



Muge v Maalim (Tribunal Case E139 of 2023) [2024] KEBPRT 793 (KLR) (9 May 2024) (Ruling)

Neutral citation: [2024] KEBPRT 793 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E139 OF 2023
CN MUGAMBI, CHAIR
MAY 9, 2024**

BETWEEN

ALEXANDER MUGE TENANT

AND

SOFIA MAALIM LANDLORD

RULING

Introduction

1. The Tenant's amended Reference to the Tribunal, amended on 14.9.2023 is brought majorly on the grounds;-
 - a. That the Landlord has purportedly evicted the Tenant and demolished the Tenant's structure known as COMRADES CORNER RESTAURANT without following due procedure and notwithstanding the fact that the Respondent was served with a court order dated 9.6.2023 even before the Respondent performed her illegal acts.
 - b. That the Tenant was granted permission by the Respondent to construct a structure on the subject land which cost the Tenant Kshs. 605,000/= as per the Bills of Quantities.
 - c. That the Tenant always paid his monthly rent of Kshs. 12,000/= without fail.
 - d. That the Tenant had obtained all the necessary licenses for the operations of his businesses.
 - e. That by the Landlord's illegal action of demolishing the Tenant's structure, she has caused the Tenant/Applicant damages and loss of business investments.
2. The Tenant in his Reference seeks for orders;
 - a. That he be compensated by the Landlord for the loss on premises structure including business and loss of goods.



- b. That without prejudice to the above (a), the Landlord be ordered to refund all rent payments received from the Tenant/Applicant obtain (sic) for breach of contract.
3. On 21.7.2023, the Tenant informed the court that he had been evicted through demolition of the structures which he had been allowed to construct by the Landlord. The court then made the following orders;-

“Tenant to amend the Reference and Application to enable him claim for compensation occasioned by the illegal eviction and demolition of improvements erected on the suit property.”
4. It is pursuant to these orders that the Tenant filed his amended Reference dated 14.9.2023 and these proceedings are therefore in regard to the said amended Reference.

The Tenant's case

5. The Tenant adopted his statement as his evidence in chief and also produced the documents listed in his list of documents as exhibits 2 to 30. In addition to the statement, the Tenant's further testimony may be summarized as follows;-
 - a. That the Tenant was granted an open space by the Respondent's mother where he constructed the suit premises and by an oral agreement entered into around February 2020, the Tenant was to pay a monthly rent of Kshs. 12,000/=.
 - b. The Tenant started construction of the suit premises in May, 2020 and completed construction in September, 2020. The Tenant had the consent of the Landlady to construct the structure that he constructed in the suit premises.
 - c. That the Tenant spent Kshs. 605,000/= in the construction of the suit premises which funds were obtained by the Tenant taking up a loan and also from funds sourced from the Tenant's other businesses.
 - d. That in March 2023, the Respondent closed the Tenant's business premises due to rent unpaid for the month of March, 2023. This closure prompted the Tenant to file this suit.
 - e. That after the Tenant obtained and served orders upon the Respondent, he was assisted by the police to remove some of his goods. It is after this that the Respondent demolished the premises and cleared the premises. The structure was demolished in June 2023 after the Respondent was served with the court orders.
 - f. That the demolition was in bad faith and the Tenant ought to be compensated for the amount of money invested in the premises.

The Respondent's case

6. The Landlord testified on her own behalf and also called one witness. The case for the landlord may be summarized as follows;-
 - a. The Respondent adopted her statement dated 26.11.2023 as her evidence in chief and also produced the documents in her list of documents as her exhibits 2, 3 and 4.
 - b. That she is yet to be registered as the owner of the premises that she occupies.
 - c. That her land does not extend to where the Tenant had constructed her premises.



- d. That she has no agreement with the Tenant at all.
 - e. That it is the Respondent's mother who allowed the Tenant to construct the suit premises outside the Respondent's perimeter wall.
 - f. That the Tenant paid Kshs. 12,000/= per month to the mother of the Respondent as a token of appreciation and not as rent.
 - g. That it is not the Respondent who demolished the suit premises and she did not contact the County Government to demolish the suit premises.
 - h. That it is the Tenant who demolished the suit premises and took away everything.
7. The Respondent's witness, Mr. Alfian Said told the court that he saw the Tenant put up his hotel structure outside the Respondent's perimeter wall. The Tenant's structure was on a road side.
8. The witness further testified that he supervised the Tenant when the Tenant was demolishing his own premises and even assisted him with a mkokoteni.

Analysis and determination

9. The issues that arise for determination in this Reference are in my view the following:-
- a. Whether the Tenant is entitled to compensation for the demolished structure, including business and loss of goods.
 - b. Whether the Tenant is entitled to a refund of all the rent paid by himself to the landlord on account of what the Tenant terms as breach of contract.

Issue No. A: Whether the Tenant is entitled to compensation for the demolished structure, including business and loss of goods.

10. While determining this issue, I have also to determine whether there existed a landlord-tenant relationship between the parties and I have also to establish as a matter of evidence whether indeed it is the Respondent who demolished or authorized the demolition of the Tenant's structure.
11. It is commonly agreed that the Tenant put up his structure outside the perimeter fence of the Respondent's home and it is also not disputed that the Tenant's structure though outside the Respondent's home was actually not built on the Respondent's land. The structure was on a road reserve. It is further agreed that what the Tenant took up was an empty space and the construction was done entirely by the Tenant. The upshot of this was therefore that the land and the structure therein built had nothing to do with the Respondent.
12. It has been agreed that the Tenant was paying Kshs. 12,000/= per month to the mother of the Respondent and later to the Respondent herself via mpesa. The Tenant terms this payment as rent while the Respondent says that the Tenant paid this money to her mother as a token of appreciation for allowing the Tenant to do business on the suit premises. I am not convinced that the Tenant was paying a token of goodwill every month and from the circumstances of this case, it is more likely than not and I do find that the Tenant was actually paying rent to the Respondent and her mother for the use of the grounds outside the Respondent's premises.
13. It has been argued by the Respondent that proof of ownership of land is central to contracted tenancies. With respect, this is not the position. It is not in all cases that the Landlord of a premises is the registered owner of the premises and it is therefore possible as it was in this case, that the Respondent



became the Landlord of the Tenant in land that otherwise belonged to the public, allowed the Tenant to construct therein and continued to accept rent from the Tenant. In the circumstances of this case, the Respondent became the party entitled to the rent and therefore the Landlord absent the assertion of public rights by the relevant public body responsible for the land wherein the Tenant's business premises was constructed. In this regard, Section 2 of the Act defines/describes a Landlord as follows:-

“Landlord” in relation to a tenancy means the person for the time being entitled as between himself and the tenant to the rents and profits of the premises payable under the terms of the tenancy.”

The Act does not therefore require the Landlord to be the registered owner of the land or the suit premises as it were.

14. The issue to be determined therefore, is, who was responsible for the demolition of the suit premises?
Both parties agree that indeed the Tenant's structure outside the Respondent's premises was demolished. The problem is that the Tenant asserts that it is the Respondent who demolished the premises while the Respondent asserts that it is the Tenant who actually demolished the said premises. It is the legal and evidential burden of the Tenant to prove these allegations that it is indeed the Respondent who demolished the suit premises.
15. The Tenant has stated in his statement dated 5.10.2023 that the Respondent demolished the premises on 9.6.2023 after court orders injuncting the Respondent had already been served upon the Respondent and in his view, the demolition was meant to defeat this Reference. The Tenant also orally testified that after he was assisted by police to remove some of his items from the premises, the Respondent removed the entire roof and cleared the space. The Tenant when cross examined said that to her knowledge, it is the Respondent who demolished the premises through the influence of the County Government. No witness was called from the County Government of Mombasa to shed any light on the participation of the County Government in this matter although the Respondent in her evidence stated that both parties visited the County Government offices. At the County offices, the parties were informed that the Tenant's structure would have to be demolished. The Tenant was given the opportunity to demolish failing which the County Government would demolish. It is the evidence of the Respondent that the Tenant opted to demolish his structure and which he proceeded to do and carried the construction materials with him.
16. The assertion by the Respondent that it is the Tenant who demolished the suit premises is supported by the evidence of the Respondent's witness Mr. ALFAN SAID. The witness stated that he knew the Tenant as they were neighbours and he knew the Tenant's business which was constructed on a road reserve outside the Respondent's premises. He stated that as a village elder, he supervised the Tenant when the Tenant was demolishing the suit premises and even assisted the Tenant with a mkokoteni, presumably to ferry the Tenant's goods. The witness confirmed that both parties to this dispute went to the County offices where demolition was discussed and threatened. Under cross examination, the witness stated that it was Alex, the Tenant who requested him to oversee him taking away his goods and indeed the Tenant told the witness that he would demolish the premises.
17. The Tenant has not provided any direct or circumstantial evidence linking the Respondent with the demolition of the suit premises. The nearest the court comes to establishing the person or persons who demolished the premises is the evidence of the Respondent's witness who implicates the Tenant. On the material placed by the Tenant before the Tribunal, I am unable to find that the Tenant has discharged his burden of proof, that the Tenant has proved that it is indeed the Landlord who demolished the suit premises. I therefore do not find the Respondent responsible for the demolition



of the premises and the Tenant is therefore not entitled to the compensation he seeks from the Respondent for the demolition of the premises.

Issue No. B: Whether the Tenant is entitled to a refund of all the rent paid by himself to the landlord on account of what the Tenant terms as breach of contract

18. The Tenant has “without prejudice” prayed that the Landlord be ordered to refund all rent paid by the Tenant on what the Tenant terms as “obtain for breach of contract”. While this is not clear, I assume that the Tenant seeks for an order that the Respondent refunds all rent received on account of breach of contract. The Tenant did not lead any evidence in support of this alternative prayer as he seems to have concentrated on his relationship with the Respondent and the structure erected upon the suit premises. No reason or basis has been put forth for the grant of this prayer and in the absence of any evidence asserting the same, it is incapable of being granted.

Disposition

19. Consequently, and on the basis of the foregoing findings, I do not find any merits in the Tenant’s Reference and the same is dismissed.
20. Each party will bear their own costs.

RULING DATED SIGNED AND DELIVERED VIRTUALLY THIS 9TH DAY OF MAY, 2024.

HON. CYPRIAN MUGAMBI - CHAIRPERSON

BUSINESS PREMISES RENT TRIBUNAL

Delivered in the presence of Ms. Otieno for the Tenant and in the absence of the Landlord and Counsel.

