



REPUBLIC OF KENYA

BUSINESS PREMISES RENT TRIBUNAL

VIEW PARK TOWERS 7TH & 8TH FLOOR

TRIBUNAL CASE NO. 796 OF 2019 (NAIROBI)

NANCY NJERI GITAU.....1ST LANDLORD/APPLICANT

MAURICE HARUN GITAU.....2ND LANDLORD/APPLICANT

VERSUS

JAMES MUCHONE NJUGA.....1ST TENANT/RESPONDENT

SARAH MUTHONI MWANGI.....2ND TENANT/RESPONDENT

RULING

1. By a motion dated 21st August 2019, the Landlords/Applicants are seeking for vacant possession and eviction orders against the Tenants/Respondents in respect of Shop no. 2, Keywest building located on that piece of Land known as Land Reference number 209/136/40, Ambala Road, off Kirinyaga road.
2. They also seek that any other orders the court deems fit be granted plus costs of the application.
3. On 22nd May 2019, the Landlord issued the Tenant with a notice to terminate tenancy which was expressed to take effect on 1st August 2019 on the grounds that the lease agreement expired and she wanted to use the business premises for her own personal purpose for not less than one year.
4. The said notice is annexed to the supporting affidavit as exhibit MHG 1 with the affidavit of service thereof as an annexure thereto.
5. By that reason, the Landlord filed a Reference dated 21st August 2019, complaining that the Tenants had refused to vacate after notice of termination and after failing to file Reference.
6. A letter dated 20th August 2019 is annexed to the supporting affidavit confirming that a reference had not been filed in the Tribunal and is marked MHG2.
7. It is the Landlord's case that there is no valid lease and that the tenant had failed to yield vacant possession.
8. The Landlord states in the supporting affidavit that the shop will be surrendered to her mother who was allocated the same by her deceased husband one John Watitu Gitau.
9. On the other hand, the Tenants/Applicants filed a replying affidavit sworn by the 1st Tenant and filed in this Tribunal on 18th November 2019 in which he deposes that they had run a business at the current location since 1st July 2008.
10. Their original Landlord was the late John Watitu Gitau with whom they had executed a lease of 5 years and 3 months.
11. After expiry of the initial lease, a new lease was entered into between the late John Watitu and the two Tenants for a further term of 5 years 3 months from 1st November 2013.
12. On a date which is not clear, the 2nd Landlord/Applicant using the letter head of "Watitu Investment Limited" gave notice to the two tenants that their lease expired in November 2018 and that they should make arrangements for renewal of the lease or return the shop for the

Landlords' own use.

13. On 13th February 2019, the two tenants wrote to the 2nd Landlord requesting him to renew the lease as per the previous agreement so that they could continue with their business as usual.
14. There are receipts marked JMN 5 issued in the name of Jasmart electrical to show that even after expiry of the said lease, the Landlord "Watitu Investment", accepted rent on 4th January 2019 and 5th February 2019 in respect of the suit premises.
15. This is my view created a controlled tenancy which could only be terminated on the grounds set out in section 7 of Cap. 301, Laws of Kenya.
16. The Tenants depose that there are two previous cases on the same tenancy being BPRT No. 195 of 2019 in which they sued one Esther Nyambura Watitu as the legal representative of John Watitu Gitau and obtained orders restraining her from demanding goodwill of Kshs. 3 million and evicting the tenants from the suit premises where they run Jasmart Electrical. The Respondent was ordered to pay costs of Kshs. 25,000/- which was to be deducted from the rent.
17. The second case was BPRT No. 199 of 2019 in which the tenants sued the 2nd Respondent which was later withdrawn to allow BPRT No. 195 of 2019 to proceed.
18. The orders given in BPRT No. 195 of 2019, were served upon the 2nd Landlord on 1st March 2019 but on 22nd May 2019 the Landlords served notice of termination of tenancy upon the Tenants.
19. On 26th July 2019, the tenants Lawyers M/S Kamau Kuria & Co. Advocates wrote to the Landlords responding to the termination notice and drawing their attention to the order issued on 28th February 2019 in BPRT No. 195 of 2019 which was yet to be concluded. According to the Tenants, the notice was meant to subvert the court order aforesaid. They demanded withdrawal of the notice.
20. The Tenants complained that they had paid a goodwill of Kshs. 1 million for the premises and were being threatened with eviction if they did not pay a sum of Kshs. 3 million as further goodwill.
21. Since the subject matter in both matters was similar, the tenants requested that they be heard together.
22. The 2nd Landlord filed a replying affidavit sworn on 23rd April 2021 in BPRT No. 195 of 2019 stating that Mrs. Esther Nyambura Watitu was wrongly sued as she was not the Landlord of shop no. 2, Keywest building, Ambala road which is the subject matter therein. He states that the correct Landlord was himself as a son of John Watitu Gitau (deceased) and Mrs Nancy Njeri Gitau as wife of the deceased and directors of Watitu investment Limited which is the registered owner of the suit premises.
23. It is deposed therein that on 20th September 2019 and 12th April 2021, BPRT No. 195 of 2019 was ordered to be consolidated with BPRT No. 796 of 2019 for hearing with the latter case being the lead file.
24. According to the deponent, he has never demanded payment of goodwill of Kshs. 3 million from the Tenants but has on several occasions requested them to pay the appropriate amount of rent for such a shop given its size and location.
25. It is deposed that there was never a notice to terminate tenancy prior to filing of BPRT No. 195 of 2019 and the said case was prematurely instituted by the Applicants/Tenants.
26. The deponent maintains that they intended to occupy shop no. 2 in Keywest building for not less than one year for purposes of running their own business known as Menards Auto Spares.
27. A notice to terminate tenancy was issued by Nancy Njeri Gitau to the Tenants on 21st May 2019 expressed to take effect on 1st August 2019.
28. No Reference was filed by the Tenants to oppose the said notice, a fact which was confirmed by this Tribunal vide a letter dated 20th August 2019. No Reference has subsequently been filed.
29. It is admitted that there were negotiations between the tenants and the Landlords but no agreement was reached and therefore the latter were not willing to let out the shop and wish to use it to run their own business.
30. According to the Landlords, the rent currently collected from the Tenants is Kshs.27,339/- per month which is much less than the rent of about Kshs.70,000/- per month ordinarily collected from such a shop given the locality and use of the shop and that they continued to suffer financially on account of continued occupation of the suit premises by the Tenants.
31. I am now called upon to determine whether or not to uphold the notice to terminate tenancy based on the evidence on record.
32. It was agreed by consent that the matter be disposed of by way of written submissions but only the Landlords' advocates filed submissions.

33. The Tenants in BPRT No. 195 of 2019 complain that the Respondent one Esther Nyambura Watitu as legal representative of John Watitu Gitau was seeking to draw a renewed lease before expiry of the existing lease and insisted that the new lease would only be signed upon payment of Kshs. 3 million as goodwill or they be evicted.

34. Although the impugned letter is clearly signed by one Maurice Harun Gitau who is described therein as director of Watitu investment Limited, the proceedings were instituted against Esther Nyambura Watitu ***“as the legal representative of John Watitu Gitau”***.

35. No letters of administration have been produced to show that indeed Esther Nyambura Watitu was the legal representative of the said John Watitu Gitau. This was important since appointment of a legal representative is a legal process and one cannot act as such until a grant representative is issued by a competent court of law (see virtually Edith Wambui Otieno – vs- Joash Ochieng Ougo & Another (1987) eKLR at page 9/12).

36. I therefore hold that the suit against Esther Nyambura Watitu has not been proved to the required standard since there is no evidence that she is the legal representative of the deceased Landlord neither is there evidence that there has ever been any Landlord/Tenant relationship between her and the Tenants.

37. The evidence on record shows that all dealings including the impugned letter was by one Maurice Harun Gitau (2nd Landlord).

38. The Tenants are therefore non suited as against the said Mrs. Esther Nyambura Watitu whose interest in the suit premises is unknown.

39. In regard to BPRT No. 796 of 2019, I find that indeed the Tenants were served with notice to terminate tenancy on the ground that the Landlords intended to use the shop for their own purpose.

40. The Tenants did not file a reference as required under Section 6 of Cap. 301, Laws of Kenya and the notice took effect on 1st August 2019 according to the Landlords.

41. There is however no dispute that even after the purported coming into effect of the said termination notice, the Landlord have continued to receive monthly rent at Kshs.28,000/- which is discerned from paragraph 18 of the further affidavit of Maurice Harun Gitau in which he states as follows:-

“ 18. That the rent currently collected from the 1st and 2nd Tenants/Respondents herein is Kshs.28,000/- per month which is much less than the rent of about Kshs.70,000/- per month that is ordinarily collected from such a shop given the locality and size of the shop. Consequently, I along with the 1st Landlord/Applicant herein continue to suffer financially given the continued occupation of shop no. 2 in Keywest building on all that piece of Land known as L.R NO. 209/136/40, Ambala Road, off Kirinyaga Road by the 1st and 2nd Tenants/Respondents”.

42. The said affidavit was sworn on 6th April 2021 and confirms the current rent being received from the Tenants.

43. The effect of continued collection of rent by the Landlords from the Tenants after the termination notice and the lease expiry was to create a controlled periodic tenancy of month to month in line with section 60 (2) of the Land Act, 2012 which stipulates as follows:-

“A lessor who accepts rent in respect of any period after the lease has been terminated or the term of the lease has expired shall not, by reason of that fact, be deemed to have consented to the lessee remaining in possession of the land or as having given up on the rights or remedies of the lessor against the lessee for breach of a covenant or condition of the lease and if the lessor continues to accept rent from a tenant who remains in possession for two months after the termination of the lease, a periodic lease from month to month shall be deemed to have come into force” (emphasis added)

44. A similar situation obtained under section 52 (2) of the repeated Registered Land Act, Cap 300, Laws of Kenya in what was commonly referred to as ***“holding over”***. In this regard, I am guided by the decision in the case of Aroko – vs- Ngotho & Another (1991) eKLR at page 4/5 where it was observed as follows:

“ The Landlord has not denied that the rent was renewed with his instructions and has not denied receipt of that rent. Prima facie, it is clear that the Tenant held over in terms of section 52(1) of the Registered Land Act and is deemed to be a month to month tenant entitled to one month notice before termination. Section 52(2) of the Registered Land Act makes it absolutely clear that the Landlord’s acceptance of rent after the expiry of the notice to vacate by 1/7/1990 should be taken as evidence of the Landlord’s consent to continued occupation by the Tenant”.

45. Equally in the present case, the continued acceptance of rent by the Landlords created a periodic tenancy of month to month and superceded the termination notice as well as the lease.

46. In the premises, I find that the notice of termination of tenancy despite the fact that it took effect for failure to file a Reference as required was superceded by subsequent events of acceptance of rent and continued occupation of the suit premises by the tenants.

DISPOSITION

47. I therefore proceed to dismiss the Tenant’s Reference in BPRT No. 195 of 2019 as well as the Landlord’s Reference in BPRT No. 796 of 2019 with each party bearing own costs of the proceedings.

It is so ordered.

DATED, SIGNED & DELIVERED THIS 3RD DAY OF AUGUST 2021 VIRTUALLY

HON. GAKUHI CHEGE

VICE CHAIR

BUSINESS PREMISES RENT TRIBUNAL

In the presence of:

Mr. Munyori for the Tenant

Mr. Wambua for the Landlords