



**Midlands Zero Thirty-Three Hotel LLP v Kindi (Tribunal Case
75 of 2020) [2023] KEBPRT 15 (KLR) (16 January 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 15 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE 75 OF 2020
A MUMA, VICE CHAIR
JANUARY 16, 2023**

BETWEEN

MIDLANDS ZERO THIRTY-THREE HOTEL LLP TENANT

AND

MORIASO OLE KINDI LANDLORD

RULING

A. Background of the Dispute

1. The Tenant through a Notice of Motion dated May 21, 2020 moved this Honourable Tribunal seeking *inter alia* orders:

- a) That the Landlord by himself, his servants, agents or any person acting under his instructions be temporarily prohibited and restrained from unlawfully evicting the tenant or in any other manner interfering with the Applicant's tenancy pending the hearing and determination of this Application;
- b) That the Landlord be compelled to accept rent at rate of Kshs 100,000.00 per month pending the hearing and determination of this case; and
- c) That costs of this Application be provided for.

Vide an Order dated May 21, 2020, the Court granted prayers 1,2,3 & 5 certifying the matter as urgent; restraining the Landlord either by himself, his servants and/or agents from seizing and attaching the movable assets and goods of the tenants; restraining the Landlord either by himself, his servants and/or agents from evicting the Tenant; and, compelling the Landlord to accept at rate of Kshs 100,000.00



2. As a result of the foregoing, the Landlord filed an Application through a Notice of Motion dated August 4, 2020 seeking an Order to discharge the Interim Orders of Injunction. The orders prohibited the Landlord from seizing and attaching the movable assets and goods; and, from evicting the Tenant from the suit premises.
3. Subsequently, on January 4, 2022, this Honourable Tribunal issued a Ruling in which it sustained all the status quo through an Order including rent.

B. Tenant's Case

4. The Tenant contends that she entered into a mutual agreement with the Landlord to review rent to Kshs 100,000.00 after the declaration of Covid-19 as a pandemic and the implementation of nationwide lock down as well as the curfew measures by the Government of Kenya.
5. It is her deponent that, despite the said mutual agreement, the Landlord instructed an auctioneer to seize and attach movable assets and goods from the suit premises.
6. She averred that she stands to suffer irreparable damages if the Landlord is allowed to seize and attach the tenant's movable assets and goods.

C. Landlord's Case

7. The Landlord deponed that the Tenant did after severally and repeatedly defaulting in rent payment apply for and obtain *ex parte* Orders of injunction which forthwith restrained him from recovering the monthly rent of Kshs 360,000.00.
8. He deponed that the Tenant concealed material information while seeking the said Orders from this Tribunal.
9. It is his case, that since the tenant is not a protected tenant, she is not entitled to the protection of this honourable Tribunal for her illegal and unlawful acts by herself or her authorized representatives.

D. Jurisdiction

10. Vide this Tribunal's Ruling dated January 4, 2022, it was clearly established that this Tribunal is properly clothed with powers to ventilate this dispute.

E. Landlord's Submission

11. The Landlord filed written Submissions dated November 8, 2021 in support of his case. He strongly submitted on two key issues: whether there is a controlled tenancy; and, whether there is a review of rent from Kshs 360,000.00 to Kshs 100,000.00.
12. While submitting on the first issue, he cited the case of *Mugo Holdings v the Attorney General & another* Misc Application No 3 of 2016 in which the honourable Court found that, a tenancy of a term exceeding five years shall not be in a reserve of Tribunal which issue had been dealt with in my first ruling.
13. He further cited the case of *Kenya Women Finance Trust v Isaac Adhiambo Okayo* Civil Appeal Number 9 of 2014 while submitting on the second issue where the honourable judge held that, it is upon the alleging party to make a full disclosure and fully adduce evidence in proving the subject matter. In his submission, he stated that the Tenant did not present any scintilla of evidence in alleging that she had negotiated for rent variation from Kshs 360,000.00 to Kshs 100,000.00.



F. Analysis and Determination

14. I have carefully analyzed all the Pleadings and all relevant evidence adduced before this honorable Tribunal. Since the issue of Jurisdiction is dispensed with, I shall proceed to the merit of the Tenant's Reference dated May 21, 2020.
15. It is my considered view that the only issue for determination is whether there was an Agreement between the Landlord and the Tenant to vary by downscaling the rent payable.
16. The Tenant through the Affidavit dated May 21, 2020 sworn by one Bismack Wasta, alleged that they reached a mutual agreement with the Landlord to pay a monthly rent of Kshs 100,000.00 instead of Kshs 360,000.00 as per their lease agreement. I have observed that in support of their allegation, they presented a copy of a letter to the Landlord requesting for the rent review.
17. On the other hand, the Landlord vehemently protested the said allegation. It is his case that there was no agreement in respect to the review of the rent as alleged by the Tenant. In his submission, he stated that in fact the Tenant did not present any evidence to prove any negotiation and agreement thereto between themselves.
18. It is trite law that, there has to be a meeting of mind between or among parties, for a contract to be deemed to exist. This is enshrined in the maxim consensus ad idem which means that there has been a meeting of the minds of all parties involved and everyone involved has accepted the offered contractual obligations of each party.
19. It is therefore imperative that, any party claiming existence of a contract must adequately prove its existence. Worth noting is that, the agreement cannot be reached arbitrarily or unilaterally. The foregoing clearly set out the correct legal principles applicable in contract law generally. Therefore, the approach by a Tribunal in considering whether a contract exists is an objective one as opposed to a subjective one.
20. The Court of Appeal in *William Muthce Muthami v Bank of Baroda* (2014) eKLR observed that: -

“In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach”
21. In light of the foregoing, the Tenant in the instant case has tendered a letter requesting the rent variation and a cheque of Kshs 100,000.00 drawn in favour of the Landlord, as the only proof that there was negotiations and mutual agreement to downscale the rent. There is no other evidence, to say the least, a letter of acceptance of the request to vary rent by the Landlord. This to me does not meet the minimum threshold of proving existence of a mutual agreement between the parties.
22. I now embark on the issue of Covid-19 rebate. Based on the stringent measures by the government, which down scaled businesses in the whole country, and even halted some, a rebate was granted to as a measure of a going concern to various entities. The same was operation for three months.
23. However this was subject to agreement and goodwill of the landlord which was not the case in here and the tenants expectation to pay rent at Kshs 100,000.00 going forward remains just that his expectation.
24. Further, the Landlord is supposed to pay Kshs 5,000,000.00 to the tenant upon termination of the tenancy at any time before termination date, pursuant to clause i of the lease Agreement. I order that the same be prorated monthly over the entire lease period remaining and a rebate be advanced to the tenant accordingly every month in the form of reduced rent approximately 35,000 per month in rebate.



Since I find it is indeed an admission by the landlord that the tenant made structural adjustments that improved the property and or goodwill the tenant on the other hand mentions 15,000,000 but only 5,000,000 seems reimbursable/payable as per the contract.

25. Accordingly landlord does share with the tenant an adjusted statement as per parties to ascertain the amount owed to each other in the next 14 days and the difference will be payable.
26. The upshot of this finding is that, the tenant's reference and application evenly dated on May 21, 2020 are settled in the following terms:
 - a) The tenant's reference and application both dated May 21, 2020 are hereby dismissed.
 - b) The parties to ascertain the difference of the amount owed to landlord by tenant in arrears as per contract and in light of paragraph 24 of this ruling and the tenant to pay within 30 days. In default liberty to distress is granted and Landlord at liberty to obtain vacant possession of the suit premises.
 - c) Landlord shall have costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY BY HON A. MUMA THIS 16TH DAY OF JANUARY, 2023 IN THE PRESENCE OF KHAFABA FOR THE LANDLORD AND IN THE ABSENCE OF THE TENANT.

HON A. MUMA

VICE CHAIR

BUSINESS PREMISES RENT TRIBUNAL

