



**Wood Dental Limited v Mwatha Company Limited & another (Tribunal
Case E088 of 2024) [2024] KEBPRT 1109 (KLR) (2 August 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 1109 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E088 OF 2024
A MUMA, MEMBER
AUGUST 2, 2024**

BETWEEN

WOOD DENTAL LIMITED APPLICANT

AND

MWATHA COMPANY LIMITED 1ST RESPONDENT

KIRAGU & MWANGI LIMITED 2ND RESPONDENT

RULING

A. Parties And Representatives

1. The Applicant, Wood Dental Limited, is the tenant and had rented space for business in the suit property, being Let Space 1A – 10A, 1B – 10B and 1D -10D erected on Land Reference Number 1/623 (hereinafter the “Tenant”).
2. The firm of C. K. Musyoki & Co. Advocates represents the Tenant in this matter.
3. The 1st Respondent, Kiragu & Mwangi Limited, is the owner of the suit premises and had rented out the aforementioned spaces to the tenant (hereinafter the “Landlord”).
4. The 2nd Respondent is the property manager of the suit property and an employee of the Landlord (hereinafter the “Agent”).
5. The firm of Kimondo, Gachoka & Company Advocates represents both the Landlord and the Agent in this matter.



B. Background Of The Dispute

6. The Tenant moved this Tribunal vide a Reference and a Notice of Motion Application filed under a Certificate of Urgency both dated 25th January, 2024 on a complaint that the Landlord through its agent unlawfully locked down the suit premises.
7. On 26th January, 2024, this Honourable Tribunal issued orders that;
 - i. The Application be certified as urgent;
 - ii. The Respondents be and are hereby ordered to forthwith reopen the suit premises pending the hearing of the Application;
 - iii. A temporary injunction be and is hereby issued restraining the Respondents whether by themselves or their agents, servants, employees or whoever else acting on their behalf from entering, trespassing, intimidating, attaching, distressing, evicting or otherwise howsoever interfering with the Applicant's assets and peaceful occupation of the suit premises, pending the hearing of the Application inter-partes;
 - iv. The accrued rent arrears upon reconciliation of accounts be liquidated through monthly installments of Kshs. 200,000.00 until payment in full. Reconciliation to commence immediately upon reopening that is Kshs. 400,000.00 to be paid before hearing date;
 - v. The Application be served for hearing on 21st February, 2024.
8. The Tribunal directed that the Application will be canvassed by way of written submissions and accordingly, the Tenant filed submissions dated 24th May 2024 with the Landlord and Agent filing joint submissions dated 29th May 2024.

C. The Tenant's Claim

9. The Tenant herein has stated that Landlord and its Agent unlawfully locked down the suit premises and have blatantly refused and/or neglected to heed to the Tenant's requests to reopen the premises. The Tenant claims that the objective of closure of the suit premises by the Landlord is to recover rent arrears accrued by the Tenant which is contrary to the provisions of the law under the Landlord and Tenant (Shops, Hotel and Catering Establishments) Act.
9. The Tenant submitted that it is at risk of loss of business due to its inability to conduct business and poses threat to its performance of third-party contractual obligations to which the Tenant is bound to fully perform.
10. It is the Tenant's case that the rent arrears as computed by the Landlord are excessive to the agreed rent payable by both the Landlord and Tenant pursuant to their Lease Agreement.
11. In support of this claim, the Tenant avers that the lease commenced in September 2023 but was never registered which resulted to the Tenant assuming periodic tenancy over the suit premises and continued meeting its contractual obligations dutifully following the terms as stipulated by Letter of Offer dated 25th September 2023.
12. Similarly, the Tenant avers that the Landlord had previously rented out a portion of the suit premises to Royal Dental Smiles Clinic (hereinafter "the previous occupant"). This portion of the suit premises was later merged with the Tenant's space, giving rise to the entirety of the suit premises which is the subject of the suit herein.



13. The Tenant avers that the relationship between the Landlord and the previous occupant was guided by a Lease Agreement dated 26th January 2021 for a tenure of six (6) years.
14. The Tenant submits that on 23rd November 2023, the Respondents issued a debit statement for settlement of rent due from the previous occupant of a portion of the suit premises before merging the let space with the Tenant.
15. The Tenant avers that on 11th January 2024, the Respondents issued another debit statement to the Tenant detailing rent arrears which the Tenant deems excessive and seemingly reflects rent due from the previous occupant for the period of tenancy between the Landlord and the previous occupant between 26th January 2021 and 25th September 2023 that the Tenant is in dispute of, on the ground that it was not a party to the lease between the Landlord and the previous occupant.
16. Additionally, the Tenant avers that the Letter of Offer dated 25th September 2023 between the Landlord and the Tenant, which guided their tenancy relationship in the absence of a registered Lease Agreement, did not include any transitional clauses on assumption of rental obligations nor strictly stipulate any accrued rent due from the Tenant.
17. The Tenant reiterates that it is a distinct and separate legal entity from the previous occupant given that the Tenant is neither a director or shareholder of the previous occupant and thus cannot be bound by the terms of the Lease between the Landlord and the previous occupant. Consequently, any such efforts to recover rent due from the Tenant that were accrued by the previous occupant are unenforceable and unlawful.
18. Pursuant to the debit statements issued by the Agent, which highlighted the outstanding rental arrears as Kshs. 3,975,214.00, the Tenant avers that the Landlord and Agent locked down the premises with the intention to proclaim the Tenant's goods without serving a Proclamation Notice as required by the law.
19. The Tenant further avers that it tried to negotiate a way forward with the Respondent, which negotiations amounted to an agreement that the Tenant would pay a deposit of Kshs.400,000. Payment of the aforesaid deposit would then pave way for reconciliation of the outstanding rental arrears and further discussions to agree on a payment plan (suggested to be monthly installments of Kshs. 200,000 by the Tenant) for the reconciled outstanding amount.
9. The Tenant submits that it paid the deposit of Kshs. 400,000 but the Respondents did not honour their part of the agreement and still refused and/or neglected to reopen the suit premises despite the Tenant making formal demand for the same. In addition, the Landlord proceeded to begin proclamation of the Tenant's goods including a dental plant, machinery and equipment necessary for the performance of the Tenant's trade and profession and thus should be exempt from the purported distress for rent.
10. Moreover, despite the Tribunal's orders for reconciliation of the outstanding rent arrears, the Landlord has not made any efforts to pursue the said reconciliation despite the Tenant's willingness to reconcile the same.
11. Therefore, the Tenant prays that this Honourable Tribunal issue orders as prayed in its Notice of Motion Application dated 24th January 2024.

D. The Landlord And Agent's Claim

9. The Landlord and its Agent (the "Respondents") filed joint submissions dated 27th May 2024.



10. The Landlord submits that it entered into agreement with the Tenant on or about 25th August 2022 with an effective commencement date of 1st August 2022 for a space of approximately 2,917 square feet following a Letter of Offer dated 22nd June 2022. The said agreement stipulated that the annual rent payable would escalate every two years at a rate of 15%. Therefore, the rent for the first two years, being 2022 – 2024, was determined to be Kshs. 2,100,240.00 annually with the security deposit agreed to be Kshs. 700,800.00 to be paid at the commencement of each lease term and a service charge of Kshs. 175,020.00 quarterly. Additionally, the agreement set out a rent-free fit- out period until 30th September 2022 wherein the Tenant was still obligated to pay the service charge.
11. The Landlord avers that it entered into a lease agreement with the previous occupant in January 2021 for a space of approximately 1,280 square feet with an effective commencement date of 1st May 2020.
12. He further avers that the Tenant and the previous occupant agreed to consolidate their rented-out spaces in 2023 which then prompted the Landlord to send the Tenant herein a revised Offer Letter dated 25th September 2023 which was duly executed by the Tenant and the effective commencement date set out as 1st March 2023.
13. Under the revised Offer Letter, the annual rent payable was set to escalate every two years at 15% and the first- and second-years' annual rent payable was set out as Kshs. 3,021,840.00, security deposit agreed to be Kshs. 1,250,915.85 to be paid at the commencement of each lease term and a service charge of Kshs. 755,460.00 to be paid quarterly with a rent-free fit-out period until 30th April 2023 wherein the Tenant was still obligated to pay the service charge.
14. The Landlord draws this Courts' attention to Clause 26 of the revised Offer Letter dated 25th September 2023 which states as follows:

“If the rent agreed or any part thereof shall at any time remain unpaid for fourteen(14) days after becoming payable (whether formally demanded or not) or if at any time thereafter the Tenant is in breach of any of the covenants or conditions referred to in the standard form of Lease, it will be lawful for the Landlord to re-enter the premises or any part thereof in the name of the whole and thereupon lease shall be terminated absolutely.”

9. Following this clause, the Landlord avers that it followed the provisions of the Lease Agreement in closing down the suit premises thus considers the aforesaid closure to be lawful as both the Tenant and the Landlord herein are bound by the contract arising from the Letter of Offer dated 25th September 2023.
10. It is the Landlord's averment that the aforementioned Letter of Offer amounts to a contract guiding the tenancy relationship between the Tenant and itself, in the absence of a registered lease. The Landlord highlights that the Tenant duly executed the revised Offer Letter thus the Tenant is contractually bound and expected to fulfill the obligations arising from the revised Offer Letter.
11. The Landlord further avers that the closure of the suit premises was only for a period of seven (7) days given the Orders issued by the Tribunal on 26th January 2024 that directed for re-opening of the suit premises.
12. Additionally, the Landlord avers that it has not proclaimed any goods from the Tenant's business.

F. List Of Issues For Determination

9. Having given full consideration to the Landlord's Notice of Preliminary Objection, submissions filed by Counsels, the issue for determination is;



- a. Whether the rent arrears as computed by the Landlord are excessive and exceeding the rent payable agreed by both parties?

F. Analysis & Determination

9. The Submissions filed by the parties raises fundamental issues discussed herein below:
 - a) Whether the rent arrears as computed by the Landlord are excessive and exceeding the rent payable agreed by both parties?
9. It is not in dispute that the Tenant has outstanding rent arrears owed to the Landlord. However, the parties are in dispute of the total amount of rent arrears due to the Landlord.
10. This Court notes that the Lease Agreement signed between the Landlord and the Tenant dated 25th August 2022 expressly provides for the rate of escalation of rent to be 15% every two years.
11. It is also not in dispute that the Tenant occupied the premises on 1st August 2022 prior to signing the Lease Agreement. In view thereof, this Tribunal marks the tenancy commencement date as well as the date of commencement of the computation of the escalated rent to be 1st August 2022.
12. This Tribunal also takes note that the parties to this Lease Agreement were the Landlord and Tenant herein only. The previous occupant, is not a party to the said Lease. Similarly, the Tenant is not a party to the Lease Agreement between the Landlord and the previous occupant as evidenced by the documents adduced by the Landlord to this Honourable Court.
13. The Landlord has clearly stated in his submissions that the need for a new Lease Agreement arose from the merging of spaces rented by the Tenant and the previous occupant. However, there was no registered lease between the Landlord and the Tenant but instead the parties were guided by the terms imposed on them by the revised Offer Letter dated 25th September 2023 which was prepared by the Landlord and duly executed by the Tenant.
14. This Honourable Tribunal is inclined to agree with the Landlord who submitted that the revised Offer Letter amounts to a contract that binds both parties.
15. Accordingly, the closure of the suit premises by the Landlord was lawful and in line with the provisions of the contract binding both the Landlord and the Tenant.
16. The Court is akin to the fact that despite issuing an Order for reconciliation of the outstanding rent arrears, the same has not been adhered to, the Court proceeds to address the issue of reconciliation as hereunder.
17. Given the commencement date of the tenancy of the Tenant herein to the suit premises being 1st August 2022, the Tribunal places emphasis on the independence of each of the Lease Agreements separately entered into by the Landlord and the previous occupant as well as that between the Landlord and the Tenant herein.
18. The Court observes that despite merging of the rented spaces by the Tenant and the previous occupant, no evidence has been adduced to demonstrate that there was an agreement between the Landlord, the Tenant and the previous occupant.
19. In absence of the same, the Court is inclined to treat them as separate entities with differing contractual obligations arising from the separate agreements and consequently, separate tenancy relationships.



20. There has been no demonstration of a transition of such contractual obligations therefore, the Court is guided by the revised Offer Letter dated 25th September 2023, to determine and interpret the terms of the tenancy relationship between the Landlord and the Tenant.
21. In view thereof, the Court is unclear on the transfer of outstanding rent arrears accumulated by the previous occupant during the subsistence of its tenancy to the Tenant.
22. Additionally, this Court places emphasis on the fact that parties are wholly bound by the contract and not partially as implied from the Landlord's insistence on increasing the annual rent payable without providing a clear justification. In the same light, the escalation of the annual rent payable is not yet enforceable by the Landlord given that the Tenant has not yet satisfied the prerequisite of occupying the suit premises for two years wherein the contract dictates that rent shall be escalated at a rate of 15% every two years.
23. As such, the Tribunal is guided by the terms of the revised Offer Letter dated 25th September 2023 which prescribes the annual rent payable for the first two years of tenancy as Kshs. 3,021,840.00. The landlord has indeed provided a statement but it is not clear whether the rent obligations of the previous tenants is included or not.
24. A quick perusal of the Lease Agreement tendered before this Honourable Tribunal reveals that there indeed exists a clause on termination under clause 8 of the Agreement. Where each party shall give the other a six month notice in writing to yield up the premises which clause gives the Tribunal jurisdiction over the 6 year lease.

F. Orders

- a. The upshot is that the Tenant's Reference alongside the amended Notice of Motion Application dated 24th January 2024 are partially allowed in the following terms;
- b. The Landlord shall in the next 14 days issue a revised statement eliminating any previous rent obligations of the previous tenant, the same can be pursued independently with the third party in the right forum.
- c. There shall be no further escalation of rent without the approval of this Tribunal.
- d. The Tenant shall pay the demanded new rent arrears in six equal monthly instalments over and above the quarterly/monthly rent Commencing 5th of September 2024 until payment in full.
- e. Failure to pay any one of the instalments above the landlord shall be at liberty to not only distress but also to take back vacant possession of the suit premises with the assistance of OCS Kilimani Police Station without any further reference to this tribunal.
- f. Each party shall bear their own costs.
- g. Reference and Application settled in the above terms.

HON A. MUMA

MEMBER

BUSINESS PREMISES RENT TRIBUNAL



Ruling dated, signed and delivered virtually by Hon A. Muma this 2nd Day of August 2024. In the presence of Musyoki For the Tenant/applicant and Kiboara For the Landlord/ respondents

HON A. MUMA

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

