



**Electro Air Systems Limited v Kundalia & another (Civil Appeal
E034 of 2021) [2023] KEELC 18886 (KLR) (20 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18886 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CIVIL APPEAL E034 OF 2021**

**AA OMOLLO, J
JULY 20, 2023**

BETWEEN

ELECTRO AIR SYSTEMS LIMITED APPLICANT

AND

V.J. DEVJI KUNDALIA 1ST RESPONDENT

K.J. RAI KUNDALIA 2ND RESPONDENT

(Business Premises Tribunal in BPT Case No. 233 of 2020)

JUDGMENT

1. The Appellant who was the tenant in the matter before the Business Premises Tribunal in [*BPT Case No. 233 of 2020*](#) was unhappy with the decision reached by the Chairman on 8th April, 2021. It filed this appeal which raised the following grounds;
 1. The learned Trial Chairman erred in allowing application dated 26th May, 2020 by failing to take into account the admissions by the Respondent/Landlord and evidence provided by the Appellant.
 2. The learned Trial Chairman erred in dismissing the Reference filed on 28th February, 2020 in respect of Notice of Termination of Tenancy dated 22nd January, 2020 which was contrary to the Appellants pleadings, evidence and admissions of the Respondent/Landlord.
 3. The learned Trial Chairman erred in law and fact by failing to take hind of the evidence furnished to confirm that the Respondent/Landlord had no intent to use the premises as purported in the grounds of termination of Notice of Termination of Tenancy as the Respondent/Landlord had moved out of the suit premises Kirinyaga Road, Land Reference Number 209/136/145 and relocated to their own property in Industrial Area and had let out their previously occupied space to Sam Livos Aout Spares.



4. The learned Trial Chairman erred in law and fact by failing to take hind of the Respondents malicious intent of terminating the tenancy of the Appellant who has been on the premises since 1982 yet proceedings to let additional space to co-tenant in the suit premises thus affirming they had no intent of use of space but sole intent to evict the Appellant as they intent of additional space would have been met if they had used spaces which they had not let to Sam Livo Auto Spares.
 5. The learned Trial Chairman erred in law and fact by failing to appreciate evidence and photographs furnished in support of the occupants of the suit premises.
 6. The learned Trial Chairman erred in law and fact by failing to take hind of the Unified Business Permit being provided by the Respondent/Landlord being for the year 2019 and not the period of the notice as they had ceased occupying the suit premises prior to the issuance of the notice thus in the year 2020 had not obtained any Business Permit for the suit premises as they were not in the suit premises as purported whatsoever.
 7. The learned Trial Chairman erred in law and fact by failing to take hind of ownership of the suit premises and the Landlords herein who are Karunkumar Jivanlal Devji Raikundalia And Vinoochandra Jivan Devji Raikundalia and not truck turner limited who are separate legal entity as any tenancy to truck turner limited would not amount to Landlords usage but to letting to a separate legal person and entity which is contrary to the provisions of the *Landlord and Tenant (Shops, Hotels and Catering Establishments)* CAP 301 and the grounds of termination provided in the Notice of Termination of Tenancy.
 8. The learned Trial Chairman proceeded unprocedurally in disallowing the said application.
2. The Appellant asked the court to allow the appeal and make the following findings;
- a. The Learned Trial Chairman's decision in *Business Premises Rent Tribunal BPRT Nairobi Case No. 233 of 2020* was wrong, improper and contrary to the Law and findings.
 - b. Notice of Motion Application dated 26th May, 2020 be dismissed with costs.
 - c. The Reference filed on 28th February, 2020 in respect of Notice of Termination of Tenancy dated 22nd January, 2020 be allowed with costs.
3. Directions were taken that the appeal be heard by way of written submissions. The Appellant's submissions are dated 28th February, 2023 while the Respondents submissions is dated 27th March, 2023.
4. The Appellant submitted on four issues:
- i. That the Chairman did not give cogent reasons in the judgment.
 - ii. The Respondents had no intention to use the premises.
 - iii. The Chairman failed to evaluate the evidence presented by the Appellant.
 - iv. The Chairman misconstrued the law.
5. The Respondent on their part submitted that the issues for determination are;
- a. Whether the appeal was overtaken by events.
 - b. Whether the grounds of notice to terminate were valid and legal



6. In ground one of the appeal, the Appellant faulted the Chairman of BPT for allowing the Respondent's application dated 26th May, 2020. The gist of the application was to declare the notice served as valid and direct the Appellant to vacate the suit premises. Therefore, the first and key question I will start with is whether or not the notice of termination issued to the Appellant was valid or not.
7. In the replying affidavit sworn on 3rd June, 2020 in opposition to the motion of 26th May, 2020, the Appellant deposed that the notice to terminate was aimed at stripping them their rights as controlled tenants and give full occupancy to Sam Livos Autospares. According to the Appellant, Truck Turners Ltd. moved out of the suit premises on Kirinyaga road and are currently in Industrial area. The same position is repeated in the submissions where the Appellant states that Truck Turners Limited moved out of the suit premises in 2019.
8. From the pleadings and submissions, I glean that the Appellant is contesting the notice to terminate on account of the reasons given for termination by the Respondent i.e

“to occupy the premises for use by our own company Truck Turners Limited which requires additional storage space.”
9. The notice was given pursuant to the provisions of section 4(2) of the *Landlord and Tenant (Shops, Hotels and Catering Establishment) Act* Cap 301. The Section provides thus

“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.”
10. Section 7 of *Cap 301* provides grounds for terminating a tenancy. The applicable paragraph is section 7 (g) which states thus;

“Subject as hereinafter provided, that on the termination of the tenancy the landlord himself intends to occupy for a period of not less than one year the premises comprised in the tenancy for the purposes, or partly for the purposes, of a business to be carried on by him therein, or at his residence.”
11. In the submissions of the Appellant it faults the Chairman for not finding that the Respondents were not intending to put the premises to their own use, rather they had let it out to Sam Livos Auto Spares who it avers currently occupies the suit premises. The Respondents on their part produced a unified Business Permit for the year 2019 that shows Truck Turners Ltd were carrying on business on plot No. 209/136/145 (suit premises).
12. At page 5 of his *judgment*, the honourable Chairman held thus;

“At paragraph 8, he states that Sam Livos Auto Spares actually occupy the premises where Truck Turners used to be located, and the intention of the Landlord is to actually surrender the whole premises to Sam Livos Auto Spares. The Tenant has not placed any material before the Tribunal to prove/establish his allegations that Truck Turners Ltd have indeed moved to their own premises in Industrial area neither have the photographs of building showing Sam Livos Auto Spares been linked with the premises known as Plot No. 209/136/145 the subject matter of the notice to terminate.”
13. I do not find any basis to fault this finding by the honourable Chairman that nothing was presented to show that Truck Turner Limited had moved out. One cannot tell by the photo of a signage of Sam



Livos Auto Spares is conclusive evidence of vacation of the suit premises by the previous occupants. If the Appellant felt the Respondents were not going to use the premises as stated in the notice, the burden shifted on them to provide the evidence of vacating by Truck Turners Ltd. In this case, that burden was not discharged within the standards required in law.

14. The Appellant also pleaded that the honourable Chairman did not give cogent reasons for the decision arrived at. The judgment faulted made reference to the documents relied on by both parties. The honourable Chairman stated that the Respondents had shown through form CR 12 that they were the directors of Truck Turners Ltd. He was also satisfied that the Business Permit produced for the year 2019 confirmed that Truck Turners Ltd did business in the suit premises. The Appellant have also confirmed that in 2019, Truck Turner was in the suit premises although according to them they later moved out. The Appellant did not however plead in which month Truck Turner Ltd moved out instead relying on a signage placed on the premises. The honourable Chairman thus laid a basis for his decision.
15. The Appellant submitted that the honourable Chairman misconstrued the law when he failed to take note that the CR 12 availed by the Respondents detailed who were the owners of Truck Turner Ltd and which are distinct from the landlord who issued the termination notice. There is no dispute that the landlords are Karunkumar Jivanlal Devji Raikundaha and Vinoo Chandra Jivan Devji Raikundaha. The CR 12 at page 15 of the record of appeal gives the directors of Truck Turners Ltd as Amil Karunkumar and Karunkumar Jivanlal Devji Raikundaha. Thus, the form CR 12 confirms one of the directors of Truck Turners Ltd is indeed a Landlord of the suit premises.
16. This court is in agreement with the cited decision of *Victor Mabachi & Another v Nurturn Bates Ltd* (2013) eKLR which held that a body corporate is a persona juridica with separate independent identity in law. However, the body corporate carries out its functions through its directors as provided in its Article of Association. Truck Turners Ltd was not a landlord to the Appellant for purposes of the notice to terminate issued. Consequently, there is no basis laid why the Truck Turners Ltd was required to provide any resolution or agreement of its intention to occupy the entire premises. Further, on account of the fact that Truck Turners Ltd were already in occupation was sufficient evidence of use and any expression to occupy more space as contained in the impugned termination notice cannot be translated to mean bad faith.
17. The decision to terminate the tenancy was reached by the landlord in their individual capacities and Truck Turner Ltd was only stated in the impugned notice to explain how the Landlords intended to put the premises to their personal use. It is my considered view and I so hold that the CR 12 was produced to show the interest/nexus the landlord had in the said company. Otherwise it would have been wrong for the honourable Chairman to find that the grounds for termination under section 7(g) had been proved. Hence, the Chairman cannot be faulted for his finding that the Landlord had a nexus with Truck Turners Ltd
18. In light of the foregoing analysis, I find no merit in this appeal and proceed to dismiss it with costs to the Respondent.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JULY 2023

A. OMOLLO

JUDGE

In the presence of:

Ms Shabana advocate appearing for the Appellant



Ms Mwikali h/b for Mwenda for Repondent

CA: Valentine

