



Karugu v Central Hotel Nyeri Limited (Tribunal Case E143 of 2023 & E141 of 2022 (Consolidated)) [2024] KEBPRT 451 (KLR) (28 March 2024) (Ruling)

Neutral citation: [2024] KEBPRT 451 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E143 OF 2023 & E141 OF 2022 (CONSOLIDATED)
A MUMA, AG. CHAIR & J ROP, MEMBER
MARCH 28, 2024**

BETWEEN

RICHARD KARUGU TENANT

AND

CENTRAL HOTEL NYERI LIMITED LANDLORD

RULING

A. Parties And Their Representatives

1. The Applicant, Richard Karugu is the tenant who rented space on Nyeri/Municipality Block 1/542 for the business known as Jazz Bistro (the “Tenant”).
2. The firm of Gitonga Kalwa & Company Advocates represents the Tenant in this matter
3. The Respondent, Central Hotel Nyeri Limited are the registered proprietors of the suit premises (the “Landlord”).
4. The firm of Machirah & Muriki Company Advocates represents the Landlord in this matter.

B. Background Of The Dispute

5. This Honourable Tribunal delivered a Ruling dated 31st August, 2023 where it partially allowed the Tenant’s Application dated 1st December, 2022 in the following terms:
 - a. The Tenant shall pay rent arrears at the rate of Kshs. 260,000.00 plus an additional Kshs. 210,000.00 being rent for the months of June, July and August 2023 within 30 days;
 - b. The Tenant to file a valuation report within 14 days showing the rent payable and the Landlord shall respond with their report in 14 days;
 - c. The parties shall file updated statements of account within 30 days;



- d. A site visit shall be conducted on a date agreed on by the parties after which an inspection report shall be filed at the Tribunal;
 - e. The Tenant is at liberty to file additional papers showing costs of renovation;
 - f. The Tenant to continue paying rent at Kshs. 70,000.00 as per the lease agreement; and
 - g. Failure to comply the Landlord shall be at liberty to distress, break in and evict with the assistance of the OCS Nyeri Police Station.
6. On the 31st October, 2023, the matter came up for a mention where this Honourable Tribunal issued directions that; the Tenant to pay the rent for the month of November, 2023 and a site visit be conducted on 17th November, 2023 to evaluate the state of the building.
7. The Tenant, on 28th November, 2023, made an oral Application before this Honourable Tribunal seeking its deposit, being Kshs. 140,000.00, paid during commencement of the Tenancy Agreement and damages. Further, the Tenant informed this Honourable Tribunal that it intended to vacate the premises by end of the year, 2023. As a result, the Tribunal directed the Tenant be at liberty to hand over vacant possession of the suit property.
8. Similarly, on 23rd January, 2024, the Landlord informed this Honourable Court that the suit property was in a state of disrepair and prayed that the Tenant be compelled to repair the same. As such, this Tribunal directed that the parties file valuation reports on the status of the building.
9. It is therefore, the Tenant's Oral Application made before this Honourable on 28th November, 2023 praying for refund of their deposit and the Landlord's Application made orally on 23rd January, 2024 praying for the Tenant to be compelled to repair the suit property, that are subject of this Ruling.

C. Tenant's Case

10. The Tenant vide his Further Submissions dated 27th December, 2023 highlighted that in May 2020, during the onset of the Covid-19 pandemic, he and the Landlord entered into a mutual agreement to revise the rent to Kshs. 50,000.00. The amount was later, between January, 2021 and June 2021, revised to Kshs. 30,000.00. The Tenant further noted that, in August, 2021, the amount was subsequently revised to Kshs. 50,000.00. The Tenant reiterated that for the period, August 2021 to May 2023 rent was Kshs. 50,000.00.
11. The Tenant further submitted that its claims for damages are claimed as special damages that arose from demolition of its forecourt by KeNHA which had been constructed on a road reserve, flooding of the lower deck due to poor maintenance of the building's piping and sewerage system by the Landlord and any rent that was overpaid.
12. The Tenant contends that he is entitled to Kshs. 3,995,000.00 being the damages incurred in respect of the renovations caused due to the Landlord's breaches during the term of the Tenancy and also a refund of over payment of rent for the terms of the Tenancy.

D. Landlord's Case

13. The Landlord vide its Supplementary Submissions dated 5th December, 2023 maintains that the renovations done by the Tenant on the premises were for the purpose and benefit of his business. The Landlord noted that the renovations were made to fit the Tenant's use of the premises and not for the benefit of the Landlord.



14. Further, the Landlord stated that the at no point during the Tenancy did it misrepresent any information that the building was constructed on a road reserve. He pointed out that it was the Tenants structure i.e. forecourt that had been built on the road reserve and not the building it had leased to the Tenant.
15. The Landlord challenged the receipts filed by the Tenant as evidence for the special damages sought. It highlighted that the receipts neither had the official store stamps nor were they addressed to the Tenant. Moreover, the receipts relied on did not specify the location of the store or the location of the delivery of the items bought.
16. On the issue of overpaid rent, the Landlord placed his reliance on the provisions of the Tenancy Agreement between it and the Tenant which stipulated the rent payable per month as being Kshs. 70,000.00 and not any of the variations provided by the Tenant.
17. In conclusion, the Landlord prays that it is entitled to rent arrears from 2019 which amounts to Kshs. 1,557,000.00

List Of Issues For Determination

18. It is the contention of this Tribunal that the issue raised for determination is as follows:
 - a. Whether the Tenant is liable to pay the outstanding rent of Kshs. 1,557,000.00;
 - b. Whether the Tenant is entitled to a refund of the deposit paid and the damages sought; and
 - c. Whether the Tenant is liable to conduct repair on the damage caused on the property

Analysis And Dertemination

Whether the Tenant is liable to pay the outstanding rent

19. Clause 1 of the Tenancy Agreement dated 1st November, 2019 between the Tenant and the Landlord sets out the rent due per month as Kshs. 70,000.00 as it provides that:

“ The Landlord agrees to let and the Tenant agrees to take all that space that was previously let out to Diamond Executive Barber and Beauty Parlour approx. 625sq feet of working space including the lower decks approx. 165sq feet, 1st day of November, 2019 Terminating 30th day of November, 2024 at an initial monthly rent of Kshs. 70,000/=”
20. The Tenant in his Submissions dated 15th June, 2023 and Further Submissions dated 27th December, 2023 submitted to this Honourable Tribunal that the rent payable was varied on various instances. He submitted that vide mutual agreements the parties agreed to reduce the rent to Kshs. 50,000.00 in May, 2020, to Kshs. 30,000.00 in January, 2021 and to Kshs. 50,000.00 in August, 2021.
21. The Tenant, however, did not produce before this Honourable Tribunal any written agreements or proof showing the amendments to the monthly rent due. The Tenant only adduced a payment schedule which included the rent payable, rent received, rent collected by the Landlord and the rent overpaid.
22. The Tenant did not however, provide any copy of written agreements denoting the variations of rent payable hence it is presumed the agreements were entered into orally.



23. It is well established that the provisions of a written agreement bear more evidentiary weight than those of an oral agreement. This Honourable Tribunal is guided by the provisions of the Evidence Act, Cap 80, where under section 98 which provides that:

“When the terms of any contract or grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 97 of this Act, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to or subtracting from its terms:” (Emphasis added)

24. In the absence of written mutual agreements varying the rent payable as provided in the Tenancy Agreement dated 1st November, 2019, the Tenant was still obligated to pay the monthly rent of Kshs. 70,000.00. As such, any arrears accrued because of irregular payment are due and payable to the Landlord.
25. This Honourable Tribunal, however, takes note of the Covid-19 pandemic and grants the Tenant a covid moratorium between the months of April-October, where they would be liable to pay half the rent, being Kshs. 35,000.00, stipulated in the Tenancy Agreement.
26. Therefore, on this issue, I find that the Tenant is in default of paying rent and consequently, he is liable to pay to the Landlord the outstanding rent arrears in the sum of Kshs. 1,382,000.00.

Whether the Tenant is entitled to refund of the deposit paid and the damages sought

27. The Tenancy Agreement dated 1st November, 2019 between the Landlord and the Tenant, under Clause 1(b) reads as follows:

“b. On or before the date of commencement of the Tenancy, the deposit payment equivalent to two months rent of Kshs. 140,000.00 will be paid. This shall not in any way be part of any month’s rent and is refundable at the end of the Tenancy.”

28. With the Tenancy relationship between the parties having ended in November, 2023, it is quite evident from the Clause above that the Tenant is owed a refund of the deposit paid of Kshs. 140,000.00
29. The Tenant also claims Kshs. 3,995,000.00 being special damages for expenses incurred in respect of renovations arising from the Landlord’s breaches during the term of the Tenancy.
30. The powers of the Business Premises Rent Tribunal are provided by the Landlord and Tenant Shops Hotels and Catering Establishments Act, Cap 301 Laws of Kenya (hereinafter the Act). Section 12(1) (g) of the Act provides that:
1. A Tribunal shall, in relation to its area of jurisdiction have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in addition to and without prejudice to the generality of the foregoing shall have power:
 - g) where the landlord fails to carry out any repairs for which he is liable:
 - i. to have the required repairs carried out at the cost of the landlord and, if the landlord fails to pay the cost of such repairs, to recover the cost thereof by requiring the tenant to pay rent to the Tribunal for such period as may



be required to defray the cost of such repairs, and so that the receipt of the Tribunal shall be a good discharge for any rent so paid;

31. It is trite law that a claim for special damages have to be claimed and strictly proved by evidence. On this I am guided by the decision of the Court of Appeal in *Richard Okuku Oloo v South Nyanza Sugar Co. Ltd* (2013) eKLR where the Court held that:

“We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.”

32. In the matter herein, the Tenant produced receipts marked as RK-5 in his Supporting affidavit dated 1st December, 2022 and RK-3(a) in his Further Affidavit dated 15th June, 2023. His claim for damages is based on demolitions done on his forecourt, flooding on the lower deck due to poor maintenance of the piping and sewerage system and over paid rent.
33. This Honourable Tribunal is therefore mandated to establish the amount, if any, of the special damages the Tenant is entitled to be compensated. I have dispensed off with the question of overpaid rent in Issue a. herein, therefore, this Honourable Tribunal has to establish the extent of breach with regards to the demolitions and flooding.
34. Clause 3 of the Tenancy Agreement between the Tenant and Landlord sets out the mandate of the Landlord as follows:

“3. THE LANDLORD HEREBY AGREES with the tenant as follows:

- iii. to keep the structure and outside of the premise in a good taste of repair and painted where necessary”

35. Per the provisions of Clause 3 above the duty of maintenance of the suit building’s piping and sewerage system falls on the Landlord of the property. As such, any expenses incurred by the Tenant in maintenance of the property or damages incurred as a result of the breach of this duty, the Tenant ought to be indemnified of the same.
36. The Tenant claims that the cost of repair caused by the flooding was Kshs. 395,000.00. However, he has provided receipts, annexed as RK-3(B) of the Tenant’s Further Replying Affidavit, of Kshs. 355,000.00 showing the costs of repair and renovations for the damage occasioned by the flooding. Therefore, the Tenant ought to be indemnified of the amount proved, that is Kshs. 355,000.00
37. A perusal of the Tenancy agreement, under Clause 1 cited above, it is evidently clear that the portion of the property being leased describes a working space of 625sq. feet and including a lower deck of 165sq. feet. The forecourt does not form part of the leased property as described above. Therefore, determination of the quantum of damages resulting from the demolitions falls outside the ambit of this Honourable Tribunal as it does not form part of the property rented. In any event the tenant ought to have undertaken due diligence to ensure the property subject matter of the lease was free of any encumbrances.
38. With the foregoing in mind, and after careful consideration of the pleadings and evidence filed thereof, I find that the Tenant herein is entitled to a refund of the deposit paid of Kshs. 140,000.00 and the costs incurred of the renovations done as a result of the damage caused by flooding on the lower deck due to poor maintenance of the piping and sewerage system to a tune of Kshs. 355,000.00.



Whether the Tenant is liable to conduct repair on the damage of caused on the property

39. The Landlord claimed that the suit building was left in a state of disrepair after the Tenant vacate.
40. Clause 2 (iii) of the Tenancy Agreement between the parties herein provides that:
2. The Tenant Hereby Agrees with the Landlord as follows:
- iii) To keep the demised premises and fixtures therein clean and in good condition and hand over the property and fixtures at the end of the Tenancy, in the same condition and repair as on entry, fair wear and tear expected.
41. Per the provisions of Clause 2(iii), the Tenant was mandated to keep the property clean and in good condition. The clause further provides that during handing over of the property at the end of the tenancy, the property should be in the same condition and repair as during the start of the tenancy, fair tear and wear is expected.
42. In order to establish the extent of the damage, this Honourable Tribunal, on 23rd January, 2024 issued directions for the parties to file a report on the state of the building. The parties complied with the said directions and filed two separate reports. The Landlord in its report dated 5th February, 2024 established that the cost of repair and restoration of the suit building would cost an estimate of Kshs. 655,200.00. The Tenant subsequently, filed it report dated 4th February, 2024 in which it noted it would rely on the rent assessment report done on 28th January, 2024.
43. Further, the parties filed colored photographs showing the state of the property. The Landlord filed a single set of photographs showing the suit property how the property was damaged. Consequently, the Tenant in his site report filed two sets of photographs showing the property after demolition and when he had conducted renovations.
44. I also note that the Landlord did not furnish this Honourable Tribunal with any evidence as to the status of the property before the commencement of the tenancy to enable the Tribunal assess the status of the building before the tenancy began.
45. It is key to note, that there is no dispute between the parties that the property was damaged by the Tenant. However, I find that the Tenant has conducted renovations on the suit property.
46. After consideration of the site report filed, and with the absence of any contradicting evidence from the Landlord, I find that the Tenant has conducted sufficient repairs on the suit premises.

Determination

47. In the upshot, the following orders shall abide: Landlords and Tenants application and reference as consolidated in E143/2022 and E141/2022 partially allowed as follows;
- a. The Tenant shall pay the Landlord a sum of Kshs. 887,000.00 being the amount due from the rent arrears due as at December, 2023 which is partially set off by the sum of Kshs. 140,000.00 being the deposit owed by the Landlord and Kshs. 355,000.00 being the refund of the amount used to renovate the property after the flooding damage;
- b. The amount in (a) above to be paid by the Tenant within 60 days of the pronouncement of this Ruling; and
- c. Each party to bear its own costs.

HON A. MUMA - AG CHAIR/MEMBER



HON. JACKSON ROP - MEMBER

BUSINESS PREMISES RENT TRIBUNAL

RULING DATED, DELIVERED AND SIGNED AT NAIROBI ON THIS 28TH DAY OF MARCH 2024 IN THE PRESENCE OF GAYA FOR THE TENANT AND NYAKIO FOR THE LANDLORD.

