



**Hybrid Investment Limited v Westminster Merchant Auctioneers (Tribunal
Case E717 of 2021) [2024] KEBPRT 1130 (KLR) (8 July 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 1130 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E717 OF 2021
P KITUR, MEMBER
JULY 8, 2024**

BETWEEN

HYBRID INVESTMENT LIMITED LANDLORD

AND

WESTMINSTER MERCHANT AUCTIONEERS TENANT

RULING

A. Parties And Representatives

1. The Applicant Hybrid Investment Limited is the proprietor of all those properties known as L.R. No. 209/10325/8 and L.R. NO. 209/10325/2 located within Nairobi County and leased out premises to the Tenant herein (hereinafter known as the 'Landlord')
2. The Firm of Taibjee & Bhalla Advocates LLP represents the Landlord.
3. The Respondent Westminster Merchant Auctioneers is Tenant having rented the suit premises from the Landlord for a period of 5 years, commencing 1st January 2019 at a monthly rent of USD 4,000 plus VAT.
4. The firm of Kabue Thumi & Company Advocates represents the Tenant.

B. The Dispute Background

5. This is one protracted dispute where parties have filed numerous issues to wit a Landlord's Notice to Terminate or Alter Terms of Tenancy dated 27th September 2021, a Reference by the Tenant dated 26th November 2021 challenging the Notice and finally the Tenant's Notice to obtain reassessment of Rent or alteration of terms or conditions of Tenancy dated 25th November 2021 which was lodged as an annexure to the Tenant's Supporting Affidavit sworn on 26th November 2021 and therefore not a pleading on its own right.



6. Vide a Landlord's Notice Terminate or Alter Terms of Tenancy dated 27th September 2021, the Landlord sought to terminate the tenancy herein with effect from the 1st day of December 2021 on the ground that the Tenant had neglected or failed or refused to pay rent arrears amounting to USD 57,521 which was equivalent to 12 months' rent.
7. Aggrieved, the Tenant filed a Reference dated 26th November 2021 before the Tribunal under S.6 of Cap 301 opposing the said notice on among other grounds, the assertion that the Tenant had made improvements of Kshs. 15,000,000/= and that the Lease Agreement between the parties provided for termination by giving three calendar months' notice yet the Landlord only gave two calendar months' notice. The Reference was supported by an Affidavit sworn on even date.
8. In response, the Landlord filed an Application dated 4th August 2023 supported by an Affidavit sworn on even date seeking among others the following prayers:-
 - i. That this Application be certified as urgent and service thereof be dispensed with in the first instance,
 - ii. That the Honourable Court be pleased to order the Tenant to deposit all the unpaid rent arrears of USD 136,571 plus future rent into this Honourable Court pending hearing and determination of this application.
 - iii. That the Tenant be restrained, by injunction from alienating and or subletting suit premises the known as L.R No. 209/10325/8 and LR. No. 209/10325/2 Nairobi pending hearing and determination of this application.
 - iv. That this Honourable Tribunal be pleased to issue an Order that the tenant gives the Landlord vacant possession of the premises known as L.R No. 209/10325/8 and LR. No. 209/10325/2.
 - v. That the Honourable Tribunal be pleased to order that the Officer Commanding Station (OCS), Industrial Area Police Station do enforce the Order in the event of non-compliance by the Tenant,
 - vi. That in the alternative, the Honourable Court be pleased to grant an order for distress of rent for all the outstanding arrears.
 - vii. That costs of this Application be provided for.
9. The Tenant responded to the Landlord's Application by filing a Replying Affidavit sworn on 11th October 2023 in which it averred that it opposed the Landlord's Tenancy notice dated 27th September 2021.
10. The Tenant further averred that its business was immensely affected by the COVID pandemic and that the bank account given by the Landlord had been frozen and thus the Tenant had been unable to make rent payment into the given account.
11. Parties took directions and agreed to dispose of the pending Application by way of Written Submissions which were duly filed by both parties and have been considered in making this determination.
12. This Ruling shall also determine the Reference as the issues raised in both the Reference, the present Application and the Tenancy Notice dated 27th September 2021 are the same.



C. List Of Issues For Determination

13. The issues raised for determination are as follows;
- a. Whether this Honourable Tribunal should determine and vary the rent payable to the Landlord.
 - b. Whether the Tenancy Notice dated 27th September 2021 should be upheld.

D. Analysis And Findings

Whether this Honourable Tribunal should determine and vary the rent payable to the Landlord

14. From the pleadings by the parties, it is evident, which evidence has not been rebutted, that the Tenant herein is indebted to the Landlord and has failed to pay the stipulated monthly rent as obligated in the Lease Agreement. The Landlord has stated that the Tenant is in arrears which stood at USD 136,571 as at 4th August 2023. The Tenant has not disputed the same.
15. The Tenant, in its Replying Affidavit alluded to being indebted to the Respondent and went further to indicate that they made efforts to reach out to the Landlord in a bid to have some accommodation to cushion them from the effects of the pandemic.
16. I do note that as at the date of the Landlord's Notice Terminate or Alter Terms of Tenancy, 27th September 2021, the Tenant was stated to be in arrears of USD 57,521. This has not been disputed at any point by the Tenant. A simple calculation of months with outstanding arrears from a monthly rent of USD 4,000 shows the Tenant had been in arrears for approximately 14 months. This clearly shows that the Tenant had been in arrears for a cumulative period long after the resumption of normal operations after the pandemic.
17. I have considered the Application in this matter and the subsequent evidence and tendered by both parties and I have made the following considerations;
18. Cap 301 requires a Tenant who wishes to obtain a reassessment of rent to give notice to the Landlord in the prescribed form. Section 4(3) thereof provides as follows: -
- A tenant who wishes to obtain a reassessment of the rent of a controlled tenancy or the alteration of any term or condition in, or of any right or service enjoyed by him under, such a tenancy, shall give notice in that behalf to the landlord in the prescribed form.
19. The Tenant has not tendered evidence showing it effected service of the Notice upon the Landlord. It is my considered view that in as much as the Tribunal has jurisdiction over this, the mode of invoking this jurisdiction has not been properly approached as spelt out in Section 4 above.

Whether the Tenancy Notice dated 27th September 2021 should be upheld.

20. The Act requires a landlord who wishes to terminate or alter the terms of a controlled tenancy to issue a notice in the prescribed form. Section 4 of the Act provides as follows;
4. Termination of, and alteration of terms and conditions in, controlled tenancy
 - (2) A landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the tenant, any term or condition in, or right or service enjoyed by the tenant under, such a tenancy, shall give notice in that behalf to the tenant in the prescribed form.



21. The Tenant, in his evidence, admits to having failed to pay rent as and when it fell due. I need not belabor the point.
22. The Tenant is under duty to pay rent when it falls due, failure to which the Landlord retains recourse under any of the grounds as stipulated under Section 7 of the Act.
23. The Tenancy Notice fully complies with the provisions of S.4 as spelt out above and I find no reason to invalidate it.
24. It is unmistakably clear that the issues between the parties herein remains unpaid rent and how the Landlord should respond to the Tenant's failure to pay rent.
25. It is not in the place of the Tribunal to rewrite a contract where the parties have agreed to consequences that follow a breach like rent payment.
26. With tremendous respect to counsel for the Tenant, the Termination Clause he seeks to rely on is purely for termination otherwise than for breach of a covenant. That provision is what can be termed as a 'happy day' termination where one seeks to walk away from the Lease Agreement without having been triggered by a breach by any party. That is not an applicable clause in the present circumstances where the Tenant is in clear breach of a covenant to pay rent of USD 4,000 plus VAT on or before every 10th day of the month, which breach triggers the provisions of section 4 as had been chosen by the Landlord and enumerated above.
27. It is my considered view that the debt is considerably of a large amount. As was stated in [*Samuel Kipkori Ngeno & another v Local Authorities Pension Trust \(Registered Trustees\) & another*](#) [2013] eKLR,

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. Why would a tenant allow himself to fall into such huge arrears of rent?

28. In seeking to make the appropriate orders in view of the foregoing, I am guided by section 12 (1) (e) of [*Cap 301*](#) which grants the Tribunal power;
 - (e) to make orders, upon such terms and conditions as it thinks fit, for the recovery of possession and for the payment of arrears of rent and mesne profits, which orders may be applicable to any person, whether or not he is a tenant, being at any material time in occupation of the premises comprised in a controlled tenancy;
29. In light of the foregoing, I therefore proceed to order as follows;

E. Orders

- a. The upshot is that the Landlord's Application dated 4th August 2023 is hereby allowed in the following terms;
- b. The tenant shall clear the arrears of USD 136,571 as at 4th August 2023 in addition to any rent and incidental costs accrued to date no later than 31st July 2024.
- c. In default, the Landlord is at liberty to proceed to levy for distress of the rent.
- d. The Tenant shall additionally hand over vacant possession of the premises to the Landlord on or before 31st August 2024 failure to which the Landlord shall be at liberty to break in and enter with the assistance of OCS Industrial Area Police Station or any other Police station close by.



- e. This Ruling settles the Reference dated 26th November 2021.
- f. Costs are awarded to the Landlord assessed at Kshs. 100,000/=.
- g. File marked as closed.

HON P. KITUR - MEMBER

BUSINESS PREMISES RENT TRIBUNAL

RULING DATED, SIGNED AND DELIVERED VIRTUALLY BY HON P. KITUR THIS 8TH DAY OF JULY 2024

In the presence of Mwangi for the Landlord and Kabue for the Tenant.

