



**Mohamud v Highbury Properties Limited (Tribunal Case
E1064 of 2022) [2023] KEBPRT 1281 (KLR) (24 October 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 1281 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E1064 OF 2022
CN MUGAMBI, CHAIR
OCTOBER 24, 2023**

BETWEEN

ALI AHMED MOHAMUD TENANT

AND

HUGHBURY PROPERTIES LIMITED LANDLORD

RULING

Introduction

1. The landlord's application dated 4.4.2023 seeks the following prayers'
 - a. Spent
 - b. That in the interim and ex parte pending hearing and determination of this application, the court be pleased to set aside, review and or stay the execution of the orders issued on 10.3.2023.
 - c. That the court be pleased to order that the tenant does pay the accrued rent arrears of Kshs. 733,200/= forthwith.
 - d. That the court be pleased to grant leave to the landlord/Applicant to terminate any form of relationship with the tenant/Respondent.
 - e. That the court be pleased to grant leave to the landlord/Applicant to evict the tenant with the assistance of the OCS, Kamukunji police station.

The Applicant's deposition

2. The landlord/Applicant's affidavit in support of its application as sworn by Anne Wathatu Ngururi may be summarized as follows:-



- a. That the tenant filed an application dated 15.11.2022 wherein Hon. Muma issued interim orders to the effect that the landlord opens the suit premises failing which the tenant would be at liberty to break into the same. The court further ordered the tenant to pay the November and December rent before the next hearing date and thereafter, every subsequent month as agreed till the full hearing (of the suit).
- b. That the parties entered into a tenancy agreement from 24.11.2016 for a period of five years and three months.
- c. That the tenancy between the parties had expired and the tenant is illegally in the premises, a fact not disclosed at the time the orders were issued.
- d. That the tenant is in rent arrears amounting to Kshs. 733,200/= being the rent accruing from a 10% increment after every two years during the pendency of the tenancy.
- e. That following the orders issued by the Tribunal on 10.3.2023, the tenant continues to occupy the suit premises despite the existence of rent arrears and the lapse of the tenancy agreement.
- f. That the tenant is using the court orders as a defence to the payment of rent.
- g. That the tenant has refused to pay rent and or to vacate the suit premises alleging that the arrears are an attempt to increase goodwill.

The Respondent's depositions

3. The tenant/Respondent's replying affidavit sworn on 18.7.2023, may be summarized follows hereunder:-
 - a. That he is a protected tenant in the suit premises and his tenancy, a controlled tenancy.
 - b. That he is not illegally in the premises as the landlord has continued to receive rent from the tenant since January 2022 to date.
 - c. That at the expiry of the lease, a periodic month to month tenancy between the parties was created in line with the provisions of Section 60(2) of the Land Act 2012.
 - d. That at the beginning of 2022, the landlord told the tenant to pay rent at the monthly rate of Kshs. 38,000/= which the tenant paid without protest.
 - e. That the landlord has not shown that there has been the discovery of new and important matter of evidence or error apparent on the face of the record or any other sufficient reasons to warrant the grant of the review orders sought.
 - f. That the purported rent arrears and the expiry of the lease are not new and important matters as the court in its ruling dated, delivered on 10.3.2023 extensively discussed the same.
 - g. That the arguments presently presented by the Applicant is a rehash of the arguments it presented when it argued its application dated 1.12.2022 that was dismissed by the court.
 - h. That the tenant has not been in any rent arrears as alleged by the landlord or at all.

Analysis and determination

4. The issues that arise for determination in this application are in my view the following:-



- a. Whether the Tribunal can grant leave to the landlord to terminate any form of relationship that exists between the parties.
- b. Whether the landlord/Applicant is entitled to the orders of review of the Tribunal's orders and ruling issued on 10.3.2023.
- c. Whether the Tribunal ought to order the Tenant to pay the alleged accrued rent of Kshs. 733,000/=.
- d. What orders ought to be made in disposition of this matter.

Issue A

5. The landlord at prayer four (4) of its application has sought an order;

“that the Honourable court be pleased to grant leave to the landlord/Applicant to terminate any form of relationship with the tenant/Respondent.”

The landlord has deponed in its affidavit and which seem to be accepted by the tenant that the tenancy entered into between the parties on 24.11.2016 has already expired. The tenant on his part has deponed that even after the expiry of the lease, he has continued to pay rent to the landlord and that further, even after the landlord increased the monthly rent to Kshs. 38,000/=-, the tenant paid the same without complaining. The tenant has annexed to his affidavit receipts for the payment of the rent for the months of February to December 2022. The landlord has not denied receiving these payments which it would appear were made after the initial lease agreement between the parties herein had expired.

6. I am in the circumstances in agreement with the tenant when he takes the position that in the circumstances, a controlled tenancy from month to month was created between the parties herein in line with Section 60(2) of the Land Act 2012 which is in the following terms;

“A lessor who accepts rent in respect of any period after the lease has been terminated or the term of the lease has expired shall not by reason of that fact be deemed to have consented to the lessee remaining in possession of the land or as having given up on any of the rights or remedies of the lessor against the lessee in breach of a covenant or condition of the lease and if the lessor continues to accept rent from a tenant who remains in possession for two months after the termination of the lease, a periodic lease from month to month shall be deemed to have come into force.”

7. The tenancy between the parties is therefore a controlled one and therefore subject to the provisions of Cap 301 of the Laws of Kenya. Under the said Act, controlled tenancies can only be terminated as per the provisions of the Act and in this regard Section 4(1) and (2) of Cap 301 respectively provides as follows:-

“4(1) Notwithstanding the provisions of any other written law, or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be terminated and no term or condition in or right or service enjoyed by the tenant of any such tenancy shall be altered otherwise than in accordance with the following provisions of the Act.”

“4(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.”

8. The Tribunal cannot grant leave to the landlord to terminate the tenancy herein generally and can only do so pursuant to a notice to terminate the tenancy issued under Section 4(2) above. The landlord in this case is not acting pursuant to any notice to terminate issued by it to the tenant and the answer to this issue is therefore in the negative. I further hold that the letter dated 16.3.2023 does not amount to a valid notice to terminate tenancy as it does not meet the formal requirements of Sections 4(2) (4) (5) of Cap 301.

Issue B and C

9. By its ruling dated 8.3.2023 and delivered on 10.3.2023, the Tribunal allowed the tenant’s application dated 15.11.2023 in terms of prayers 2, 3, 4, 5, 6 and 7 thereof and in the same breath dismissed the landlord’s application dated 1.12.2022. These are the orders that the landlord now seeks to have the Tribunal review and set aside.
10. Under Section 12(i) of Cap 301, the Tribunal has power to vary or rescind any order made by the Tribunal under the provisions of the Act. Cap 301 does not provide for the material considerations for the grant of the orders of variation or rescission of its decisions and therefore the substantive considerations for the exercise of this power are to be found under the provisions of order 45 Rule 1 of the Civil Procedure Rules wherein it is provided as follows:-

“45(1)

- (i) Any person considering himself aggrieved;
 - a. By a decree or order from which an appeal is allowed but from which no appeal has been preferred or
 - b. By a decree or order from which an appeal is hereby allowed and who from the discovery of new and important matter or evidence which after the existence of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record or for any other sufficient reason desires to obtain a review of the decree or orders may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”
11. The grounds upon which the landlord seeks a review of the orders issued on 10.3.2022 may be summarized as follows:-
 - a. That the tenant filed an application dated 15.11.2022 in which interim orders were issued by the Tribunal.
 - b. That the tenancy agreement between the parties dated 24.11.2016 has expired and the tenant continues to be in illegal occupation of the suit premises, which fact was not brought to the attention of the Tribunal when the orders were issued.



- c. That the tenant has rent arrears amounting to Kshs. 733,000/=.
 - d. That the tenant continues to occupy the suit premises despite being in rent arrears and the lease agreement having expired.
12. The question that arises at this juncture is whether any of the grounds raised by the landlord in his application amount:-
- a. To the discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the Applicant or could not be produced by the Applicant when the orders herein were made.
 - b. To some mistake or error apparent on the face of the record.
 - c. Any other sufficient reason.

13. The grounds sought to be relied on by the Applicant are generally that the tenancy has expired and that the tenant is in rent arrears. Are these new and important matters?

In the landlord's replying affidavit sworn on 13.12.2022 in response to the tenant's application dated 15.11.2022 and whose orders the Applicant seeks to have varied/reviewed, the landlord deponed as follows at:

Paragraph 4;

"That we entered into a tenancy agreement from the 24th November 2016 and the term of lease was for five years three months."

Paragraph 5;

"That the tenancy agreement has since lapsed and the tenant is illegally in the possession of the premises."

14. While dealing with the issue of the expired lease, the Tribunal at paragraph 12 of its ruling stated as follows:-

"It is common ground therefore that the lease agreement between the parties expired on or about February 2022. The question that arises is whether the landlord continued to receive rent from the tenant after the expiry of the lease."

After considering the import of Section 60(2) of the Land Act 2012, the court stated at paragraph 14 of the ruling;

"On this issue, I therefore find that the tenancy between the parties herein is a controlled tenancy and therefore governed by the provisions of Cap 301 of the Laws of Kenya."

The issue of the expired lease does therefore not amount to a new and important matter. It has always been there and was sufficiently dealt with by the court.

15. Is the issue of rent arrears a new and important matter? I do not think so! Again, in the landlord's affidavit in response to the tenant's application dated 15.11.2022, the landlord had deponed as follows:-

"That the tenant/Respondent has rent arrears amounting to Kshs. 491,200/= being rent that accrued from the 10% increment after every two years during the tenancy period."



Paragraph 8;

“That without paying its rent in full, the tenant is using this Honourable court to illegally stay on the premises in which he has rent arrears without making good the payments.”

While dealing with the issue of the rent raised by the landlord, the Tribunal at paragraph 17 of its ruling on the application dated 15.11.222 stated as follows:-

“there is a lack of clarity on the rent payable per month. The lease agreement annexed to the landlord’s affidavit show the monthly rent to be Kshs. 40,000/= while the tenant in his affidavit states that prior to January 2022, he was paying rent at the rate of Kshs. 38,000/= per month from January 2022 to date. None of the parties has clearly summarized the payments and the landlord has not given any explanation as to why for a period of five years, it did not raise any concerns as to the underpayment of rent of any... I will in the circumstances, allow the tenant to continue paying rent at the monthly rent of Kshs. 38,000/= and subject the disputed balance to a hearing.”

16. The issue of rent is therefore not a new issue, it has been dealt with in the Tribunal’s ruling.
17. The Applicant has not alluded to any error apparent on the face of the record and in view of my findings hereinabove, I am also not convinced that the Applicant has established any sufficient reasons to warrant the review of the orders as sought.
18. Quoting from various decisions, the High Court in the case of; *Republic vs Advocates Disciplinary Tribunal ex parte Apollo Mboya* [2019] eKLR brought out the following principles in applications for review; -
 - a. A court can review its decision on either of the grounds enumerated in order 45 Rule 1 and not otherwise.
 - b. The expression “as any other sufficient reason” appearing in Order 45 Rule 1 has to be interpreted in the light of the specified grounds.
 - c. An error that is not self-evident and can only be discovered via lengthy process of reasoning cannot be interpreted as an error visible on the face of the record justifying the exercise of power under Section 80.
 - d. An erroneous order/decision cannot be remedied by exercising the power of review.
 - e. A subsequent decision/judgment of a coordinate or larger bench of the tribunal or of a superior court cannot be used to appeal a decision/order under Section 80.
 - f. When considering an application for review, the court must limit its decision to material available at the time of initial decision. The occurrence of some subsequent event or development cannot be used to declare the initial order/decision void due to an obvious error.
 - g. The mere discovery of new or significant information or evidence is insufficient justification for reconsideration. The party seeking review must also demonstrate that such matter or evidence was not within its knowledge and, despite due diligence, could not be produced before the court/tribunal sooner.
 - h. A mistake or error visible on the face of the record denotes a mistake or error that is prima facie visible.



- i. Section 80 of the [Civil Procedure Code](#) grants a civil court, and thus the appellate courts, substantive review power. The words in Section 80 indicate subject to such requirements and limitations as may be specified, and for that purpose, the procedural conditions set out in Order 45 Rule 1 must be considered.
 - j. Section 80 of the [Civil Procedure Code](#) does not specify any constraints on the court's power, although such limitations are specified in Order 45 Rule 1.
 - k. Section 80 of the [Civil Procedure Code](#) establishes civil courts authority to review its own judgment/decision. The reasons for seeking review are listed in Order 45 Rule 1.
19. I do not think that in the circumstances, the landlord's application dated 4.4.2023 has any merits and the same is hereby dismissed with costs to the tenant.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24TH DAY OF OCTOBER 2023.

HON. CYPRIAN MUGAMBI

CHAIRPERSON

24.10.2023

Delivered in the presence of;

Ms. Somba for the Tenant

Mr. Paul Muchiri for the Landlord

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