



REPUBLIC OF KENYA

IN THE BUSINESS PREMISES RENT TRIBUNAL AT NAIROBI

TRIBUNAL CASE NO. 179 OF 2021

OSCAR LUYAHA (EXPLORE AUTO VALUERS

AND ASSESSORIES LIMITED).....TENANT/APPLICANT

-VERSUS-

BABI INVESTMENTS.....LANDLORD/ 1ST RESPONDENT

SANTA MANAGEMENT.....2ND RESPONDENT

RULING

PARTIES AND THEIR REPRESENTATIVES

1. The Tenant/Applicant, **EXPLORE AUTO VALUERS AND ASSESSORIES LIMITED** (hereinafter referred to as the “Tenant”) is a Limited Company incorporated under the Companies Act, Cap 486 Laws of Kenya.
2. The Tenant authorized one of its Directors, **OSCAR MWANI LUYAHA** to act on its behalf in these proceedings. The Tenant has been in occupation of office suite Number A4 at Santa Plaza along Ngong Road, and which premises is owned by the 1ST Respondent.
3. The Firm of MAC Law Advocates LLP represent the Tenant/Applicant. (litigation@maclaws.com)
4. The Landlord/ 1st Respondent, **BABI INVESTMENTS** (hereinafter referred to as the “Landlord”) is the registered owner and Landlord of the Premises rented out to the Tenant/Applicant. The Landlord authorized **CHARLES KARANJA JACOB** to act on his behalf in these proceedings.
5. The Firm of Mutitu Thiong’o & Company Advocates represent the Landlord/Respondents. (mutituthiong'o@yahoo.com)

Summary of Proceedings

6. The Tenant filed a Reference to this Honourable Tribunal dated **22nd February 2021**, in line with the provisions of **Section 12 (4) of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act**, on grounds that the Tenant was at risk of being evicted from the premises by the Landlord.
7. The Reference was accompanied by a Notice of Motion Application, brought under Certificate of Urgency, and supported by the Affidavit of **Oscar Mwani Luyaha**, all dated **22nd February 2021**. In the Application, the Tenant sought several orders key being restraining the landlord and or its agents from evicting the tenant which orders were granted pending inter partes hearing. The Tenant was ordered to serve the Application to the Landlord and hearing was scheduled for **23rd March 2021**.
8. On **23rd March 2021**, The Court ordered the matter be canvassed by way of written submissions. Parties exchanged documents and submissions and on **18th June 2021**, the said matter was scheduled for ruling on **25th June 2021**, which ruling was later deferred to **15th July 2021**.
9. The sole issue for determination in this matter is whether the Landlord’s notice of termination of the tenancy agreement vide a letter dated **1st February 2021** was lawful and valid?

Tenant’s Submissions

10. The Tenant advanced their case vide a Reference Application, a Notice of Motion and a Supporting Affidavit sworn by **Oscar Luvaha** on behalf of the Tenant, all documents dated **22nd February 2021**. The Tenant also filed a Supplementary Affidavit sworn by Oscar Luvaha and dated **3rd May 2021**, and written submissions dated **5th May 2021**.

11. The Tenant submitted that they have been loyal Tenants to the Landlord for close to a decade, since **23rd February 2013** to date, and have been paying rent for the rented premises faithfully.

12. The Tenant further averred that vide a letter dated **6th January 2021**, **Oscar Luvaha** together with other tenants of the Landlord's premises namely; **Lawrence Njeru; Muchira Lynne; Christopher Nzuve and David Muguna** wrote to the Landlord requesting for a meeting with the Directors and Management of the Landlord's premises with regards to some issues that had collectively affected the Tenants' occupancy of the said premises. The issues which are reiterated in **paragraph 12** of the Tenant's written submissions are: Limited access to the office premises; unprofessional treatment by the caretaker and manager; no clear guidelines when lodging complaints; and delayed repair and maintenance of office facilities such as toilets and windows.

13. The Tenant averred that the Landlord responded to the Tenant's complaints vide a letter dated **1st February 2021**. In the said letter, the Landlord alleged that the continued occupation of the premises by the Tenant was untenable due to persistent delay in payment of rent and total non-cooperation of the Tenant with regard to the opening and closing hours of the office. Further, that the letter served as a notice to the Tenant to vacate the premises by **28th February 2021**.

14. The Tenant submits that the termination of the tenancy by the Landlord is malicious, unlawful and unjustified, and urged this Honourable Court to find that the notice of termination of the tenancy by the landlord dated **1st February 2021** is unlawful.

Landlord's Submissions

15. The Landlord responded to the Tenant's claims vide a Replying Affidavit, sworn by **Charles Karanja Jacob**, dated **23rd March 2021** and written submissions, which were undated, but filed in Court on **6th May 2021**.

16. The Landlord averred that the Tenancy was to be terminated based on three grounds in their submissions:

- i) The Tenant had repeatedly refused or neglected to make the rental payments on or before the **5th** day of every month, and did not pay any fees associated with any late payments as required by the Landlord.
- ii) The Tenant had refused to replace his unserviceable generator that was noisy and produced a lot of smoke, which was detrimental to the health and well-being of the other tenants in the premises, who had complained about the use of the generator by the Tenant.
- iii) The Landlord is attempting to renovate its property with the aim of making the premises more habitable and that all the other tenants had acquiesced, save for the Tenant who had refused to allow for any further renovations on the premises.

17. The Landlord urged this Honourable Court to allow the tenancy agreement between the parties herein to terminate and that the Landlord is willing to allow the Tenant a period of two months to vacate the premises.

Analysis and Determination

18. Before I address the merits of this matter, I have carefully considered the documents filed by both parties before this Honourable Court, and it is clear from the very outset that both parties concur to the existence of a tenancy agreement between them from **23rd February 2013** to date.

19. Additionally, it is also not in dispute, that the initial rent payable in **2013** was **KShs. 13,000.00** per month, and that this amount was later increased to **KShs. 15,000.00 per month** vide a letter dated **11th November 2014**. I however note that this amount was increased without the consent of the Tribunal, contrary to the provisions of **the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301 Laws of Kenya**.

I. Whether the Landlord's notice of termination of the tenancy agreement vide a letter dated 1st February 2021 was lawful and valid?

20. In addressing this issue, I shall consider two aspects: the formal requirements of a notice for termination of a tenancy agreement and the Landlord's grounds for termination of the tenancy.

a) Formal requirements of notice of termination of a tenancy.

21. **Section 4(2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301 Laws of Kenya (hereinafter referred to as the "Act")** provides that;

"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."

22. Additionally, **Section 4(4)** provides that no tenancy notice shall take effect until such date, not being less than two months after the receipt thereof by the receiving party, unless the terms and conditions of the tenancy provide for a period exceeding two months or the parties to the tenancy agree in writing to a lesser period of notice.

23. The two requirements therefore for a valid notice of termination of the tenancy is first, that the notice shall be in the prescribed form and secondly, that the notice shall not take effect until after expiry of two months, or such notice period as may be agreed by the parties. This was emphasized in the case of **Munaver N Alibhai T/A Diani Boutique v South Coast Fitness & Sports Centre Limited [1995] eKLR**, where the Court of Appeal at Mombasa in finding that the notice of termination of the tenancy was void for failing to comply with **Section 4 of the Act** stated 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.”

24. Based on the evidence tendered before this Honourable Court, it is evident that the parties in their agreement did not make provision for the period of notice required before termination of the tenancy agreement. As such, **section 4(4)** of the Act as mentioned above applies, thus the default notice period for termination of the tenancy herein is two months.

25. The notice to vacate was issued by the Landlord on **1st February 2021**, and required the Tenant to vacate the premises by **28th February 2021**. I note that the duration of the notice fell below the two months period as prescribed by the Act therefore contrary to the requirements of the Act.

26. Additionally, according to **Section 4(2)** mentioned above, the notice of termination of tenancy should be the **prescribed form**, specifically **Form A**, as provided for in the **Landlord and Tenant (Shops, Hotels and Catering Establishments) (Tribunal) (Forms and Procedure) Regulations, 1966**.

27. The Landlord’s notice of termination of the tenancy was in the form of a letter to the Tenant, dated **1st February 2021** and not in Form A as prescribed by the Act. The notice of termination of the tenancy herein therefore fell short of the requirement of the Act with regard to being in the prescribed form.

28. Accordingly, I am guided by **Section 72** of the **Interpretation and General Provisions Act Cap 2 Laws of Kenya**, which permits deviation from the prescribed form where such deviation does not affect the substance of the instrument. The provision specifically states as follows:

“Save as is otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead.”

29. According to **Form A** as provided in the Regulations above mentioned, the Landlord’s notice to terminate the terms of the Tenancy herein should have specified;

- a. The Landlord’s premises occupied by the Tenant;
- b. The duration of the notice of terminating the tenancy and the date when the notice is to take effect;
- c. The grounds for termination of the tenancy;
- d. The requirement that the Tenant should within one month notify the Landlord in writing whether or not the Tenant agrees to comply with the notice as from the date of receipt of the notice.

30. Bearing in mind that the notice of termination of the tenancy by the Landlord dated **1st February 2021** was not in the prescribed form, it is evident that the failure to comply with the prescribed form affected the substance of the notice of termination of the tenancy, and it was as good as no notice having been issued.

31. Notwithstanding the above finding, I shall briefly consider the substance of the notice of termination of the tenancy, in the interest of justice.

b) Grounds for termination of the tenancy by the Landlord.

32. **Section 4(1)** of the Act provides that no tenancy shall be terminated, or no term or condition, or right or service enjoyed by the tenant shall be altered otherwise than in accordance with the provisions of the Act.

33. The Act further provides for the grounds on which the Landlord may seek to terminate the tenancy in **Section 7**. The grounds stated under this provision and which are applicable herein include;

i. *that the tenant has defaulted in paying rent for a period of two months after such rent has become due or payable or has persistently delayed in paying rent which has become due or payable;*

ii. *that the tenant has committed other substantial breaches of his obligations under the tenancy, or for any other reason connected with the tenant's use or management of the premises comprised in the tenancy; and*

iii. *that on the termination of the tenancy the landlord intends to demolish or reconstruct the premises comprised in the tenancy, or a substantial part thereof, or to carry out substantial work of construction on such premises or part thereof, and that he could not reasonably do so without obtaining possession of such premises;*

34. In this matter, the Landlord issued a notice of termination of the tenancy to the Tenant, vide a letter dated **1st February 2021**. In the said letter, the grounds for termination of the tenancy as specifically stated were that the Tenant had ***“continuously failed to follow our terms of engagement in matters of rent payments as well as our office opening and closing times/hours”***

35. It is trite law that he who alleges must prove. This is in accordance with the Evidence Act of Kenya in **Section 107**, which places a burden of proof on the person who desires any court to give judgment as to any legal right or liability, which is dependent on the existence of facts, which he asserts.

36. The Landlord in **paragraph 9** of their submissions alleged that the Tenant was in breach of the terms of the tenancy agreement on the grounds produced hereinbefore at paragraph 16.

37. In the Replying Affidavit Sworn by **Charles Karanja Jacob**, the Landlord in **paragraph 5** only avers that the Tenant had defaulted in paying rent on various occasions, and that the Tenant never paid any of the late fees levied for late payment of rent between the years **2018** and **2021**. This was reiterated in **paragraph 9** of the Landlord's submissions. The Landlord relied on the Tenant's payment receipts annexed to the Tenant's Supporting Affidavit dated **22nd February 2021**. No other factual issue is addressed therein, instead all issues of fact are raised in the submissions instead of the affidavit. Submissions can never replace what ought to be deponed on oath with evidence annexed.

38. In addition, I have considered the documents filed by the Landlord, I find it unusual that though the Landlord has alleged default in payment of rent by the Tenant, the Landlord has not clearly indicated the amounts in arrears as rent due from the Tenant. Additionally, I note that in the notice of termination of the tenancy, the Landlord did not demand settlement of the rent arrears by the Tenant prior to vacating the premises.

39. Based on the foregoing, I find that the Landlord has not sufficiently proved that the Tenant was in default of payment of rent as a ground for terminating the tenancy agreement. The other grounds being renovation and breach have also not been proved.

40. On this basis therefore, I find that the Landlord has not discharged its burden of proving termination of the tenancy.

41. In the circumstances I hereby proceed and make the following orders:

a) The Tenant's Application dated **22nd February 2021** is allowed in terms of prayers 2, 4 and 6. Tenant to continue paying rent in the same terms on or before the 10th of every month.

b) The Landlord's notice of termination of the tenancy dated **1st February 2021** lacks a legal leg to stand upon is therefore invalid and of no consequence.

c) The Reference dated **22nd February 2021** is settled on the similar terms.

d) The Cost of this Application shall be borne by the Landlord.

ANDREW MUMA

VICE CHAIR

BUSINESS PREMISES RENT TRIBUNAL

RULING DATED, SIGNED AND DELIVERED THIS 11TH DAY OF AUGUST 2021 IN THE ABSENCE OF THE PARTIES.

ANDREW MUMA

VICE CHAIR

BUSINESS PREMISES RENT TRIBUNAL