



**Njoki v Chege & another (Tribunal Case E1190 of 2023)
[2024] KEBPRT 598 (KLR) (12 April 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 598 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E1190 OF 2023
N WAHOME, MEMBER
APRIL 12, 2024**

BETWEEN

CAREN NJOKI TENANT

AND

FRANCIS CHEGE LANDLORD

AND

JUSTUS MUTUA RESPONDENT

RULING

1. The Applicant/Tenant initiated these proceedings by the reference dated 28/11/2023. The same was said to be brought under Section 12(4) of the Landlord and Tenants (Shops, Hotels and Catering establishments Act) Cap 301 hereinafter “the act”. The applicants grievances were that despite meeting her cardinal obligations of paying rent, the landlord had done the following;
 - i. Locked up and denied her access to unit no 24 within Capital heights Apartments.
 - ii. Disconnected water and electricity from her unit no. 21 within the same capital heights apartments.
 - iii. Issued her with a defective notice of termination of tenancy contrary to section 4(2) of the Act.
2. The applicant together with the reference lodged a notice of motion application under certificate of urgency. The reliefs sought were principally that:-
 - a. The Respondent be restrained from interfering with the Applicant’s quiet occupation of the two units within capital heights apartments.
 - b. Respondent be ordered to restore the unit which he had taken possession of to the Applicant.



- c. A declaration that the termination notice was illegal.
 - d. Order that the Tenant does not pay rent for the locked unit.
 - e. The orders granted be enforced by the OCS Gigiri Police Station and also sought for costs.
3. From the notice motion, the tenant stated her case thus:-
- i. She was the Respondent's tenants for a period of about 2 years paying rent religiously.
 - ii. The Respondent had forcefully taken over one of her business units and disconnected water and power from the other,
 - iii. The Respondent had served her with an illegal notice with a view to evicting her.
 - iv. This court should come to her aid as a protected Tenant.
4. On being served with the application, reference and the orders thereof, the Respondent was most unhappy. In particular with the order directing restoration of the Applicant back into the said unit No. 24. He in answer thereof filed the notice of preliminary objection dated 4/12/2023. The notice of motion Application dated 7th December 2024 and the Replying Affidavit dated 8th December 2023. In essence, he raised the following issues:-
- I. The units occupied by the Applicant were private dwelling units outside the jurisdiction of this court.
 - II. Unit no. 24 had already been rented out to a 3rd party who was in quiet occupation of the same.
 - III. The Applicant was a serial rent defaulter who needed to vacate the unit No. 21 also and pay all the rents in arrears.
 - IV. Annexed a lease agreement between him and the Applicant dated 1/8/2022 showing that unit No. 21 and 24 were private dwelling houses- annexure FC-01.
5. In the said Notice of Preliminary objection dated 4/12/2023, the Respondent asserted that:-
- i. The Tribunal lacks jurisdiction to hear and determine the reference/Application dated 28/11/2023 as the tenancy agreement does not fall under the jurisdiction of the Tribunal.
 - ii. That the Tenant/Applicant does not run a business within the premises as per the tenancy agreement and if at all, it is not within the knowledge of the Respondents, the County Government of Kiambu or the Kenya Revenue Authority.
6. Further in his Notice of Motion application dated 7/12/2024 brought under certificate of urgency, the respondent sought that:-
- “This Honourable court be pleased to set aside/vary order no. 2 of the orders of the Honourable Tribunal dated 1/12/2023 pending the hearing and determination of the Application”.
7. The order being challenged was actually order No. 3 and not no. 2 of the orders issued on the 1/12/2023. The same was to the effect that:-
- “An order is issued compelling the Respondents to return to the Applicant the key to and reopen her business premises forthwith and unconditionally”.



8. The Landlord complained of inability to obey the said orders for reasons that the unit No. 24 afore said had by a lease Agreement dated 26/11/2023 granted unit 24 to one Joy Nelima Nyongesa who was in quiet occupation of the same.
9. The Landlord however made an admission that the said unit had been forcefully taken over from the Applicant with the help of the local chief.
10. The Tenant with the leave of this court filed the further affidavit sworn on the 19/2/2024. The same was a tirade against the person of the respondent. It is evident from a casual reading of the same that the relationship between the two run deeper than can be deduced from the cold letters of their pleadings. The Tenant asserted that:-
 - i. She had not executed the purported lease agreement dated 1/8/2022 and marked FC-01.
 - ii. The Respondent was aware of the business that she run at the units being one of Air bnb and annexed screenshots from a whatsapp group where the respondent is a member and marked "NJ-C" Also annexed and marked "NJ-C" are screenshots of messages between the parties.
 - iii. She was in rent arrears for the month of February, 2024 only at the time of filing the Affidavit which was Kshs.7,000/- annexture "Njd" which are filtered mpesa statements.
 - iv. She therefore sought that the respondents application be dismissed and that her application be allowed.
11. On 6/3/2024, when this matter came up for hearing, the court allowed the parties to make oral submissions. They both reiterated all their averments in their respective pleadings.
12. I have perused the parties pleadings and considered their respective oral submissions and am of the view that the issues for determination in this matter are the following:-
 - a. Whether the Notice of Preliminary objection dated 4/12/2024 is merited.
 - b. Whether the Applicant's application dated 28/11/2023 has merit.
 - c. Whether the respondent's application dated 7/12/2023 is merited.
 - d. Who should bear the costs of the matters herein.

ISSUED NO. 1- Whether the Notice Preliminary objection dated 4/12/2024 is merited.

13. In the case of Gitonga Muriuki and co. Advocates – vs- Mhasibu Sacco society Ltd (Misc civil Application E730 of 2023) AA Visram Judge as he then was held that,-

“For a preliminary objection to succeed the following tests ought to be satisfied, firstly it should raise a pure point of law, secondly, it is argued on the assumption that all the facts pleaded by the other side are correct, and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit”.
14. The above holding relied heavily on the locus Classicus case of Mukisa biscuits Manufacturing Co. Ltd – vs- West End Distributors Ltd (1969) EA where sir Charles Newbold held that:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on assumption that all the facts pleaded by the other side are correct.



It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

15. The respondent herein raises the notice of preliminary objection on the strength of the lease Agreement dated 1/8/2022 and marked FC-01. The same has been denounced by the applicant. She in fact stopped short of pronouncing that her alleged signature was a forgery.
16. The issues of licensing by the County Government of Kiambu, payment of taxes to the KRA and other obligations to other Government agencies can only be ascertained through a full hearing where the parties would render evidence and same be tested through cross-examination.
17. The upshot of this is that the parties herein could not agree on any single issue and the notice of preliminary objection dated 4/12/2023 has simply not met the threshold of the law as enunciated in the cited cases herein above. Indeed a lot of doubt is created on the status of the demised premises and the same is compounded by the discourses between the parties in Applicants annexures “NJ-B” and “NJ-C”. I therefore proceed to dismiss the same.

ISSUE NO. B- Whether the Applicant’s Application dated 28/11/2023 is merited.

18. There has been admissions by the Respondent that he took over the possession of unit no. 24 without the consent of the Applicant nor the Authority of this court. The Applicant had therefore the reason to move to this court to secure her rights. This is more so if it is proved during the hearing that the demised premises are for business purposes.
19. I note that the Respondent did not provide any materials including building plans and their approval to authentic the status of the building where the suit premises are found. Such plans would have easily shown whether they were residential or commercial.
20. Indeed from exhibits no. “NJ-b” and “NJ-C” it is apparent from the casual perusal of the discourses thereof that the same are utilized for commercial purposes and in particular as Air bnb. I would therefore proceed to grant the Application in terms that the Tenant is allowed quiet possession of the same pending the hearing and determination of the Reference herein.

ISSUE NO. C- Whether the Respondent’s application dated 7/12/2023 has merit.

21. At the outset I would wish to state that the manner the respondent took possession of unit no. 24 and thereafter lease it to Joy Nelima Nyongesa on the 26/11/2023 was unwarranted and without the authority of the law. It is unfortunate that I have not benefited from the report of an inspector of this tribunal to confirm the status of unit 24. I however note that the Tenant did not deny such occupancy in her lengthy further Affidavit. I doubt that she would have just mentioned the issue in passing if indeed the said unit 24 was still vacant.
22. I would therefore and in reliance to the case of Lena Sarange – vs- Robert Oyieko Angoi (2020) e KLR grant the application dated 7/12/2023. In the cited matter, the court held that:-

“Having said that, it would not be practical to set aside the order issued on the 12/4/2019 and reinstate the Appellant in the premises as the owners of the premises have already leased the premises to the Respondent. The Applicant’s only recourse is in damages for loss of tenancy. The appellant is also at liberty to sue the owners of the demised premises for the refund of the unutilized rent and general damages for breach of the lease agreement”.
23. The effect of the above citation is that I allow the Application dated 7th December 2023 in terms of prayer no. 2 thereof.



ISSUE NO. D- Who should bear the costs of the matters herein.

24. I note that the Applicant has partially succeeded in her application dated 28/11/2023. The Respondent has lost his notice of preliminary objection dated 4/12/2023 but succeeded in his application dated 7/12/2023. I would in the circumstances direct that costs do abide the outcome of the reference herein.
25. In the final analysis, the orders that commend to me are the following:-
- i. That the notice of preliminary objection dated 4/12/2023 is dismissed.
 - ii. That the Applicant's application dated 28/11/2023 is allowed in the terms that she will be allowed quiet enjoyment of the demised premises being unit No. 21 pending the hearing and determination of the reference.
 - iii. That the application by the Respondent and dated 7/12/2023 is allowed in terms of prayer no. 2 thereof.
 - iv. That the costs of the matters herein will abide in the outcome of the reference dated 28/11/2023. Those are the orders of the court.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 17TH DAY OF APRIL 2023.

HON. NDEGWA WAHOME, MBS

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

Ruling delivered in the presence of Mr. Gitau for the Respondents and in the absence of the Applicant.

HON. NDEGWA WAHOME MBS

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

12/4/2024

Court: The parties to comply with Order 11 of the Civil Procedure Rule for the purposes of hearing of the reference herein within 30 days and exchange their respective documents.

The Landlord to serve the Applicant with these directions and the matter be mentioned on the 15th May 2024 to take a date for hearing of the reference.

HON. NDEGWA WAHOME MBS

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

12/4/2024

