed.
 - b. Whether the tenant is entitled to compensation by the landlady as claimed in his reference.
 - c. Who shall bear the costs of the reference?

Issue a) Whether the tenancy notice issued by the landlord to the tenant ought to be approved or dismissed.

32. As observed above, the tenant moved this Tribunal vide a Reference dated 27th October 2023 pursuant to Section 6(1) & 12(1)(i) of the [Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#) Cap 301, Laws of Kenya seeking that Subject to his continued payment of rent to the Landlady, an Order of Permanent Injunction issues restraining the Landlady either by herself, agents or representatives from interfering with his business, evicting, terminating his controlled tenancy agreement or in any manner whatsoever interfering with or limiting his access, occupation and/or use of his business premises located in Room 2, Plot 293, Mlolongo.



33. In alternative, he seeks for an order directing the landlady to, within timelines set by the Tribunal, refund to him the sum of Kshs.502,400/=, being the amount of money used and owing in respect of construction of the toilet for public use on the suit premises herein.
34. In the alternative, the tenant seeks to be allowed to manage the toilet for public use until the whole construction costs of Kshs.502,400/= is recovered and for an order to issue restraining the Landlady from implied and/or express termination of the controlled tenancy herein together with an order directing the Landlady to grant him peaceful enjoyment of the premises pending recovery of the construction costs thereof. He finally seeks for interest on the judgement sum from the date of filing the reference together with Costs of this Reference.
35. It is not contested that the tenancy herein is controlled within the meaning and interpretation of Section 2(1) of Cap 301, Laws of Kenya. Sections 4(1) & (2) of the said statute which provides as follows;
- “(1) Notwithstanding the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be terminated, and no term or condition in, or right or service enjoyed by the tenant of, any such tenancy shall be altered, otherwise than in accordance with the following provisions of this Act.
- (2) A landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the tenant, any term or condition in, 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.”
36. Section 4(4) & (5) of the said statute provides as follows: -
- “(4) No tenancy notice shall take effect until such date, not being less than two months after the receipt thereof by the receiving party, as shall be specified therein.”
- (5) 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.”
37. We have looked at the tenancy notice dated 12th September 2023 which was served upon the tenant and noted that it is not in the prescribed form, it does not give a period of two months and does not request the tenant to file an objection within one month as required. It is therefore not in tandem with the foregoing legal provisions. Consequently, the same is invalid, null and void.
38. In view of the foregoing, the landlady is not entitled to evict the tenant on the basis of the defective notice. As such, prayer 1 of the tenant’s reference dated 27th October 2023 is allowed and an Injunction is hereby issued, restraining the Landlady either by herself, agents or representatives from interfering with the tenant’s business, evicting the Tenant, terminating the controlled tenancy agreement or in any manner whatsoever interfering with or limiting the Tenant’s access, occupation and/or use of the premises located in Room 2, Plot 293, Mlolongo without adhering to the provisions of the [Landlord and Tenant \(Shops, Hotels and catering Establishments\) Act](#), Cap. 301, Laws of Kenya..



39. For avoidance of doubt, the landlady shall be entitled to serve a proper notice to terminate the tenant's tenancy under Section 4 of Cap. 301 notwithstanding the injunction order given herein.

Issue (b) Whether the tenant is entitled to compensation by the landlady as claimed in his reference.

40. Although the tenant claims a sum of Kshs 502,400/= being the balance owing to him by the landlady, he did not present a breakdown of how the amount is made up. He however produced some receipts attached to his supporting affidavit sworn on 27th October 2023 which upon calculation amounts to Kshs 213,600/= only. We shall therefore award the said amount in special damages on the assumption that any amount paid by the landlady to the tenant went into labour costs for the construction.
41. Based on the evidence on record, we find and hold that the tenant took over the toilet construction project which had already been started by the landlady and was at an advanced stage and is therefore not entitled to payment of the full construction costs thereof.
42. On the basis of evidence on record, we further find that this tribunal is not bound by the report of the landlady's Quantity Surveyor as he stated in cross examination that he was informed by the landlady that the toilet building was 90% complete by the time the tenant took over the construction works contrary to the evidence tendered by the tenant and the landlady's witness one Ian Macharia Mwangi who said that the tenant took over the same after excavation and that he completed the construction up to the painting stage.
43. The tenant is however liable to pay any rent arrears owing to the landlady which shall be offset against the construction costs awarded herein and any balance thereafter shall be paid to him. Should the amount however be inadequate to cover the said rent arrears, the tenant shall pay to the landlady any balance thereof.

Issue (b) Who shall bear the costs of the reference?

44. As regards costs, the same are in the Tribunal's discretion under Section 12(1)(k) of Cap. 301, but always follow the event unless for good reasons otherwise ordered. We shall award costs of the reference to the tenant being the successful party.

C. Orders

45. In view of the above analysis, the final orders which commend to us are;
- The landlady is not entitled to evict the tenant from the suit premises known as Room 2, Plot No. 293, Mlolongo on the basis of the defective termination notice dated 12th September 2023.
 - An Injunction order is hereby issued restraining the Landlady either by herself, agents or representatives from interfering with the tenant's business, evicting the tenant, terminating the controlled tenancy agreement or in other any manner whatsoever interfering with or limiting the tenant's access, occupation and/or use of the premises known as Room 2, Plot 293, Mlolongo without adhering to the provisions of the *Landlord and Tenant (Shops, Hotels and catering Establishments) Act*, Cap. 301, Laws of Kenya.
 - For avoidance of doubt, the landlady shall be entitled to serve a proper notice to terminate the tenant's tenancy under Section 4 of Cap. 301 notwithstanding the injunction order given herein.
 - The tenant is awarded compensation in the sum of Kshs 213,600/= being the amount proved in construction of the public toilet on the landlady's premises.



- e. The tenant is liable to pay any rent arrears owing to the landlady which shall be offset against the construction costs awarded herein and any balance thereafter shall be paid to him. Should the amount however be inadequate to cover the said rent arrears, the tenant shall pay to the landlady, any balance thereof.
- f. The tenant is awarded costs of the reference assessed at Kshs 50,000/= against the landlady which shall be offset against the rent account.

It is so ordered.

JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY THIS 18TH DAY OF DECEMBER 2024

HON. GAKUHI CHEGE

(PANEL CHAIRPERSON)

BUSINESS PREMISES RENT TRIBUNAL

HON. JOYCE AKINYI OSODO

(MEMBER)

In the presence of:

Miss Okumu for the tenant

No appearance for the landlord

