Cadtech Services Limited v Open Hire Limited & another (Tribunal Case E549 of 2023) [2023] KEBPRT 465 (KLR) (25 August 2023) (Ruling)

Neutral citation: [2023] KEBPRT 465 (KLR)

REPUBLIC OF KENYA

IN THE BUSINESS PREMISES RENT TRIBUNAL

TRIBUNAL CASE E549 OF 2023

P MAY, VICE CHAIR

AUGUST 25, 2023

BETWEEN

CADTECH SERVICES LIMITED ..... TENANT

AND

OPEN HIRE LIMITED ..... LANDLORD

AND

TRADE WIDE AUCTIONEERS ..... RESPONDENT

RULING

1. The tenant approached the Tribunal by filing the complaint against the landlord dated May 31, 2023. The grounds for the complaint were that the landlord had forced their way into the tenant's premises and attached property thus causing immeasurable damage and disrupting the running of the business. Contemporaneous with the complaint, the tenant filed the application on an even date seeking the protection of the Honourable Tribunal.

2. The application was placed before the Tribunal whereby interim orders were issued in favour of the tenant pending the inter partes hearing. The said orders were subsequently extended and are subsisting to even the date of delivery of this ruling.

3. The landlord filed an application dated June 5, 2023 seeking to have the orders set aside or varied stating that the they were not granted an opportunity to be heard and that the Tribunal had determined the matter conclusively to their detriment without their participation.

4. This ruling will determine the two pending applications. It is imperative that the Tribunal gives precedence to the landlord's application to set aside the orders issued on May 31, 2023.

5. The Tribunal in determining whether to set aside or vary interim orders is guided by the decision in the case of; *Ragui – Vs – Barclays Bank of Kenya Ltd*(2002) I KLR 647 where Hon. Justice Ringera as he was, held:-

> "It is settled law that if an interlocutory injunction has been obtained by means of misrepresentation or concealment of material facts, the same will on the application of the party aggrieved be discharged.
>
> The injunction was granted because of non-service of the statutory notice of the exercise of the power of sale on the administrators of the estate, which was the true position hence it would not be unjust or inequitable to maintain the interlocutory injunction issued in force."

6. Further in the case of; *Mobile Kitale service Station V Mobil Oil Kenya Limited & Another*(2004) 1 KLR the court pronounced itself on the issue as follows:

> "An interlocutory injunction is given on the court's understanding that the defendant is trampling on the rights of the plaintiff.
>
> An interlocutory injunction, being an equitable remedy, would be taken away(discharged) where is shown that he person's conduct with respect to matters pertinent to the suit does not meet the approval of the Court which granted the orders which is the subject matter.
>
> The orders of injunction cannot be used to intimidate and oppress another party. It is a weapon only mean for a specific purpose-to shield the party against violation of his rights or threatened violation of the legal rights of the person seeking it."

7. The Landlord in their application wants the interlocutory injunction issued to the tenant set aside, or discharged or varied due an alleged misrepresentation of material facts by dint of the allegations that the same did not consider the law on distress for rent.

8. I have taken note of the landlord's and it should also be imperative to observe that the Landlord's application if allowed can determine the reference with finality at an interlocutory stage. The eviction of the tenant, will render the present reference nugatory. I am fortified by the Court of Appeal decisions in the case of; *Olive Mwihaki Mugenda & Another V Okiya Omtata Okoiti & 4 Others* [2016] eKLR where the court considered a persuasive decision of India on issuance of final orders at interlocutory stage and stated:

> "Ashok Kumar Bajpai V Dr (Smt) Ranjama Baipai, AIR 2004, All 107, 2004 (1) AWC 88, at paragraph 17 of the decision the Indian Court expressed as follows:
>
> "... It is evident that the Court should not grant interim relief which amounts to final relief and in exceptional circumstances where the Court is satisfied that ultimately the petitioner is bound to succeed and fact-situation warrants granting such a relief, the Court may grant the relief but it must record reasons for passing such an order to make it clear as what are the special circumstances for which such a relief is being granted to a party".

9. I stated earlier that the Landlord's application was filed in response to the tenant's application. The modes of responding to an application are stated explicitly under Order 51 Rule 14 of the *Civil Procedure Rules*. The rules do not envisage a situation whereby a party files a separate application as a response. The issues raised in the application could be ventilated through a replying affidavit. The application was filed prematurely.

10. I will now turn to the prayers sought in the application. The tenant has admitted to having been in rent arrears. The tenant stated that it was agreed by the parties that the landlord will deduct the rent arrears from the rent deposit. The tenant states that this agreement was not reduced into writing but was a mutual agreement between parties.

11. I have taken time to peruse through the tenancy agreement. The terms of the said agreement are explicit. The Tribunal can only uphold the terms of the said agreement. It is a longstanding principle of law that parties to a contract are bound by the terms and conditions thereof and that it is not the business of the Courts to rewrite such contracts. In *National Bank of Kenya Ltd vs Pipe Plastic Samkolit (K) Ltd* (2002) 2 EA 503, (2011) eKLR the Court of Appeal at page 507 stated as follows: -

> " A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."

12. In *Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Ltd* (2017) eKLR the Court of Appeal further stated that: -

> "We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved."

13. The tenancy agreement stated that the deposit was refundable upon the termination of the tenancy. The levying of distress that was commenced by the landlord being should besides seeking for leave as envisaged under section 12 of *cap 301* should have factored in the deposit paid by the tenant. This is because the levying of distress had a net effect of terminating the tenancy.

14. The tenant has expressed their willingness to pay the rent after deducting the deposit and restore the occupied premises to its original state. In order to mitigate the dispute from spiraling any further and taking the commercial interests at stake, this would then be a viable proposal. In exercise of the discretion granted under section 12 of *cap 301* and in the interest of justice, I would order that the tenant makes good of this proposal forthwith. This ruling will therefore settle the complaint.

15. Having made the above findings and analysis, I will make the following findings:

    a. The landlord shall supply the tenant with an updated statement of rent having deducted the deposit paid within 3 days from the date hereof and the tenant shall settle the outstanding rent arrears within 7 days from the date.

    b. The tenant shall forthwith vacate the demised premises and restore the demised premises to its original state within 7 days from the date hereof.

    c. Each party shall bear their own costs.

RULING DELIVERED VIRTUALLY THIS 25TH DAY OF AUGUST 2023

HON. P. MAY

VICE CHAIR

August 25, 2023

In the presence of;

No appearance for parties