



Premier Care Diagnostic Limited v Oltalet Investments Limited (Tribunal Case E461 of 2023) [2023] KEBPRT 720 (KLR) (Civ) (24 November 2023) (Ruling)

Neutral citation: [2023] KEBPRT 720 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
CIVIL
TRIBUNAL CASE E461 OF 2023
GAKUHI CHEGE, CHAIR & J OSODO, MEMBER
NOVEMBER 24, 2023**

BETWEEN

PREMIER CARE DIAGNOSTIC LIMITED APPLICANT

AND

OLTALET INVESTMENTS LIMITED RESPONDENT

RULING

1. The tenant/applicant herein moved this Tribunal by a motion dated 9th May 2023 seeking for restraining orders against the Landlord from interfering with its quiet enjoyment of the premises comprised of space on the first floor known as shop No. OLT/FF/25 measuring approximately 4207 square feet situated on Land Reference No. Narok Township/166 otherwise known as the Oltalet Mall pending hearing and determination of the reference.
2. The application is supported by the affidavit of DR. Stephen Ojwang sworn on 9th May 2023 and the grounds on the face thereof. The gist of the application is that the parties entered into a lease dated 19th June 2017 in respect of the suit premises for a term of six (6) years. The term expired on 28th February 2023 whereupon the Respondent offered and the Applicant accepted to renew the lease for another term of six (6) years which was to commence on 1st March 2023.
3. The Applicant contends that it had a legitimate expectation that the Respondent would renew the lease but had in a complete turn around issued a notice demanding the Applicant to vacate the suit premises within 14 days. It is the Applicant's case that the notice is fatally defective as it was not in the prescribed form and was for less than two months.
4. The Applicant contended that the Respondent had locked it out of the suit premises and threatened to auction its assets. As a result, the applicant had suffered and continued to suffer loss of revenue and reputational damage as a medical services provider.



5. Owing to the fact that no new lease had been executed, it is the Applicant's case that a controlled tenancy existed and consequently, the Tribunal had jurisdiction.
6. Interim orders were given on 11th May 2023 in terms of the application pending hearing inter-partes on 23rd June 2023.
7. The application is opposed through a replying affidavit of the Respondent's property manager one Cardiff Amondi sworn on 16th June 2023 wherein it is deposed that the initial lease dated 19th June 2017 expired on 28th February 2023 before the parties had agreed and/or formalized the renewal thereof and that no rent had been received from the tenant in respect of the suit premises for the successive months after the expiry thereof.
8. The tenant had expressed interest in renewing the expired lease vide a letter dated 16th September 2022 but the terms proposed by it were not acceptable to the landlord who required it to vacate on expiry of the lease. The tenant's letter is marked as annexure "CA-1".
9. The landlord has annexed several other letters and email correspondence dated 11th November 2022, 29th December 2022, 21st January 2023, 1st February 2023, 3rd March 2023, 29th March 2023, 1st April 2023, 14th April 2023, 15th April 2023 and 3rd May 2023.
10. The bottom line of all the foregoing correspondence is that the landlord's offer for renewal of lease was not accepted by the tenant by way of execution and payment of rent. The space offered by the landlord measured 4207 square feet.
11. The landlord claims in the replying affidavit for Kshs.2,049,650.40 in unpaid rent service charge and VAT arrears as set out on paragraph 35 of the replying affidavit.
12. According to the landlord, the tenant is to blame for non- renewal of lease in that it failed and/or deliberately refused to execute its acceptance of the offer letter which was never returned despite the same having been given in January 2023. As such, the tenant had no legitimate expectation that the lease would be renewed in absence of acceptance of the landlord's offer, payment of security deposit, quarterly rent, service charge or VAT.
13. As such, the reference is premature as no controlled tenancy has occurred. The tenant is said to have requested the landlord to allow it to vacate the suit premises and evacuate its CT Scan and X-ray machines by the end of May 2023 and had even offered to pay rent up to end of May 2023 on the pre-agreed rates contained in the letter of offer dated 21st January 2023.
14. The tenant had partially moved to another premises as per notice to be seen on annexure "CA-22". The tenant however continued to occupy the premises despite the said notice and moving its valuable machines therefrom without paying rent or consent of the landlord.
15. According to the landlord, the relationship between it and the tenant did not amount to a controlled tenancy and the dispute cannot be subject to the provisions of [Cap. 301](#), Laws of Kenya. As such, the reference and application ought to be dismissed and the tenant ordered to vacate and pay rent and service charge for the occupied space.
16. On 1st August 2023, this Tribunal discharged the interim orders given in favour of the tenant on account of non-payment of rent. However, the tenant filed yet another application dated 2nd August 2023 seeking reinstatement thereof pursuant to which an order of status quo was given pending hearing inter-partes on 29th August 2023.



17. The tenant filed a further affidavit sworn on 2nd August 2023 by Dr. Stephen Ojwang in support of the application dated 2nd August 2023.
18. The application is opposed through the replying affidavit of Timothy Maeku advocate sworn on 11th August 2023 wherein it is deposed that the tenant had not paid rent for the period March 2023 to August 2023 as ordered by the Tribunal.
19. The applications were directed to be canvassed by way of written submissions but only the Respondent's counsel complied.
20. This Tribunal is required to determine the following issues in this case:-
 - a. Whether there exists a controlled tenancy between the Applicant and the Respondent herein to warrant this Tribunal to exercise jurisdiction herein.
 - b. Whether the tenant's application dated 9th May 2023 and 2nd August 2023 ought to be granted or dismissed.
 - c. Who is liable to pay costs?.
21. The relationship between the parties herein is founded on the initial lease agreement dated 19th June 2017 which was for a period of six(6) years. The said lease expired on 28th February 2023 and there is no evidence from the materials placed before this Tribunal to show that it was renewed.
22. There were negotiations taking place between the parties which resulted into drafting of a letter of offer dated 21st January 2023 which is annexed to the Applicant's supporting affidavit of 9th May 2023. However, the same is not executed. The intention however was to renew the lease for six (6) years with effect from 1st March 2023.
23. We have seen annexure marked "CA-7" attached to the affidavit of Cardiff Amondi sworn on 16th June 2023 confirming that the terms of offer were acceptable to the Applicant. However, there is no evidence of any consideration having been paid in form of rent, security deposit, service charge or VAT.
24. Secondly there was no lease prepared and executed by both parties as envisaged in the draft letter of offer to bind the parties in their future relations. Consequently, the parties remained in the same position they were after expiry of the lease.
25. Section 60(1) &(2) of the [Land Act](#), 2012, provides as follows:-
 - "(1) if a lessee remains in possession of land without the consent of the lessor after the lease has been terminated or the term of the lease has expired, all the obligations of the lessee under the lease continue in force until such time as the lessee ceases to be in possession of the land".
 - (2) 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 having given up on any of rights or remedies of the lessor against the lessee for 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.



26. It is to be noted that the tenant having held over in the suit premises has not paid rent for a period of two (2) months as the sum of Kshs.200,000/- paid on 1st April 2023 went to clear rent balance for February 2023 in the sum of Kshs.158,000/- leaving a credit balance of Kshs.42,000/- as shown in annexure marked “CA 14” attached to the replying affidavit of Cardiff Amondi. As at the date of the said email of 14th April 2023, the tenant was in arrears of Kshs.1,545,000/- inclusive of security rent deposit. A notice of non -renewal marked “CA 16” was issued to the tenant which precipitated this suit.
27. On 17th April 2023, the tenant wrote an email through Dr. Stephen Ojwang indicating its intention to vacate the suit premises within one (1) week. It is therefore inconceivable that it thereafter rushed to this Tribunal for protection against alleged eviction.
28. Given all the foregoing analysis, we are not convinced that this Tribunal has the requisite jurisdiction to entertain this suit in absence of creation of a controlled tenancy under section 60(2) of the Land Act, 2012. Any subsequent rent payment after the initial lease expired can only be termed as mesne profits which are defined under Section 2 of the Civil Procedure Act, Cap. 21, Laws of Kenya as follows-
- “Mesne profits” in relation to property means those profits which the person in wrongful possession of such property have received therefrom together with interest on such profits but does not include profits due to improvements made by the person in wrongful possession”.
29. We have further noted that the Tenant/Applicant vide annexure marked “CA22” informed its customers that it had moved to its main branch located at TM, Zebu Lodge Junction effective from 17th April 2023. It was therefore an abuse of court process to come to court and apply for orders of injunction thereafter through concealment of material facts as submitted by counsel for the Respondent.
30. In the premises, the applicants applications dated 9th May 2023 and 2nd August 2023 are candidates for dismissal for want of jurisdiction and for being an abuse of court process.
31. Costs of every action before this Tribunal are at our discretion under Section 12(1) (k) of Cap. 301, Laws of Kenya but always follow the event unless for good reasons otherwise ordered. We have no reason to deny costs to the Respondent.
32. In conclusion, the following orders commend to us under Section 12(4) of Cap. 301, Laws of Kenya.:-
- (a) The applications dated 9th May 2023 and 2nd August 2023 by the Tenant/applicant are hereby dismissed for want of jurisdiction and for being an abuse of court process.
 - (b) The applicant shall pay the Respondents costs of Kshs.100,000/- for abusing the court process in line with Section 12(k) of Cap. 301, Laws of Kenya.
 - (c) The status quo order given in favour of the applicant herein is discharged/set aside.

It is so ordered.

RULING DATED, SIGNED & VIRTUALLY DELIVERED THIS 24TH DAY OF NOVEMBER, 2023.

HON. GAKUHI CHEGE - PANEL CHAIRPERSON

HON. JOYCE OSODO - MEMBER

BUSINESS PREMISES RENT TRIBUNAL

Ruling delivered in the presence of:



Kinuthia for the Tenant/Applicant

M/S Kariuki for the Landlord/Respondent

