



Wafula v Khamali (Tribunal Case E062 of 2024)
[2024] KEBPRT 1538 (KLR) (18 October 2024) (Judgment)

Neutral citation: [2024] KEBPRT 1538 (KLR)

REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E062 OF 2024
P MAY, MEMBER
OCTOBER 18, 2024

BETWEEN

HUMPHREY SIMIYU WAFULA TENANT

AND

ELNAS JIKAINI KHAMALI LANDLORD

JUDGMENT

1. The landlord issued the tenant with a notice to terminate tenancy dated 12th February, 2024. The notice was issued under Section 4(2) of CAP 301 and was to take effect from 1st May, 2024. The landlord cited default in payment of rent as the reason for terminating the notice. The tenant filed the reference dated 2nd April, 2024 to oppose the said notice.
2. The hearing of the reference proceeded on 8/8/2024 where each party called a witness who testified in support of their respective positions. The testimony given by each party is as summarized below:

Summary of tenant's case

3. The tenant stated that he had been in occupation of the demised premises since the year, 2007. He stated that the original landlord passed on in 2020 and he was then approached by the deceased's sons who demanded rent. He however informed the deceased's wife of the same and was advised to not pay rent until the family agreed on who was to collect rent. He stated that he did not pay rent for 3 months being the months of October, November and December 2020 but he would later pay the same to the landlady herein.
4. He stated that he continued paying rent until December, 2023 when he was involved in an accident and therefore was not in a position to pay rent. He acknowledged that he was served with the notice to terminate tenancy which took him by surprised as he had not accrued rent arrears of Kshs. 97,000



thus forcing him to institute the present proceedings. During cross examination he could not explain why he did not have receipts to prove payment of rent.

Summary of the Landlord's Case

5. The landlady's son testified on her behalf. He stated that he had been managing the premises since 2019. He acknowledged that he had been managing the premises since that period which was before his father passed on. He stated that he would issue tenants with receipts upon receiving payment. He further stated that they encourage tenants to pay through Mpesa before they could issue receipts.
6. He stated that the premises were currently in a deplorable state and required urgent renovations. He acknowledged that the tenant had made some payments but the rent arrears accrued remained Kshs.97,000. He urged the tribunal to compel the tenant to pay the said arrears and vacate the premises.
7. During cross examination, witness stated that he would not know if their late father issued receipts for rent paid. He maintained that the rent due was Kshs. 97,000/-

Analysis

8. The dispute herein revolves on the question on the validity of the notice issued on 12th February, 2024. The Tribunal will therefore consider the same.
9. In addressing this issue, I shall consider two aspects: the formal requirements of a notice for termination of a tenancy agreement and the Landlord's grounds for termination of the tenancy.

a) Formal requirements of notice of termination of a tenancy.

10. Section 4(2) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* Cap 301 Laws of Kenya (hereinafter referred to as 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 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.”

11. Additionally, Section 4(4) provides that no tenancy notice shall take effect until such date, not being less than two months after the receipt thereof by the receiving party, unless the terms and conditions of the tenancy provide for a period exceeding two months or the parties to the tenancy agree in writing to a lesser period of notice.
12. The two requirements therefore for a valid notice of termination of the tenancy is first, that the notice shall be in the prescribed form and secondly, that the notice shall not take effect until after expiry of two months, or such notice period as may be agreed by the parties. This was emphasized in the case of; *Munaver N Alibhai T/A Diani Boutique v South Coast Fitness & Sports Centre Limited* [1995] eKLR, where the Court of Appeal at Mombasa in finding that the notice of termination of the tenancy was void for failing to comply with Section 4 of the Act stated as follows;

“The Act lays down clearly and in detail, the procedure for the termination of a controlled tenancy. Section 4(1) of the Act states in very clear language that a controlled tenancy shall not 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 specified provisions of the Act. These provisions include the giving of a notice in the prescribed form. The notice shall not take effect earlier than 2 months from the date of receipt thereof by the tenant. The notice must also specify the grounds on which termination is sought. The



prescribed notice in Form A also requires the landlord to ask the tenant to notify him in writing whether or not the tenant agrees to comply with the notice.”

13. Section 4(1) of the Act provides that no tenancy shall be terminated, or no term or condition, or right or service enjoyed by the tenant shall be altered otherwise than in accordance with the provisions of the Act.
14. The Act further provides for the grounds on which the Landlord may seek to terminate the tenancy in Section 7. The grounds stated under this provision and which are applicable herein include;
 - i. that the tenant has defaulted in paying rent for a period of two months after such rent has become due or payable or has persistently delayed in paying rent which has become due or payable;
 - ii. that the tenant has committed other substantial breaches of his obligations under the tenancy, or for any other reason connected with the tenant’s use or management of the premises comprised in the tenancy; and
 - iii. that on the termination of the tenancy 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;
15. In the present circumstances the notice indicated that the tenant was in default and has accrued rent arrears amounting to Kes. 97,000. It is trite law that he who alleges must prove. This is in accordance with the Evidence Act of Kenya in Section 107, which places a burden of proof on the person who desires any court to give judgment as to any legal right or liability, which is dependent on the existence of facts, which he asserts. The landlord filed proof that the tenant was in default.
16. I agree and I am guided by the decision of the court in the case of; Dorcas Ondieki Gisege vs Nyakarangania Farmers Co-operative Society [2010] eKLR where the court stated;

“Under Section 7(1)(b) of the Landlord and Tenant (shops, hotels and Catering Establishments) Act Cap 301, one of the grounds upon which a landlord may terminate tenancy is where the tenant has defaulted in paying rent for a period of two months after such rent has become due or payable. One of the implied terms and conditions of any tenancy is that the tenant shall pay rent in advance except where it is specifically agreed otherwise. Where there is no tenancy agreement as was the case herein, the Appellant was under an obligation to pay rent in advance. From the evidence on record, there is no dispute that the Appellant was persistently in arrears of rent and/or delayed in the payment of the same for several months. At the time of the service of the notice of termination of tenancy, the Appellant was in substantial arrears of rent. It matters not whether the rent arrears were cleared shortly thereafter.”
17. In the circumstances, the notice of termination dated 12th February, 2024 is upheld. The tenant shall forthwith vacate the premises. The landlord is awarded costs assessed at Kshs. 20,000/.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 18TH DAY OF OCTOBER, 2024.

HON. PATRICIA MAY - MEMBER

BUSINESS PREMISES RENT TRIBUNAL

Delivered in the absence of the parties

