



**Color Twist Media Ltd v Rahans Investments Ltd (Tribunal Case
E546 of 2023) [2023] KEBPRT 1322 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 1322 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E546 OF 2023
CN MUGAMBI, CHAIR
SEPTEMBER 22, 2023**

BETWEEN

COLOR TWIST MEDIA LTD TENANT

AND

RAHANS INVESTMENTS LTD LANDLORD

RULING

Introduction

1. The tenant's application dated 30.5.2023 seeks orders that the landlord be restrained from evicting the tenant and/or distressing for rent against the tenant pending hearing and determination of the reference. The tenant has also sought an order that the landlord be ordered to utilize part of the service charge as rent. Costs of the application have also been sought.

The Tenant's Depositions

2. The tenant's affidavit in support of its application sworn by Ali Nuctar Ahmed one of the tenant's directors may be summarized as follows hereunder:-
 - a. That the Applicant has a tenancy agreement with the Respondent for five years expiring on 31.5.2027 at a monthly rent of Kshs. 200,000/=.
 - b. That the tenant has been paying service charge to the landlord which since the year 2012, has so far accumulated to Kshs. 1,400,000/=.
 - c. That the tenant has been paying rent together with service charge and other taxes.
 - d. That in the renewed lease, the landlord has dropped the service charge upon complaint by the tenant.



- e. That despite collecting service charge from the tenant, the landlord did not provide any services on the premises and the same is in a pathetic condition.
- f. That the service charge was supposed to be used to maintain common areas including the premises corridors, toilets etc.
- g. That officials from the County Government have threatened to close down the premises as it is in bad shape and not good for habitation.
- h. That in the circumstances, the money paid for service charge ought to be utilized for rent or refunded to the tenant, which the landlord has declined to do.
- i. That in the circumstances, the landlord wants to unjustly enrich himself.
- j. That the landlord has despite holding the tenant's money in service charge, threatened to levy distress for rent against the tenant in the sum of Kshs. 798,000/=.

The Landlord's depositions

3. The Replying affidavit sworn by Ms. Marysarah Kinyua, the landlord's property manager may be summarized as follows:
 - a. That it is not true that the landlord has attempted to distress for rent against the tenant or to evict the tenant and there is no evidence of any such activity.
 - b. That the Respondent does not owe the tenant Kshs. 1,400,595.74 for service charge as alleged as the same was utilized for provision of services in common areas and other Miscellaneous expenses as provided in the lease and hence the same is not available for refund.
 - c. That the service charge can also not therefore be utilized as rent and cannot also be the basis for stopping the landlord from collecting rent.
 - d. That the Applicant is acting in bad faith by seeking restraining orders while there does not exist any threat to distress for rent.
 - e. That the Tribunal should not interfere with the parties contractual rights and obligations in the lease agreement which binds the parties.

Analysis and determination

4. The issues that arise for determination in this application are in my view the following:
 - a. Whether the service charge paid to the landlord by the tenant can be refunded to the tenant or converted into rent.
 - b. Whether the tenant is entitled to the orders sought in the application.

Issue A

5. Through the entire proceedings, I have not seen any rent demand from the landlord. Indeed there is no evidence of any attempted distress for rent against the tenant. The only indication that there is to be found on the rent owing is the complaint filed by the tenant wherein it complains that the landlord has threatened to distress for rent in the sum of Kshs. 780,000/=, yet the landlord owes the tenant Kshs. 1,400,597/= in terms of service charge. The tenant in its application has also sought that the landlord



converts part of the service charge to rent and further at paragraph 15 of the supporting affidavit of the tenant wherein it is disposed;

- 15: That in the circumstances, the landlord owes the tenant a sum of Kshs. 1,400,597.74 and the tenant seeks that the landlord be ordered to utilize the said amount on rent and refund the balance to the tenant.
6. The tenant does not dispute the amounts that it alleges the landlord was threatening to levy distress for. The tenant's only issue being that the rent owed should be recovered from the service charge and any excess refunded to the tenant. It is therefore only reasonable to conclude on this issue that the tenant is indeed in rent arrears, otherwise, it would have had no basis for proposing that the said rent be recovered as it has suggested.

Issue B

7. The tenant has exhibited a table wherein the service charge paid from 1.2.2015 to 31.12.2020 has been shown to total Kshs. 1,400,597.74. This is the money the tenant seeks to be utilized to set off the rent arrears owed to the landlord; and the balance refunded to the tenant. The reasons that the tenant ascribes to this demand are found in the following paragraphs of its affidavit.
- 8: that despite collecting service charge, the landlord did not provide any service on the premises and the same is in a pathetic condition.
- 9: that according to the undertaking between the landlord and the tenant, service charge was supposed to be used to maintain common areas including the premises corridors, toilets etc.
- 10: that officers from the County Government have readily visited the premises and have even threatened to close the same as it is bad shape and not good for habitation.
11. that in the circumstances, the money paid for service charge by the tenant was never utilized.
8. The landlord in response to these allegations by the tenant has stated as follows in its affidavit (where relevant);
- 4(a) That the Respondent does not owe the tenant Kshs. 1,400,597.74 for service charge as alleged or at all. On the contrary, the same was utilized for provision of services in common areas and other miscellaneous expenses as provided in the lease, hence the same is not available for refund.
- 4(b) The service charge cannot be utilized as rent since it has already been used for provision of services in common areas.
9. It is apparent from the pleadings that the tenant has been paying service charge since the year 2015 to December 2020. For the tenant to claim that all the service charge it has paid since 2015 be utilized as rent and the balance thereof be refunded to it, it would mean that the tenant has never received any services from the landlord. In this regard, the Act, Cap 301, defines service charge as "a charge for any services rendered and proceedings to further state, "SERVICES" in respect of any tenancy means the uses of water, light or power, conservatory, sewerage facilities, sweeper, watchman, telephone or other amenity or facility available to the tenant save and except the supplying of meals and the right of access to the tenant by reason of his occupation of the premises comprised in the tenancy.
10. Would the tenant have been denied the above facilities by the landlord in this matter since the year 2015 and yet it still continued paying the service charge? Why would the tenant take almost nine years to raise the issue of service? The tenant has not given any plausible reason for the timing of his complaint



and I do not find any merits in the instant demand. It cannot be that the tenant suddenly woke up to the realization that the landlord was not providing the common services after almost nine years.

11. Both parties have not annexed a copy of the lease agreement entered into prior to the one dated 20.1.2021.

The only discernible term from a general reading of the pleadings is that service charge was payable under that lease. There is nothing in the pleadings to suggest that the payment of rent by the tenant was to be affected by the services offered in the common areas, much less so, that the money paid for service charge would be converted into rent at a future date if services are not rendered or that the service charges would indeed be refundable at all to the tenant.

In the absence of any express provisions to the above effect, any orders by the court directing how the service charge ought to be utilized would amount to re-writing the agreement between the parties which the Tribunal has no powers to do.

12. It is my finding on this issue therefore that the service charge paid by the tenant in compliance with the earlier lease agreement between the parties cannot be applied to offset the rent owed by the tenant to the landlord neither is it refundable in the circumstances of this case.

Issue C

13. I have already found that on the tenant's own documents, the tenant owes rent to the landlord and I have further found that the said rent cannot be recovered from the service charge paid by the tenant to the landlord. The tenant being in rent arrears is not entitled to the equitable relief of injunction sought in its application. I have also gone through the pleadings of the tenant and I have not found any evidence of any threat by the landlord to levy distress for rent against the tenant. The tenant seems to be running away from its own shadow!
14. The complaint by the tenant dated 30.5.2023 is to the effect that the landlord has threatened to distress for rent yet it owes the tenant service charges in the amount of Kshs. 1,400,597.74/=. I have already found that the service charge is not recoverable from the landlord. Having also found that the tenant is in rent arrears, there is nothing wrong with the landlord levying distress for rent for the recovery of the rent arrears. Even so, the tenant has not demonstrated that the landlord has taken any steps to levy distress for the said rent. In the circumstances, I do not find any merits in the tenant's complaint dated 30.5.2023 and the same is also dismissed with costs to the landlord.

HON. CYPRIAN MUGAMBI - CHAIRPERSON

22. 9.2023

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 22ND DAY OF SEPTEMBER 2023

In the presence of;

Mr. Leibor for the landlord

Mr. Davido for the tenant

