



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Wahome v Macharia (Environment and Land Appeal  
80 of 2019) [2023] KEELC 17239 (KLR) (4 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17239 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL 80 OF 2019**

**OA ANGOTE, J**

**MAY 4, 2023**

**BETWEEN**

**SIMON WAHOME ..... APPELLANT**

**AND**

**SIMON WAWERU MACHARIA ..... RESPONDENT**

*(Being an appeal from the entire judgement and order delivered by the Honourable Mr Mbichi Mboroki on the 20th September, 2019 at Nairobi BPRT Case No 22 of 2017)*

**RULING**

**Background**

1. The present Appeal arises from a Judgment rendered by the Chairman of the Business Premises Rent Tribunal (the Tribunal), Hon Mbichi Mboroki, on September 20, 2019, on a reference lodged by the appellant.
2. The reference, dated 9<sup>th</sup> November, 2017 was instigated by a notice of termination of tenancy issued by the Respondent in relation to the business premises located on Plot No 1144/515, Naivasha. The Respondent served on the Appellant the impugned notice under section 4 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* (the Act), contending that he wished to terminate the tenancy because he wanted to occupy the business premises for his own use for a period exceeding one year.
3. The Respondent objected to the reference vide an Affidavit of Objection dated 12<sup>th</sup> January, 2018 in which he deponed that he rented out his premises to the Appellant sometime in 2007; that they did not sign any lease as their relation was of a temporal nature, the Appellant having been evicted from his former premises and that the rent payable for the premises was Kshs 25,000per month.



4. It was deponed by the Respondent that he runs a company by the name Eastgate Merchants Limited carrying on a water processing business; that he intends to use the premises occupied by the Appellant as a depot/store for a period of more than one year and that he has been paying VAT for the company but is unable to carry out the intended business on the premises since it is occupied by the Appellant subjecting him to heavy losses.
5. The Respondent deponed that he is a man of means and wants to utilize the business premise comprising of a room in which the Appellant operates the wines and spirits business and the adjoining store and self-contained lodging; that the Appellant has been abusive towards him and their relationship is irretrievably broken down and that the Appellant should be ordered to grant vacant possession of the open room, store room and the room he has been using for free but is usable as a self-contained lodging.
6. The Appellant filed a Replying Affidavit sworn on 23<sup>rd</sup> January, 2018 wherein he deponed that he entered the premises in the year 2004 and not 2007 as alleged; that he took up a normal tenancy at an initial rent of Kshs 6,000 per month which has increased over the years by mutual consent and that neither himself nor the Respondent were keen to draw up a lease.
7. It was deponed by the Appellant that the rent that he pays is inclusive of both the shop and the store which the landlord refers to as a lodging room; that the annexure SMWIII refers to Thrills Home Limited located at Kilimo Home a distance away; that annexure SMWI is not his document as Smiles Café is not his business and that there is no evidence that the Respondent intends to use the premises as a depot or any water business. According to the Appellant, the termination is actuated by malice.
8. The matter proceeded for oral hearing on the 26<sup>th</sup> April, 2018 before the Tribunal. Vide its decision dated 20<sup>th</sup> September, 2019, the Tribunal found against the Reference holding that:
  - i. The Tenants reference dated 9<sup>th</sup> November, 2017 and filed in the Tribunal on 13<sup>th</sup> November, 2017 is hereby dismissed.
  - ii. The Landlords notice dated 28<sup>th</sup> September, 2017 is allowed.
  - iii. The Tenant shall vacate and hand over possession of the suit premises on or before the 1<sup>st</sup> April, 2020 in default an eviction order shall issue without further reference to the Tribunal.
  - iv. In the circumstances of this case, each party shall bear its own costs.
9. Aggrieved by the foregoing, the Appellant vide the Memorandum of Appeal dated 22<sup>nd</sup> October, 2022 seeks the setting aside of the Tribunal's findings and orders on the following grounds:
  - i. The Learned Chairman erred in law and in fact in failing to appreciate that the Respondent herein was not the person and/or the same person who intended to utilize the premises.
  - ii. The Learned Chairman erred in law and in fact in allowing the Landlords notice in circumstances that were not envisaged by cap 301 of the Laws of Kenya.
  - iii. The Learned Chairman erred in law and in fact in failing to appreciate that the Landlord had not demonstrated through concrete evidence of his intention to utilize the premises.



- iv. The Learned Chairman erred in law and in fact in failing to appreciate that the Landlords Notice to terminate was issued for ulterior motives.
  - v. The Learned Chairman misdirected himself in his finding that being wealthy is the only condition required to demonstrate capacity to use premises for own needs.
  - vi. The Learned Chairman erred in entering Judgement in favour of the Landlord without the threshold in the burden of proof being met by the Landlord.
  - vii. The Learned Chairman erred in law and in fact erred in condemning the Appellant to meet the costs of the case.
  - viii. The Learned Judge erred in law in failing to make findings on major issues at hand.
10. The appellant has sought for the following orders:
- a. The whole Judgement of the Honourable Mr Mbichi Mboroki be set aside and the Tenants reference be allowed.
  - b. That the costs of this Appeal and those of the Reference be awarded to the Appellant.
  - c. Such further orders may be made as this honourable court may deem fit to grant.

### Submissions

- 11. The appellant filed submissions on November 23, 2022. It was submitted that the court in *Auto Engineering Limited vs Gomell and Co Ltd*(1978)KLR 248 held that a landlord has to show a firm and settled intention to occupy the premises for more than a year; and that this position was affirmed by the Court of Appeal in *Jane E Selim vs Kennedy Nyambane*[2008]eKLR.
- 12. It was submitted that in the circumstances, the Respondent is not intending to occupy the premises; that despite adducing evidence of incorporation of a company known as Eastgate Merchants Limited, there was no evidence that the Respondent is a shareholder or Director thereof and that in any event, a company is distinct from its shareholders.
- 13. It was submitted that there was further no evidence of intention to occupy the premises in the way of business plans, business resolutions, renovation plans and no intended applications to the County Government; that the Respondent has shown that he has other properties within the subject property and that the water bottling company is close to the subject property hence it is unclear why he needed a depot in such a close proximity.
- 14. It was submitted by the Appellant that the Respondent's notice to terminate was actuated by malice as evinced by the Appellant's evidence of the deteriorating relationship between the two and that in the case of *Jane E Selim vs Kennedy Nyambane*[2008]eKLR, the Court found that due to the nature of the relationship between the Respondent and the Appellant which had become acrimonious due to the Appellants efforts to raise rent, it was evident that the termination notice was not issued in good faith.
- 15. The Respondent submitted that he issued the Appellant with a legal notice to terminate his tenancy on 28<sup>th</sup> September, 2017 as he wanted to use his store as a shop for a water packaging business; that the Appellant challenged the termination notice by filing a Reference which was unsuccessful and that he



has a right to choose which among its properties is best suited for the business and the Tribunal was satisfied that he had a genuine use for his property.

16. It was submitted that the Appellant has been abusive thus irretrievably straining the relationship between the two; that the question of whether the notice was issued in bad faith was canvassed at the Tribunal and dismissed; that there are no settlement negotiations between the parties and that he has adduced evidence that it is his company, Eastgate Merchants Limited, that he intends to run in the premises.
17. The Respondent submitted that it has been five years since the issuance of the notice to the Appellant during which time the Court processes have been ongoing which constitutes sufficient time for the Appellant to have identified an alternative premise.

### **Analysis & Determination**

18. The court has considered the memorandum of appeal and the parties' submissions. Whereas the Appellant has set out 8 grounds of Appeal, the issues can be summarized as hereunder:

- i. Whether the Learned Chairman erred in law and in fact in dismissing the Reference?

19. This being a first Appeal, the Court is required to re-evaluate the evidence tendered and make its own findings and conclusions. The Court is not bound by the findings of fact and law made by the lower court and may, on re-evaluation, reach its own conclusion and findings. This principle was aptly enunciated in the case of *Selle & Another vs Associated Motor Boat Co. Ltd & Others* (1968) EA 123 where the Court of Appeal stated thus:-

“This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in this respect.”

20. As to the circumstances under which this Court can interfere with the decision by the Tribunal, the Court of Appeal in *Khalid Salim Abdulsbeikh vs Swaleh Omar Said* [2019] eKLR expressed itself as follows:

“We nevertheless appreciate that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings.”

21. The Respondent served the Appellant with a statutory notice of termination of tenancy which read as follows:

“I want to occupy the premises for my own use for a period of not less than one year.”



22. Indeed, pursuant to section 7(1)(g) of the Act, one of the circumstances in which a Landlord may seek to terminate a tenancy is where he intends to use the premises for his own use. It provides as follows;
- “...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 as his residence.”
23. In the circumstances, guided by the provisions of section 107 of the *Evidence Act* which states that he who alleges must prove, the burden of proof lay with the Landlord, the Respondent herein, to prove his intent to occupy the premises for his use. The Court in *James Kariuki Kitbinji vs Dominic Ntongai* [2020] eKLR, noting that the Landlord had established a clear intention to commence a business in the suit premises stated as follows:
- “...The Act does not state that a detailed account should be given regarding the nature of the intended use of the premises by the landlord. It was therefore sufficient for the respondent to demonstrate that he intended to put up a business and use the suit premises...As regards the first issue, I find that the respondent gave evidence before the tribunal stating that he had registered a company and was intending to carry out a business. He was to use the suit premises as an office and a show room for the products he was to be selling. He provided details of his registered company...”
24. The Appellant contends that the Chairman erred in fact in failing to appreciate that the Respondent herein was not the person and/or the same person who intended to utilize the premises. While appreciating the Appellants’ argument that a company is a distinct legal entity, the same is of necessity operated by persons. It was therefore sufficient for the Respondent to show his interest in the company.
25. The Respondent’s testimony in this respect was that he owns a company known as Eastgate Merchants Limited through which he sells water. It was his case that he wants to use the suit premises as a depot/storage for his water selling business. In this respect the Respondent adduced the Certificate of Incorporation of Eastgate Merchants Limited.
26. However, the Certificate, apart from proving the existence of the Company, does not prove that the Respondent owns the same or has any interest therein. The Respondent also adduced into evidence a VAT certificate presumably for the Company. However, looking at the VAT certificate, it refers to the tax payer as Thrills Place Limited at Kilimo House.
27. The only reference to Eastgate Merchants Limited is SMW111 which is a receipt indicating the monies paid to the company, which is not sufficient evidence of ownership of the business.
28. Apart from the foregoing, there was no other evidence demonstrating steps taken by the Respondent towards setting up a business. In this respect, the Court finds that the fact that the Respondent demonstrated financial capabilities in setting up a business is insufficient in light of his failure to prove establishment of a business to be situated in the suit premises.
29. In the circumstances, it is the Court’s finding that the Respondent did not establish a firm and clear intention of starting a business within the suit premises, and further, that the business can only be conducted from the suit premises. In view of the foregoing, the Court finds that the Tribunal did not fully consider the evidence placed before it and subsequently arrived at an erroneous decision.
30. In addition, the evidence by both parties pointed to a strained relationship between the two. The Respondent stated during trial that he does not want to continue his tenancy with the Appellant. That



being so, the court finds that the notice was simply an attempt to remove the Appellant from the suit premises.

31. For those reasons, the Court finds merit in the Appeal and allows it as follows:

- i. The Judgement of the Tribunal dated 20th September, 2019 be and is hereby set aside and the Reference of 9th November, 2017 is allowed.
- ii. The Appellant shall have the costs of the Appeal and the Reference.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 4TH DAY OF MAY, 2023.**

**O. A. ANGOTE**

**JUDGE**

**In the presence of;**

Ms Kwamboka holding brief Thuita for the Appellant

No appearance for the Respondent

Court Assistant - June

