



**Jacinta Wasike t/a Spa Cleopatra v Wasilwa & another (Tribunal Case E452 of 2024)
[2024] KEBPRT 961 (KLR) (Commercial and Tax) (28 June 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 961 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
COMMERCIAL AND TAX
TRIBUNAL CASE E452 OF 2024
CN MUGAMBI, CHAIR
JUNE 28, 2024**

BETWEEN

JACINTA WASIKE T/A SPA CLEOPATRA TENANT

AND

TIMOTHY WASILWA 1ST RESPONDENT

JOSEPH B.D. K. KIMANI T/A PYRAMID AUCTIONEERS .. 2ND RESPONDENT

RULING

Introduction

1. The Tenant's Application dated 09.04.2024 seeks orders restraining the Respondents from proceeding with any attachment and/or distress of the Tenant/Applicant's goods, items, tools of trade and all properties situate at Title Number L.R. No. 1/380 along Nyangumu road, Nairobi and commonly known as SPA Cleopatra and/or interfering with the Tenant's quiet possession thereof. Costs of the Application and police assistance in the enforcement of the orders sought have also been sought by the Tenant.

The Tenant's depositions

2. The Tenant's/Applicant's Affidavit in support of her Application may be summarized as follows;-
 - a. That the Tenant rented the suit premises from the Landlord on or about the year 2007 and she has been operating a salon and spa on the said premises.
 - b. That the formal lease expired in the year 2018 and in the year 2020, during the Covid period, the parties agreed to a rent of Kshs. 60,000/= which rent the Tenant has been faithfully paying.
 - c. That the Landlord has not issued any notice to alter the terms of the tenancy.



- d. That on 06.04.2024, the 2nd Respondent/Auctioneers proclaimed the Tenant's goods in the suit premises for some alleged rent arrears.
- e. That the Tenant has no rent arrears with the Landlord who has acknowledged receipt of the rent of Kshs. 60,000/= per month for close to four years without any complaint.

The Landlord's depositions

- 3. The Landlord's replying affidavit sworn on 08.05.2024 may be summarized as follows;-
 - a. That he is the proprietor and the Landlord of the suit premises while the Applicant has been a Tenant since the year 2012, at a monthly rent of Kshs. 120,000/=.
 - b. That the Tenant is in breach of the agreed terms of the tenancy and has accrued rent arrears amounting to Kshs. 2,940,000/=.
 - c. That the accrual of the rent arrears necessitated the Landlord to instruct his Advocates to demand for the same.
 - d. That by a letter dated 06.07.2020, Counsel for the Tenant requested the Landlord to consider reducing the rent to Kshs. 60,000/= per month for a period of one (1) year effective April, 2020 before resuming payments of Kshs. 120,000/= per month.
 - e. The request for reduction of rent was to enable the Tenant to clear the arrears citing Covid 19 pandemic challenges.
 - f. That Counsel for the Landlord acquiesced to the request by their letter dated 07.02.2024.
 - g. That the payments referred to in the Tenant's affidavit have been accounted for and the balance of rent still remains Kshs. 2,940,000/=.
 - h. That the Landlord's demand for settlement of rent arrears have fallen on deaf ears as a result of which the Landlord instructed his Counsel to instruct auctioneers to recover the said rent arrears.
 - i. That the proclamation notice issued to the Tenant was procedural.
 - j. That the Tenant/Applicant has an obligation to pay rent on time as agreed failure to which she ought to vacate the premises.
 - k. That the Tenant has not come to court with clean hands.

The Tenant's Supplementary Affidavit

- 4. The Tenant has sworn a Supplementary Affidavit whose contents may be summarized as follows;-
 - a. That the demand letters allegedly sent to the Tenant in the year 2019 and 2020 are false as no rent was owing then and in any case, the said letters were neither received nor acknowledged by the Tenant.
 - b. That the Tenant has paid the rent of Kshs. 60,000/= as agreed between the parties in the year 2020.
 - c. That the Landlord has always received the rent of Kshs. 60,000/= without complaint until when she received a rent demand of Kshs. 2,880,700/=.



- d. That the Tenant is ready and willing to negotiate reasonable terms and rent adjustments but is not amenable to the demand for payment of any back dated rent arrears which do not exist.
 - e. That on the contrary, it is the Landlord who has come to the Tribunal with unclean hands as he is in breach of various legal provisions regulating tenancy agreements.
5. The parties have filed their written submissions which I have duly read and will consider in this Ruling.

Analysis and determination

6. The issues that arise for determination in this Application are, in my view, the following:-
- a. Whether the Tenant is in rent arrears?
 - b. Whether the Tenant is entitled to the orders sought in her Application.

Issue A: Whether the Tenant is in rent arrears

7. It is commonly agreed between the parties herein that the agreed rent for the suit premises was/is Kshs. 120,000/= per month. This payment at the rate of Kshs. 120,000/= per month seems to have been interrupted by the onset of Covid 19 pandemic which made it difficult for the Tenant to meet her rental obligations and as a result of which the Counsel for the Tenant wrote to the Counsel for the Landlord requesting that the rent payable be reduced to Kshs. 60,000/= per month for a period of one (1) year. That letter forms the fulcrum of this Ruling and I proceed to reproduce the same;

6.7.2020

Olando Okello & Lusenera

Advocates,

Nairobi.

Dear Sir,

RE: Rent Arrears Timothy Wasilwa (landlord)

And

Spa Cleopatra (tenant)

Kindly refer to the above matter where we act for the Tenant. We understand you act for the Landlord. Our client appreciates that your client has been kind and very indulging in these hard economic times precipitated by the corona virus Covid 19 pandemic.

Our client further acknowledges that each and every one has bills to meet and it is only right that your client receives some form of rental income from the premises.

However, despite our client willingness and commitment to meet this obligation, it has increasingly become difficult to do so. Our client thus requires that your client (landlord) does consider reducing the rent to Kshs. 60,000/= per month with effect from April 2020 for the next one year so that our client can struggle and clear the arrears.

Signed

Kirimi David (Advocate)



8. The Advocates for the Landlord responded to the above letter on 07.02.2024 agreeing to the request by the Tenant and also setting out the outstanding rent arrears after taking into account the concession for the period of one (1) year requested by the Tenant.
9. The period of one (1) year reduction of rent requested for by the Tenant ended on or about March 2021. The Landlord accepted the rent of Kshs. 60,000/= and I take it that by his silence on the request placed by the Tenant, he consented to the same. The issue to be dealt with here is to what terms was the Landlord consenting to by his silence on the Tenant's letter dated 06.07.2020?

Did the Landlord by accepting the reduced rent of Kshs. 60,000/= thereby alter the terms of the agreement and for how long was the rent to remain at Kshs. 60,000/=.

In my view, the Landlord can only have been consenting to the limited request in the letter by the Tenant and therefore effective April, 2021, the rent reverted to Kshs. 120,000/= per month.

The Tenant did not seek any extension of time to continue paying the Kshs. 60,000/= and I think the fact that the Landlord did not sooner move to enforce his rights to the balance of the rent is no estoppel to him demanding the same as he did in his Counsel's letter dated 24.01.2024.
10. If the court were to find that the Tenant was to continue paying the rent of Kshs. 60,000/= on the basis of the request in the letter of 06.07.2020, the court would have descended into the arena and in effect participating in setting out terms of the agreement between parties. I do find that the agreed monthly rent of Kshs. 120,000/= was only interrupted to the extent requested by the Tenant and consented to by the Landlord and no more. That interruption did not go beyond the month of March, 2021.
11. To the extent that the Tenant continued to pay rent at the monthly rate of Kshs. 60,000/= from April, 2021, I do find that she fell into rent arrears for the monthly balance of Kshs. 60,000/= as the rent payable has already been found to have been Kshs. 120,000/= effective April, 2021.
12. On this issue, I therefore do find that the Tenant is in rent arrears.

Issue No. B: Whether the Tenant is entitled to the orders sought in her Application.

13. The Tenant has argued that the Landlord should have issued a notice under Section 4 of Cap 301 if he intended to terminate or alter terms of the tenancy. While I generally agree with this submission, I do not think the Landlord is in any way attempting to terminate the tenancy between the parties. What the Landlord seems to be seeking is the enforcement of his rights under the *distress for rent Act* Cap 293 of the Laws of Kenya and which right the Landlord clearly has under Section 3 of the said Act.

I also do not think that the Landlord needed to issue any notice to have the rent revert back to the initial rent of Kshs. 120,000/= after the end of March, 2021. The circumstances under which the rent was reduced to Kshs. 60,000/= and the duration for which the reduction was to subsist have already been explained elsewhere in this ruling.
14. I agree that the tenancy between the parties expired in the year 2018. This being the case, and the Landlord continuing to accept rent, the tenancy was converted into a controlled tenancy but under the same terms of the expired tenancy. The rent therefore remained at Kshs. 120,000/= per month even under the controlled tenancy.
15. The Tenant was under a duty to resume the payment of rent at the rate of Kshs. 120,000/= effective April 2021. If she was still unable to effect the same payments, it was incumbent upon her to seek indulgence and extension from the Landlord. This she did not do and therefore the correction assumption is that the original position obtained.



16. Is the Tenant in the circumstances entitled to the orders sought in her Application?

In this regard, I have already found that the Tenant is in default of rent. Consequently, she cannot benefit from the discretion of a court of equity. In the case of *Kyangavu vs Kenya Commercial Bank Ltd and Another* [2004] eKLR, the court held as follows:-

“Secondly, the injunction sought is an equitable remedy. He who comes to equity must fulfil all or substantially all his outstanding obligations before asserting on his rights. The plaintiff has not done that, consequently, he has not done equity.”

Further, in the case of; *Samuel Kipkorir Ng’eno & Another vs Local Authorities Pension Trust (Registered Trustees) & Another* [2013] eKLR, the court held as follows:-

“A tenant’s first and main obligation is to pay rent as and when it becomes due, for the Landlord has the right to an income from his investment...”

The temporary injunction sought in the present Application is an equitable remedy at the court’s discretion. He who comes to equity in huge arrears of rent is undeserving of the court’s discretion. The court cannot be the refuge of a tenant who fails to meet his principal obligation of paying rent as and when it becomes due.”

17. Consequently, I do not find any merits in the Tenant’s Application and the same is dismissed with costs to the Landlord.
18. I however do note that the Landlord slept on his rights as far as the exercise of his rights to levy distress are concerned. He seems to have woken up from this slumber on or about February, 2024. In these circumstances, I will order that the Tenant clears the rent arrears within a period of six (6) months failing which the Landlord will be at liberty to levy distress for the said rent arrears.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF JUNE, 2024

HON. CYPRIAN MUGAMBI - CHAIRPERSON

BUSINESS PREMISES RENT TRIBUNAL

Delivered in the presence of;

Mr. Kiriimi for the Tenant

Mr. Olando for the Landlord

Court: Mention on 07.08.2024

