



**Joseph Nyilu Mutisya t/a Passover Wines & Bar v Janji (Tribunal Case E044 of 2022) [2023] KEBPRT 601 (KLR) (Civ) (8 September 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 601 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
CIVIL  
TRIBUNAL CASE E044 OF 2022  
A MUMA, AG. CHAIR  
SEPTEMBER 8, 2023**

**BETWEEN**

**JOSEPH NYILU MUTISYA T/A PASSOVER WINES & BAR ..... APPLICANT**

**AND**

**REMI JANJI ..... RESPONDENT**

**RULING**

**a. Parties & Their Representatives**

1. The applicant, Joseph Nyilu is the tenant occupying the Premises located at Ukunda, Kwale county that are the subject matter of the present suit. (hereinafter “the tenant”).
2. The applicant appears in person in these proceedings.
3. The respondent herein is the Landlord of the Premises that is the subject matter of the present suit. (hereinafter “the Landlord”).
4. The respondent is represented by the Firm of Amanyang & Company Advocates (xxxlaw@gmail.com).

**b. Dispute Background**

5. On May 5, 2023, the Court dismissed the landlord’s Application dated March 17, 2023 for the reason that the Landlord’s allegations of a collusion between the Tenant and the court’s registry in respect of the ruling date was unsubstantiated and that the same was just but an administrative error on the part of the Court’s registry.
6. Further, the Court determined that the tenancy relationship between the Landlord and the Tenant had determined since the Tenant was no longer in the premises and that the premises had already been let to another Tenant.



7. In the circumstances, only issue for determination by the Court is to assess the quantum of damages to be awarded to the Tenant for the loss suffered by closure of his business and the stock carted away from the premises by the Landlord.
8. Accordingly, the Court ordered that the tenant files a statement of assessment of damages afresh in 14 days together with a supporting affidavit and submissions and serve the Landlord. Further, the court ordered that the Landlord to respond within 14 days of the date of the service.

### **c. Claim and Defence**

9. The Tenant filed a letter to the Landlord dated May 9, 2023 and submissions on even date. In the said letter, the applicant states that the Landlord has partially complied with the Order of the Court which required him to return all items taken away by him.
10. The applicant further states that the Landlord is yet to pay back his two months rent deposit, cost of all damaged items, Court expenses and the income lost per day from December 5, 2021 to March 8, 2023.
11. In his submissions, the Applicant submits that the conduct of the Landlord at the time of terminating the tenancy relationship was meant to defeat justice. He states that the Landlord had been harassing him and that locking the premises was meant to re-enter the premises thereby evicting him unlawfully.
12. The Tenant submits that the Landlord ought not to be allowed to retain a position of advantage that he obtained through a planned and blatant unlawful act.
13. The respondent denies the Tenant's claim vide a replying affidavit dated 16<sup>th</sup> May 2023. His case is that he purported assessment of damages is fraught with a litany of lies deliberately intended to defraud him and for the purpose of the Tenant's unjust enrichment.
14. The Landlord claims that in compliance with the court Order dated 26<sup>th</sup> October 2022, he surrendered to the Tenant all his items. It is his case that the Tenant confirmed receipt of all his items in the presence of Sergeant Ali Boya of Diani Police Station who also appended his signature on the said order.
15. Further, the Landlord claims that

### **d. Issue for Determination**

16. It is the contention of this Tribunal that the sole issue that falls for determination is:
  - i. Whether the tenant should be paid damages as pleaded.

### **e. Analysis And Determination**

17. I have given a full consideration to the Applicant's Reference, Notice of Motion Applications (by the Applicant and the Respondent) and the supporting documents. First, I wish to state that the jurisdiction of this Tribunal was not contested by any party.
18. Section 12 of the [Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#) cap 301 Laws of Kenya provides that the Tribunal has jurisdiction to award costs in respect of references made to it and to award compensation for any loss incurred by a tenant on termination of a controlled tenancy.
19. In exercise of this Jurisdiction, the Court *vide* a ruling dated May 5, 2023 ordered the Tenant to file a supporting affidavit, a statement of assessment of damages and submissions within 14 days.



20. The term damages was defined In the case of *Antique Auctions Ltd v Pan African Auctions Ltd* [1993] eKLR where the Court of Appeal defined the term damages according to the McGregor book on Damages as follows:  
  
The definition of the term, “damages” is set out in *McGregor on Damages* Fifteenth Edition paragraph 1 as:  
  
“pecuniary compensation, obtainable by success, for a wrong which is either a tort or a breach of contract, the compensation in the form of a lump sum which is awarded unconditionally, and is generally, but now not necessarily, expressed in English currency.”
21. The Tribunal in Tribunal Case No. 8 of 2019 *Robert Ayieko Angoi v Lena Sarange* [2021] eKLR stated in relation to the form of damages that;  
  
“Damages may be in the form of general damages or special damages..... Special damages have to be specifically pleaded and strictly proved by evidence. This would include the costs incurred by the Tenant as a result of the eviction or specific damage to property that was in the premises during the eviction.”
22. The *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* chapter 301 Laws of Kenya Act at section 12 (1) (l) accords the Tribunal as one of its powers the Jurisdiction to;  
  
“Award compensation for any loss incurred by a tenant on termination of a controlled tenancy in respect of goodwill, and improvements carried out by the tenant with the landlord’s consent;”
23. In Tribunal Case No. 8 of 2019 *Robert Ayieko Angoi v Lena Sarange* [2021] eKLR, where the matter was instituted by virtue of a Notice of Termination issued to the tenant by the landlord. The tenant did not file a Reference opposing the said notice and as a result, the Court gave orders allowing Landlord to evict the tenant.
24. The tenant thereafter filed for stay of the above orders and averred that there was no tenancy relationship between themselves and the landlord. When the matter later came up for hearing the Tribunal proceeded to order that the premises be reopened and returned to the landlord.
25. The Tenant aggrieved by the above decision proceeded to appeal through E.L.C Appeal No. 12 of 2019. During the appeal several matters arose which the appellate court felt were not fully addressed by the Tribunal. One such matter was the question on the tenancy relationship between the parties.
26. The appellate court established that the owner of the premises had leased the premises to both the tenant and the landlord without their knowledge. This as a result, created a scenario where the tenant was a sub-tenant of the alleged landlord despite there being no lease agreement between them. This then explained why the landlord had issued the tenant with a notice to terminate. The Tribunal did not investigate this issue prior to issuing of the Ruling and as such did not give an explanation as to why they returned the premises back to the landlord.
27. Based on the above the Court was of the opinion that the only recourse available for the tenant was damages for loss of tenancy. The Court stated that:  
  
“The appellant’s only recourse is in damages for loss of tenancy. The appellant is at liberty to sue the owners of the demised premises for a refund of the unutilized rent and general damages for breach of the agreement.”



“In view of the foregoing, I find merit in the appeal and allow it. The matter is referred back to the Tribunal for assessment of the appellant’s damages for loss of tenancy.”

28. Based on the holding above, the Court established the Jurisdiction of the Tribunal to assess and award damages in a matter relating to a Controlled Tenancy.
29. It is trite Law that special damages have to be specifically pleaded and strictly proved by evidence. This would include the costs incurred by the Tenant as a result of the eviction or specific damage to property that was in the premises during the eviction.
30. This Court is guided by the decision of the Court of Appeal stated its position on specific damages in the case of *Richard Okuku Oloo v South Nyanza Sugar Co. Ltd* [2013] eKLR as follows:

“We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.”
31. From an analysis of the documents filed by the Tenant, I note that the Tenant has not specified the type of damages claimed. Further, he has failed to provide documentary evidence to prove the loss as claimed.
32. Additionally, I note that although the Tenant filed and served a statement of assessment of damages and submissions in support of the said statement, he failed to file a supporting affidavit to introduce the said evidence in support of his claim.
33. The Law of evidence in Kenya requires that evidence must be adduced under oath. This may be done through either the examination of witnesses or vide filing an affidavit. Failure to file the supporting affidavit makes the documents filed by the Tenant of insignificant probative value.

#### **f. Orders**

34. In view of the above, this Court cannot ascertain the veracity of the statement of assessment of damages filed by the Tenant.
35. The upshot is that the:
  - a. Tenant’s reference and notice of motion application dated February 28, 2022 are hereby dismissed.
  - b. The tenant’s claim for damages is not adequately proven and is hereby dismissed.
  - c. Reference is settled on those terms.
  - d. Each party to bear its own costs.

**HON A. MUMA**

**Ag. Chair /Member**

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**JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY BY HON. MUMA THIS 8<sup>TH</sup> DAY OF SEPTEMBER 2023 IN THE PRESENCE OF ONGOMA FOR THE LANDLORD AND JOSEPH NYILU THE TENANT IN PERSON.**



**HON. A MUMA**

**Ag. Chair /Member**

**BUSINESS PREMISES RENT TRIBUNAL**

