



**Wafula v Barasa (Tribunal Case E059 & E101 of 2022 (Consolidated))  
[2023] KEBPRT 230 (KLR) (Civ) (12 May 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 230 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
CIVIL  
TRIBUNAL CASE E059 & E101 OF 2022 (CONSOLIDATED)  
A MUMA, VICE CHAIR  
MAY 12, 2023**

**BETWEEN**

**DELAILA WAFULA ..... TENANT**

**AND**

**PETER ISAAC BARASA ..... LANDLORD**

**RULING**

**A. Parties And Represenatatives**

1. The applicant Delaila Wafula is the tenant and rented space for business in the suit property shop number 01 Ten Star Road- Bungoma within Bungoma county (hereinafter the “tenant”)
2. The firm of Ragira Gideon and Company Advocates represents the tenant in this matter.
3. The respondent Peter Isaac Barasa is the landlord and the owner of the suit property and rented out the space on the suit premises to the tenant.
4. The firm of Mercy Barasa & Company Advocates represents the landlord/respondent in this matter.

**B. Background Of The Dispute**

5. The landlord and the tenant entered into a tenancy agreement dated 30<sup>th</sup> February 2020 for a monthly fee of six thousand six hundred only (Kshs 6,600).
6. The landlord however issued a notice dated May 25, 2022 seeking to terminate tenancy on the grounds that he wanted to renovate the suit premises.
7. As a result, the tenant filed a reference and a notice of motion application dated October 24, 2022 in BPRT E059 of 2022 seeking orders restraining the landlord from interfering with their quiet possession



and occupation of the premises. The tribunal directed that the tenant should pay rent due to the landlord.

8. The landlord also moved this honorable tribunal *vide* a notice of motion under a certificate of urgency in BPRT case No E101 of 2022 dated October 17, 2022 seeking orders that:
  - a. That the application be certified as urgent and the same be dispensed with in the first instance.
  - b. That this honourable tribunal be pleased to order consolidation of Kakamega BPRT E101 of 2022 Peter Isaac Barasa v Delaila Nasimiyu Wafula with Kakamega BPRT E059 of 2022 Delaila Wafula v Isaac Barasa and this matter be the lead file
  - c. That this honourable tribunal issues eviction orders against the tenant.
  - d. The costs of this application be in cause

The tribunal through an order dated October 31, 2022 ordered that the application be served for hearing on November 28, 2022.

### **C. The Tenant's Claim**

9. In response to the application filed by the landlord in BPRT E101/2022, the tenant raised a notice of preliminary objection stating that the suit is *res judicata* as the matters raised are already in an ongoing suit No BPRT O59 of 2022.
10. The tenant further avers in the notice of preliminary objection that the advocate acting for the applicant drafted, executed and witnesses the tenancy agreement between the landlord and the tenant thus ought not to represent the applicant.
11. Further, the tenant *vide* a replying affidavit dated February 1, 2023, averred that the failure to pay rent was occasioned by a break-in by thieves which affected her business. The tribunal however ordered on November 1, 2022 as per the proceedings that the tenant to make good the rent payments and the same has since been settled.
12. She further avers that she has maintained the premises in a clean and tenable condition citing that the same does not require any renovations. She therefore terms the landlord's actions as malicious and an excuse to evict her.
13. The tenant further avers that the notice issued to her did not include sufficient reasons for eviction.

### **D. The Landlord's Claim**

14. It is the landlord's case that the tenant has continuously disregarded the terms of the lease agreement dated 30th February 2020 by failing to pay a monthly rent of Kshs 6,600.
15. She has further made alterations to the premises by erecting additional mabati structures without the consent of the landlord contravening the terms of the lease agreement.
16. The landlord avers that he wanted to rehabilitate and renovate the premises and he consequently issued a termination notice dated May 25, 2022 to the tenant/applicant and five other tenants occupying the premises.
17. The tenant opposed the said notice *vide* a reference and application dated June 14, 2022, filed in Kakamega BPRT E059 of 2022 where the tribunal ordered that tenant to settle rent arrears owed to the landlord.



18. The landlord avers that he is currently servicing a loan that he had taken out for the purposes of the intended renovation of the premises.
19. The landlord further submits that he will continue to suffer judicial and financial prejudice should the tenant refuse to make way for the proposed renovations.

#### **E. Submissions**

20. The landlord indicated that the relationship between the landlord and the tenant had irretrievably broken- down owing to the tenant's conduct. The applicant avers that the tenant has continuously failed to pay rent as and when it becomes due, has made alterations to the premises without the landlord's consent among other actions.
1. In response to the application filed by the landlord in E101 of 2022, the respondent filed submissions on the preliminary objection stating that the advocate for the applicant ought not to appear for the landlord as she had previously represented both the landlord and the tenant in drafting, execution and witnessing of the tenancy agreement. As such, the advocate ought not to represent one of the parties as she may be called in as a witness.

#### **F. List Of Issues For Determination**

22. The issues raised for determination are as follows;
  - a) Whether the issues raised in the notice of preliminary objection are merited?
  - b) Whether the notice to terminate tenancy issued by the landlord is legal and should be upheld?

#### **G. Analysis & Determination**

23. The application and the affidavit filed by the tenant/applicant raises fundamental issues discussed herein below:

#### **Whether the issues raised in the notice of preliminary objection are merited?**

24. The respondent raised a preliminary objection on the grounds that the suit herein is *res judicata* as the same is ongoing in suit No BPRT/059/2022. Res judicata is defined as a matter that has been adjudicated by a competent court and therefore may not be pursued further by the same parties. In *Lotta v Tanaki*, the court held that *res judicata* is meant to bar multiplicity of suits and guarantee finality to litigation. It is therefore applicable to matters that have been heard and determined by court.
25. In the matter at hand, this honourable tribunal on January 26, 2023 ordered the consolidation of BPRT E101 of 2022 and E059 of 2022 with the latter being the lead file. This is because the issues raised and orders to be granted would apply to both files. On the aforementioned grounds, the preliminary objection raised is hereby dismissed.
26. On the issue raised regarding the landlord's advocate in conduct of this matter, we hold that that notwithstanding, the proceedings are currently at a conclusive stage and orders given will settle the reference and application and as such it would be futile to ask the advocate to withdraw from acting in addition I see no conflict if all the advocate did was to draft a lease agreement unless the lease agreement execution was disputed and attesting witness had to be called as required by the [Evidence Act](#) section 71 which is not the case herein.



### Whether the tenancy notice issued was valid and duly served?

27. Section 4(2), (4) of the *Land and Tenant (Shops, Hotels and Catering Establishments) Act* chapter 301 Laws of Kenya states that:

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

28. In *Munaver N Alibhai T/A Diani Boutique v South Coast Fitness & Sports Centre Limited* [1995] eKLR, the Court of Appeal held that the notice of termination of the tenancy was void for failing to comply with section 4 of the Act stating 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.”

29. From the foregoing, it is clear that a notice to terminate or alter the term of a controlled tenancy must be issued not less than two months to the tenant and the same must indicate valid reasons for such termination.
30. The evidence tendered before this honourable tribunal indicates that the landlord complied with the aforementioned provision as the termination notice was issued on May 25, 2022, and the same was to take effect on July 26, 2022. I have examined the validity of the notice issued and I hold that it was valid as it also indicates the reasons for such. The termination notice also states that the tenant would be notified once the renovations are completed.
31. Section 7 of the *Land and Tenant (Shops, Hotels and Catering Establishments) Act* chapter 301 Laws of Kenya further provides for the grounds on which a landlord may seek to terminate tenancy. Section 7(f) permits a landlord to issue a notice where the landlord intends to demolish or reconstruct the premises comprised in the tenancy or a substantial work of construction on such premises and that he cannot reasonably do so without obtaining possession of such premises
32. The applicant through his pleadings particularly in the replying affidavit dated February 9, 2023 has stated that he has already acquired the funds for the renovation and the same cannot be phased and need to be conducted together for the whole premises. The same has however not been proved before this honourable tribunal.
33. The applicant also seeks to terminate the tenancy relationship on the grounds that the tenant has substantially breached his obligations under the tenancy by erecting a mabati structure in the premises contrary to the tenancy agreement. This is contrary to sections 7(c) of Cap 301. For these reasons and several others above the tribunal sees it fit to hear the reference in full and gives directions as follows
34. Orders



- a. The landlord shall provide the proof of funds for renovation within 14 days tenant to respond in 14 days;
- b. The parties shall prepare updated statement of accounts showing the arrears owed if any landlord to commence.
- c. Inspection to be carried out on May 5, 2023 at 12 noon. All parties to be present and to share costs. The inspection shall determine state of building and whether other tenants have moved out as alleged?
- d. The reference shall be fixed for further hearing on May 18, 2023.
- e. Costs shall be in the cause.

**HON A. MUMA**

**VICE CHAIR**

**BUSINESS PREMISES RENT TRIBUNAL**

**Ruling dated, signed and delivered virtually by Hon A. Muma this 12<sup>th</sup> day of April 2023 in the presence of Wachira for the Tenant and N/A for the Landlord.**

**HON A. MUMA**

**VICE CHAIR**

**BUSINESS PREMISES RENT TRIBUNAL**

