



**Namikoye & another v Waurimu & another (Tribunal Case E043 of 2024)  
[2024] KEBPRT 1595 (KLR) (Commercial and Tax) (15 November 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 1595 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
COMMERCIAL AND TAX  
TRIBUNAL CASE E043 OF 2024  
A MUMA, MEMBER  
NOVEMBER 15, 2024**

**BETWEEN**

**ROSE NAMIKOYE ..... 1<sup>ST</sup> TENANT**

**CHRISTIAN ANTOSA ..... 2<sup>ND</sup> TENANT**

**AND**

**ALICIA WAURIMU ..... 1<sup>ST</sup> LANDLORD**

**TOM MAINGI MBUVI ..... 2<sup>ND</sup> LANDLORD**

**RULING**

**A. Parties And Their Representatives**

1. The 1<sup>st</sup> Applicant, Rose Namikoye, occupies the premises at Sun-Park area in Malindi (the “Tenant”).
2. The firm of Katsoleh & Company Advocates represent the Tenant in this matter.
3. The 2<sup>nd</sup> Applicant, Christian Antosa, also occupies the premises at Sun-Park area in Malindi (the “Tenant”).
4. The firm of Mkan & Company Advocates represent the Tenant in this matter.
5. The 2<sup>nd</sup> Respondent, Tom Maingi Mbuvi, is the proprietor of the premises at Sun-Park area in Malindi (the “Landlord”).
6. The firm of Tonia Mwanja & Associates represents the Landlord in this matter.



## **B. Dispute Background**

7. The 1<sup>st</sup> Applicant moved this Honorable Tribunal vide an Application dated 5<sup>th</sup> February 2024. The 1<sup>st</sup> Applicant sought, inter alia, the following Orders from this Honorable Tribunal:
  - I. An order restraining the Respondent, whether acting personally or through their servants, agents, employees, assigns, or representatives, from seizing or distraining the Applicant's goods for rent, or otherwise claiming distress for rent, until the hearing and determination of this Application.
  - II. An order restraining the Respondent, whether acting personally or through their servants, agents, employees, assigns, or representatives, from harassing the Applicants in their business and residential premises located at Plot No. MLD/2480 Malindi, or in any way interfering with their quiet enjoyment, use, and occupation of the premises until the hearing and determination of this suit.
  - III. The costs of the development and improvement amounting to KShs.3,000,000 to be recovered from the Landlord.
8. Having considered the 1<sup>st</sup> Applicant's Application, the Tribunal vide an Order dated 8<sup>th</sup> February 2024 allowed Prayers 1,2,3 and 4 as per the 1<sup>st</sup> Applicant's Application dated 5<sup>th</sup> February 2024 in the interim.
9. The 2<sup>nd</sup> Applicant further filed a further affidavit dated 25<sup>th</sup> July 2024.
10. Subsequently, the Landlord filed a Replying Affidavit dated 7<sup>th</sup> September 2024 in response to the 1<sup>st</sup> Applicant's Application dated 5<sup>th</sup> February 2024 and later filed his written submissions dated 7<sup>th</sup> October 2024.

## **C. Tenants' Claim**

### **The 1<sup>st</sup> Applicant's Claim**

11. The 1<sup>st</sup> Applicant avers that they operate a restaurant and also reside in a residential apartment.
12. She states that they have been tenants on the premises since June 2023 and have consistently paid rent on time, with the agreed monthly rent for both premises set at KShs. 20,000, inclusive of electricity and water.
13. She avers that the Landlords did not disclose to them that they were not the owners of the house at the time they leased the premises.
14. The Landlords have disconnected the electricity supply without any explanation claiming arrears in rent yet they have been paying for the electricity and water from the time they entered the premises.
15. The 1<sup>st</sup> Applicant disputes the claim of rent arrears, asserting that it is unsubstantiated and unfounded.
16. She also states that, with the Landlords' consent, she undertook improvements on the premises at a cost of approximately KShs. 3,000,000, which should be deducted from the rent until fully recovered.
17. Nonetheless, she states that she is ready to pay rent whenever it falls due to the Tribunal for the Landlord's collection when such rent is ascertained to be due.



### **The 2<sup>nd</sup> Applicant's claim**

18. The 2nd Applicant states that he entered into a tenancy agreement with the Landlord, under which he was to pay a monthly rent of KShs. 20,000, deducting KShs. 14,000 each month as reimbursement for development costs, leaving a monthly rent balance of KShs. 6,000.
19. He asserts that during his occupancy, he incurred expenses totalling KShs. 4,150,000 for renovations made to the premises.
20. The 2nd Applicant further claims that he engaged a licensed valuer, Citiscape Valuers and Estate Agent Limited, to prepare a valuation report, which was duly completed and filed.
21. He also claims to have M-Pesa statements showing the rent payments made to the Landlord. Accordingly, he asserts that he has overpaid rent by a total of KShs. 260,000 for a 13-month period, against the required KShs.78,000.
22. Including all M-Pesa payments made to the Landlord, he claims an overpayment of KShs. 4,103,000.

### **D. Landlords' Defence**

#### **The 2<sup>nd</sup> Respondent's Defence**

23. The Landlord avers that, sometime in April 2023, the Tenants approached him seeking to rent his premises, specifically two shops, for the purpose of operating a restaurant. They verbally agreed on a monthly rent of KShs. 26,000 for both shops, with the Tenants responsible for utility bills.
24. The Landlord further claims that the M-Pesa statements presented by the 1st Applicant do not reflect rent payments, rather, these funds were transferred to the 1st Respondent, who served as an employee or supervisor of the Tenants, based on their private arrangements.
25. He further states that he is the owner of the said premises having been gifted the same by his mother before her demise and therefore the premises belong to him for all intents and purposes.
26. Additionally, the Landlord avers that he has never disrupted the Applicants' business operations but has consistently requested for rent payments. Due to their refusal to pay, the Tenants have accused him of harassment.
27. He further states that the electricity and water supply were disconnected by Kenya Power and Malindi Water and Sewerage Company due to non-payment.
28. The Landlord avers that the Tenants made alterations to the original condition of the premises without his knowledge or consent, and thus, they should restore the premises to their original state, settle any outstanding arrears, and vacate the premises.

### **E. Issues For Determination**

29. Having carefully perused all the pleadings and evidence presented before this Honourable Tribunal by the parties, it is my respectful finding that the sole issue for determination is:
  - a. Whether the Tenant is in arrears?
  - b. Whether the Tenants should recover the costs of development and improvement of the premises from the Landlord?



## **F. Analysis And Findings**

### **Whether the Tenant is in arrears**

30. Upon perusal of the pleadings presented before this Honourable Tribunal, it is quite evident that the monthly rent payable is in contention as both the Landlord and Tenant aver that the monthly rent payable is KShs.26,000 and KShs.20,000 respectively. Additionally, the Tenants deny being in rent arrears, despite the Landlord's assertion to the contrary.
31. As there is no formal tenancy agreement between the parties, this Honourable Tribunal shall rely on the statements of account provided.
32. It is the Tenants' contention that the rent payable is Kshs.20,000. Vide the Tenant's (1st Applicant) Application dated 5th February 2024, the Tenant has provided this Honourable Tribunal with the statements of accounts evidencing payment of rent to the Landlords herein as well as payments for electricity and water bills.
33. However, it should be noted that despite the filing of the statements of account, this Honourable Tribunal is unable to assess the monthly rent payable as the same is ambiguous.
34. Conversely, the Landlord avers that the monthly rent payable is KShs.26,000 and alleges that the Tenants are in arrears totalling KShs.364,000. Despite this claim, the Landlord has not provided sufficient evidence to substantiate the current monthly rent due or payable.
35. Accordingly, as the Tenant has adduced evidence demonstrating payment of rent, this Honourable Tribunal is inclined to place reliance upon the Tenant's statements of account.

### **Whether the Tenants should recover the costs of development and improvement of the premises from the Landlord**

36. In addressing this issue, it is essential that we first determine whether the Tenants were required to obtain the Landlord's consent before undertaking development and improvements on the premises.
37. The answer to this question lies in the tenancy agreement and the Act. It is apparent, however, that the tenancy between the parties herein was not in writing as no agreement governing the relationship between the Tenant and Landlord herein has been provided to the Tribunal.
38. Additionally, the Tribunal takes note that the tenancy agreement provided by the Tenants (2nd Applicant) is irrelevant to the present case, as the "identified landlord" is unknown to the Tribunal.
39. Over and above that, this Tribunal proceeds under the presumption that the tenancy was one that was not reduced into writing, in which case the terms and conditions to be implied and applied in the tenancy are those under the Act.
40. Section 3(2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Cap 301, Laws of Kenya (hereinafter the "Act") provides as follows:

“(2) The terms and conditions set forth in the schedule to this Act shall be implied in every controlled tenancy which is not reduced to writing or which is in the prescribed form.”



41. The First Schedule of the Act outlines the terms and conditions to be implied in tenancies. The terms that, as per the Tribunal's view, are relevant to the present case are:
- “ v) The lessor shall be responsible for all repairs to roofs, main walls, main drains, main electric wiring and structures, and shall be responsible for all necessary renewals to the premises.
  - vi) The lessee shall be responsible for all internal repairs and decorations, fair wear and tear excepted.
  - vii) The lessor shall be responsible for the repair, maintenance, cleaning and lighting of common parts where part of building is let.” (emphasis ours)
42. It is clear from the record that the claims of the Tenants and that of the Landlord are at variance. Whereas the Landlord categorically denies that there was no consent sought and none given, the Tenants maintain that the development and improvement of the premises was done with the consent of the Landlord.
43. However, the Tenant has not provided this Tribunal with any evidence proving that such consent was granted.
44. Furthermore, as per the First Schedule of the Act, it is quite clear that the Lessor (the Landlord) is responsible for all repairs to roofs, main walls, main drains, main electric wiring and structures, and shall be responsible for all necessary renewals to the premises.
45. Conversely, the Lessee (the Tenant) is responsible for all internal repairs and decorations, fair wear and tear excepted.
46. Consequently, the alterations made by the Tenants constituted not only repairs but also structural renewals to the premises, which, according to the schedule, fall under the responsibility of the Landlord.
47. Furthermore, the Court (C. Yano J.) in *Adbulmajid Mohamed Adam v Nimish Shah t/a Flora Printers* [2018] eKLR stated as follows:
- “My understanding of this passage is that it is a breach of the covenant to repair if the tenant pulls down any part of the premises or makes alterations in them unless he is expressly or impliedly given power to do so by the lease. Where there was no written lease as in the present case, consent of the landlord was necessary before such repairs or alterations are made. There was no consent or authority sought from the Appellant hence the actions of the Respondent amount to a breach of the lease.”
48. In light of the above, this Tribunal finds that the Tenants have failed to provide any evidence showing that consent was obtained from the Landlord, leading to the inference that no such consent was sought.
49. Furthermore, despite the Tenants (2nd Applicant) having submitted a valuation report detailing the extent of the developments and improvements made, along with costs amounting to KShs.4,150,000, the report is insufficient. It does not provide a breakdown of the costs incurred for each improvement. It is important to strictly stipulate repairs undertaken and amounts of each with annexed evidence of receipts or invoices or LPOs as the case may be albeit to give us the market values.<sup>i</sup>
50. Additionally, the Tenants have not provided this Tribunal with any evidence on the specific receipts of the items purchased for the development and improvement of the premises.



51. Over and above that, the Tenant has failed to approach this Honourable Tribunal in the prescribed manner.
52. As per Regulation 3 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) (Tribunal) (Forms and Procedure) Regulations, reference to the Tribunal under section 6(1) or section 12(4) of the Act shall be in Forms B and C in the Schedule to these Regulations.
53. The Tenant (1<sup>st</sup> Applicant) approached this Honourable Tribunal vide a Notice of Motion Application instead of a Reference in the prescribed form (Form C) thereby not complying with the procedural requirements. Nevertheless, despite this non-compliance, this Honourable Tribunal proceeded to hear the case based on its merits.

#### **G. Orders**

54. In the upshot the Tenant's Application dated 5<sup>th</sup> February 2024 is hereby dismissed.
55. Each party shall bear its own cost.

**RULING DATED, DELIVERED AND SIGNED AT NAIROBI ON THIS 15<sup>TH</sup> DAY OF NOVEMBER 2024 IN THE ABSENCE OF THE TENANTS AND IN THE PRESENCE OF MR. MWANGI FOR THE LANDLORD/2<sup>ND</sup> RESPONDENT.**

**HON A. MUMA - MEMBER**

**BUSINESS PREMISES RENT TRIBUNAL**

