



Kamundeh Kimathi Mwirabua t/a Richdad Enterprises v Magomano Trading Company Ltd (Tribunal Case E1261 of 2023) [2024] KEBPRT 409 (KLR) (19 April 2024) (Ruling)

Neutral citation: [2024] KEBPRT 409 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E1261 OF 2023
GAKUHI CHEGE, CHAIR & J OSODO, MEMBER
APRIL 19, 2024**

BETWEEN

**KAMUNDEH KIMATHI MWIRABUA T/A RICHIDAD
ENTERPRISES APPLICANT**

AND

MAGOMANO TRADING COMPANY LTD RESPONDENT

RULING

1. Before us is an application dated 15th December 2023 in which the tenant has sought for the following Orders;
 - i. That on the grounds more specifically set out in the Certificate of urgency filed herein, the application be certified urgent and service thereof be dispensed with in the first instance.
 - ii. That pending the inter-partes hearing and determination of the application and reference, this Honorable Tribunal be pleased to grant a temporary order of injunction restraining the Respondent/Landlord by itself, agents, servants or whomsoever acting on its behalf from interfering with the Applicant/Tenant's quiet enjoyment of the premises comprising space measuring approximately 2699 Sq ft inclusive of common area apportionment situated on 9th Floor of Sonalux House on L.R No. 209/601.
 - iii. That pending the inter-partes hearing and determination of the application and reference, this Honorable Tribunal be pleased to grant a temporary order of injunction restraining the Respondent/Landlord by itself, agents, servants or whomsoever acting on its behalf from harassing the sub-tenants currently occupying the premises comprising space measuring approximately 2699 sq ft inclusive of common area apportionment situated on 9th Floor of Sonalux House on L.R No. 209/601.



- iv. That this Honorable Tribunal be pleased to grant an order of mandatory injunction compelling the Respondent/Landlord to carry out repairs, to wit replace the entire roof of premises comprising space measuring approximately 2699 Sq ft inclusive of common area apportionment situated on 9th Floor of Sonalux House on L.R No. 209/601, for which it is statutorily responsible.
 - v. That this Honorable Tribunal be pleased to grant an order compelling the Respondent/Landlord to pay for damages incurred by the Applicant/Tenant for breach of statutory duty to carry out repairs at the premises.
 - vi. That this Honorable Tribunal be pleased to grant an order for payment of damages for loss of business occasioned by breach of statutory duty to carry out repairs at the premises.
 - vii. That in the alternative, this Honorable Tribunal be pleased to grant an order for payment of damages for breach of tenancy agreement.
 - viii. That this Honorable Tribunal be pleased to make such Order as it deems mete and just.
 - ix. That the costs of the Application be borne by the Respondent/Landlord.
2. The application is premised on the grounds set out on the face thereof and the affidavit of the Tenant/Applicant sworn on 15th December 2023 wherein he deposes that he is the sole proprietor of Richdad Enterprises which is duly registered as a business name vide registration number BN/2009/37355 as per annexure marked "KKM1".
 3. It is further deposed that on or about December, 2021, the Tenant entered into an oral tenancy agreement for premises comprising space measuring approximately 2699 Sq ft inclusive of common area apportionment situated on 9th Floor of Sonalux House on L.R NO. 209/601 (hereinafter the premises) with some of the salient features of the said oral tenancy agreement being:
 - a. That the Tenant would pay a commitment fee of Kshs. 300,000 for the Respondents/Landlord to commence the necessary repairs to make the premises tenantable as agreed.
 - b. That he would pay monthly rent of Kshs. 150,000 which amount would be inclusive of service charge and water charges.
 - c. That he would pay 3 months' deposit amounting to Kshs. 450,000/=.
 - d. That half of the roof of the premises was/is covered by iron sheets while the other half is a concrete slab.
 - e. That the Respondent/Landlord would replace the iron Sheets Roof which was old and worn out and leaking heavily and spilling water into the premises.
 - f. That the Respondent/Landlord would repair the Slab/Roof Top which was old and worn out and leaking heavily and spilling rain water into the premises.
 - g. That the Respondent/Landlord would repair the Ceiling beneath the iron sheets which was old and fallen apart.
 - h. That the Respondent/Landlord would replace the boards that formed part of the wall with stone bricks.
 - i. That the Tenant would partition the premises for purposes of sub-letting.



- j. That the Tenant would carry out repairs to the premises including retiling the entire floor and painting the premises and the amounts expended in tiling and painting would be offset from rent payable to the Landlord.
 - k. That the commencement date for the tenancy would be determined by satisfactory replacement/repair of the worn out iron sheet roof, falling ceiling and leaking concrete slab roof by the Respondent/Landlord as mentioned above.
4. The Tenant deposes that whereas he complied by paying all the sums payable to the Respondent/Landlord, the latter reneged on his part by blatantly refusing and/or declining to repair the roof and ceiling and part of the wall of the premises thereby exposing him and the sub-tenants to extreme weather elements and risk of bodily harm. The payment receipts, photographs and video flash disc are marked “KKM2a, 2b and 2c”.
 5. The Tenant deposes that he called for several meetings with the Respondent/Landlord at the premises to try to solve the stalemate on the repairs of the premises but the Respondent/Landlord totally refused to repair the premises. During one of the meetings the Respondent/Landlord is said to have requested the Tenant to Submit quotations of all the repairs required and any damages occasioned by the rains/leakages since October 2022 but failed to act despite being furnished with the quotation by the tenant’s contractor one Mr Njiru. The said quotation is marked as annexure “KKM3”.
 6. It is the Tenant’s case that during the last meeting held on 14th November 2023, the Directors of Magomano Trading Company and their agent, Mr James Muriithi became very aggressive against him and they started shouting him down and threatened to take over the business from him. His Contractor, one Mr Njiru was forcefully kicked out of the said meeting by the Respondent/Landlord when he tried to explain the repairs required.
 7. The aforesaid, Mr James Muriithi who was introduced by the Respondent/Landlord has been endlessly persuading the Tenant to stop pursuing repairs and abandon the business with intention of the Landlord taking over the business.
 8. Despite several reminders, the Respondent/Landlord refused, declined and/or failed to carry out repairs on the premises for which he is responsible thereby occasioning the Tenant damage and loss of business.
 9. The Respondent/Landlord resulted into illegally harassing the sub-tenants currently occupying the premises. On or about 4th December, 2023, the Respondent/Landlord instructed its property Manager, M/S N W Realite to irregularly issue instructions to levy distress for rent vide proclamation notice dated 1st December, 2023 which is annexed as “KKM5”.
 10. On 5th December 2023, the Respondent/Landlord is accused of sending unknown people at around 6:30pm to harass the sub-tenants who were instructed to be paying rent to Magomano Trading Group.
 11. According to the Tenant, the aforesaid proclamation notices are irregular and illegal for the following reasons:
 - a. The amount demanded for in the proclamation notice dated 1st December, 2023 vary from the amount indicated in the letter dated 12th October, 2023.
 - b. The proclamation notices are irregular and/or illegal as they attach property of the sub-tenants who are not privy to the oral tenancy agreement between the parties herein.
 12. On the basis of the foregoing matters, the Tenant seeks that the application be allowed.



13. The said application having been filed under certificate of urgency was considered ex-parte and interim orders granted.
14. On 19th December 2023, the Tenant amended his application to include a prayer to restrain the Landlord from levying distress against his properties. The said order was also granted ex-parte on 20th December 2023.
15. The Landlord upon being served with the Tenant's applications aforesaid filed its motion dated 31st January 2024 seeking for orders;
 - i. That the application be certified urgent and service thereof be dispensed with in the first instance.
 - ii. That pending the hearing and determination of the application, this Honorable Tribunal be pleased to order a stay of execution of its Orders given on 20th December, 2023.
 - iii. That this Honorable Tribunal does issue an order directing the Tenant to forthwith pay to the Landlord Kshs. 1,028,120/= (Kenya Shillings One Million, Twenty-Eight Thousand One hundred and Twenty) being rent arrears for the year 2023.
 - iv. That this honorable court does issue an order compelling the Tenant to forthwith pay to the Landlord Kshs. 450,000/= (Kenya Shillings Four Hundred and Fifty Thousand) being the rent payable for the first quarter of the year 2024.
 - v. That in default of payments in Order 3 and 4 within 7 days, all the sub-tenants on 9th Floor, Sonalux House, to have an option of signing new tenancy agreements with the Landlord or vacating the premises, and thereafter, execution for recovery of any pending arrears to issue against the Tenant personally.
 - Vi. That in default of any sub-tenant to exercise either of the options in order 5 above, the Landlord be at liberty to levy distress against them.
 - Vii. That this honorable Tribunal be pleased to review, vary and/or set aside its orders given on 20th December 2023.
16. On 1st February 2024, the said application was placed before the duty court and prayers 1, 2, 3 & 4 were granted pending hearing inter-partes on 27th February 2024.
17. The application is premised on the grounds set out on the face thereof and the supporting affidavit of James Muriithi sworn on 31st January 2023 wherein it is deposed that he is the Agent of the Respondent herein.
18. According to the affiant, the Tenant herein deliberately misrepresented himself before this honorable court and withheld material information that led to the court granting interim orders on 20th December 2023 to the detriment of the Respondents.
19. The said orders are said to be very unjust to the Landlord, because the tenant came to this Honorable Tribunal with unclean hands and hoodwinked the Tribunal into granting the said orders, yet he is the one who has been guilty of non-payment of rent for a period of over one year.
20. Since the Tenant was granted a lease of the subject premises towards the end of the year 2021, he has only paid rent once, despite having sub-let the subject space and collecting rent from the sub-tenants. He was in arrears of over Kshs 1,000,000/=.



21. The Tenant was therefore undeserving of the interim orders granted for the reasons that he was granted space in the subject premises at an agreed rent of kshs 150,000/= payable quarterly in advance.
22. He made a deposit of Kshs 600,000/= in favor of the Landlord being the initial two months' security deposit and part of the first quarter as per annexure marked "JM-3".
23. At the time, the roof needed some repairs and the Tenant entered into an oral agreement with the Landlord that the Tenant would start fitting in and partitions as the Landlord completed the repairs of the roof. During the said period, the Tenant was not being charged any rent or service charge.
24. The Tenant incurred costs of tiling the space and the Landlord agreed to credit the amount spent to the Tenant's rent account. The Landlord had by then prepared an offer letter with a commencement date of September 2022 but the Tenant declined to sign it. The offer letter is marked "JM-4".
25. By 1st October, 2022, even though the Tenant had neither signed the Offer Letter nor obtained express consent of the Landlord to sublet the space, he began subletting the space, and acquired several sub-tenants.
26. In November 2022, there was a broken window pane on one of the windows, which caused rain water to leak into part of the premises and even though this was not the Landlord's duty to repair, the Landlord paid contractors to repair the same.
27. That by this time, the Landlord had prepared a Lease Agreement for the Tenant to sign, but the Tenant declined to sign the same, without any plausible reasons.
28. That after several consultative meetings with the Tenant, the Landlord requested the Tenant to now sign a Lease Agreement, with a commencement date of January 2023, whereby the amounts paid by him would be credited to his rent account as from January 2023, but the Tenant once again declined to sign the same, and further declined to pay any rent despite several demands to do so.
29. That the premises remained tenantable and in good condition until April 2023 when the rainy season started and a section of the property began leaking. The Landlord intervened and had the same repaired right away and the Tenant was granted a rent waiver for that month due to the inconveniences caused by the leakage.
30. That in September 2023, an initial meeting was held between the Tenant and the Landlord's agents, to find out why he refused to sign the Lease Agreement, and why he was not paying rent, despite the fact that he was collecting rent from the sub-tenants, but despite this, he did not start paying for his tenancy.
31. That by this time, the Landlord had prepared a Lease Agreement for the Tenant to sign, but the Tenant declined to sign the same without any plausible reasons.
32. That after several consultative meetings with the Tenant, the Landlord requested the Tenant to now sign a Lease Agreement, with a commencement date of January 2023, whereby the amounts paid by him would be credited to his rent account as from January 2023, but the Tenant once again declined to sign the same, and further declined to pay any rent despite several demands to do so.
33. That the premises remained tenantable and in good condition, until April 2023 when the rainy season started, and a section of the property began leaking. The Landlord intervened and had the same repaired right away and the Tenant was granted a rent waiver for that month, due to the inconveniences caused by the leakage.
34. That in September 2023, an initial meeting was held between the Tenant and the Landlord's agents, to find out why he refused to sign the Lease Agreement, and why he was not paying rent, despite the



- fact that he was collecting rent from the sub-tenants, but despite this, he did not start paying for his Tenancy.
35. That several months later and several demands to pay rent and to sign the Lease Agreement being delivered to the Tenant, he remained adamant in his refusal to pay rent or sign the Agreement. The Landlord relies on copies of demand letters marked "JM 5".
 36. Once again in November 2023, the Tenant alleged that the subject premises needed repairs but this time, the Landlord demanded that the Tenant pays his rent arrears, so that the Landlord could afford to pay for any confirmed repairs, but still, the Tenant declined to pay any amount.
 37. In December 2023, the Landlord instituted distress against the Tenant, who in turn rushed to this court and hoodwinked the court to believe that he was a fully paid up Tenant who was aggrieved.
 38. That after proclamation was conducted in December 2023, several sub-tenants approached the Landlord to seek a solution because they felt aggrieved, having paid their rent dutifully to the Tenant herein and many of them preferred to sign proper leases with the Landlord herein but a few days thereafter they were threatened with eviction by the Tenant.
 39. The Landlord attaches annexures marked "JM6a-c" being a spread sheet of all amounts collected by the Tenant from the sub-tenants since October 2022 to November 2023.
 40. It is therefore the Landlord's case that the Tenant herein has come to court with unclean hands and is only seeking to outstretch the Landlord's good will. He is collecting rent from the sub-tenants every month, but he is not remitting any amount to the Landlord. Since his initial deposit of Kshs. 600,000/= in December 2021, the Tenant has never paid any rent to the Landlord.
 41. The Landlord was therefore experiencing the tough economic situation in the country while the Tenant is unjustly enriching himself.
 42. The Landlord contends that a clear look at the amounts claimed by it demonstrates the excess grace extended to the Tenant which has only charged rent from January 2023 which is thirteen months since the parties got into a Lease Agreement with the Tenant having had possession of the premises free of charge as per annexure marked "JM7" being a spreadsheet of the Tenant's Rent Account detailing all the 2023 arrears. The Landlord explains at paragraph 12 of the supporting affidavit how the amount of rent of Kshs 1,478,120/= claimed against the Tenant is made up. The amount of kshs 321,800/= used by the Tenant in tiling the premises is also credited besides the waiver of one month's rent during the repair of leakage of the premises. It is on the said basis that the Landlord seeks for discharge of the orders issued in favor of the Tenant.
 43. On 12th February 2024, the Tenant moved this Tribunal seeking that the orders given on 1st February 2024 in favor of the Landlord be set aside, vacated, rescinded or reviewed. He also sought for stay of the said orders and reinstatement of the orders of 20th December 2023.
 44. He further sought for an order directing the sub-tenants to deposit rent into a joint account to be opened by him and the Landlord. Finally, he seeks this Tribunal's authority to repair the entire roof of the suit premises inclusive of the common areas.
 45. The application was considered ex-parte and the Tenant was directed to serve it for hearing inter-partes on 27th February 2024. On 26th February 2024, the Tenant filed yet another application seeking stay of sale of his tools of trade listed in the notification dated 20th February 2024 which was scheduled for 28th February 2024.



46. The Tenant also sought for the setting aside of the attachment and/or sale of his tools of trade listed in the notification of sale of movable property dated 20th February 2024 which was scheduled on 28th February 2024.
47. The Tenant also sought for an order suspending payment of a portion of rent payable for the premises comprising space measuring approximately 1349 situated on 9th Floor of the suit premises.
48. All the applications were directed to be disposed of by way of written submissions but we have only seen submissions by the Landlord's Counsel but none from the Tenant's Counsel.
49. The following issues emerge for determination in this case;
- Whether the tenant is entitled to the reliefs sought in the applications dated 19th December 2023, 12th February 2024 and 26th February 2024.
 - Whether the Landlord is entitled to the reliefs sought in the application dated 31st January 2024.
 - Who is liable to pay costs of the applications aforesaid?
50. The Tenant is essentially seeking for injunctive reliefs in all the applications filed by him. The applications are opposed through the replying affidavit sworn by one James Muriithi on behalf of the Landlord on 1st April 2024 wherein he deposes that the application dated 26th February 2024 was overtaken by events as the sale sought to be stopped was conducted on 28th February 2024 as per annexures marked "JM2a-q". In regard to the prayer for suspension of rent, it is deposed that the Tenant has not paid rent since January 2022 yet he has been collecting rent from the sub-tenants.
51. According to the Landlord, the portion the Tenant seeks to be exempted from paying rent is occupied by subletting tenants and the prayer was a ploy to evade payment of rent for the same. The lease agreement is said not to be divisible. The orders of 20th December 2023 are therefore challenged on the basis that they were made through deliberate misrepresentation or withholding of material information.
52. The Tenant is accused of being in rent arrears of Kshs 1,928,120/= to date. As such, the prayer for review of the orders of 1st February 2024 according to the Landlord is an abuse of court process. The tenant is said not to have paid rent since taking possession save for a sum of kshs 600,000/= initially paid as deposit.
53. The Tenant is accused of coming to court with unclean hands and trying to stretch the Landlord's goodwill. He is collecting rent from the sub-tenants without remitting any amount to the Landlord.
54. In response to the Landlord's application dated 31st January 2024, the tenant filed a replying affidavit sworn on 12th February 2024 wherein he deposes in material part that part of the roof covering half space of the suit premises has never been repaired by the Landlord rendering it uninhabitable due to being exposed to extreme weather elements including rain water, wind and dust as per annexure marked "KKM-2". As such, the Tenant deposes that only half of the premises is in use.
55. The tenant deposes that he has so far paid a sum of kshs 1,403,700/= made up as follows-
- Kshs 300,000/= being commitment fee paid in cash to Samuel Gichimu Gikonyo on 8th December 2021.
 - Kshs 600,000/= being rent and security deposit paid to the Landlord's account on 9th December 2021.



- c. Kshs 321,800/= spent on tiling the entire floor of the space which was to be credited to the rent account.
 - d. Kshs 181,900/= spent on repairing and painting the ceiling, painting the four main walls of the premises and plumbing works which was to be credited to the rent account.
56. The Tenant admits that the sum of Kshs 300,000/= was to be retained as security deposit and therefore the total rent paid is Kshs 1,103,700/=. According to the Tenant, the tenantable space is only half of what was agreed upon and consequently ought to attract a monthly rent of Kshs 75,000/=. He therefore deposes that the total rent payable between January 2023 and 30th March 2024 is Kshs 1,125,000/= which after being set off against the amount already paid leaves a balance of Kshs 21,300/= which he was willing to settle immediately.
57. Based on the foregoing affidavits, it is clear that the dispute between the two parties relate to alleged rent arrears owing by the Tenant to the Landlord. There is no dispute that the parties entered into a tenancy agreement which was not reduced into writing in respect of the suit premises at a monthly rent of kshs 150,000/= in the year 2021.
58. It is admitted by the Landlord that some repairs were supposed to be undertaken and indeed some were undertaken by the Tenant while the roof repair was undertaken by the Landlord. The tenant brought in sub-tenants who still occupy the suit premises and have been paying rent to him despite his complaint that the premises are uninhabitable.
59. We have considered the Tenant's request to be allowed to pay half rent for the premises and note that there is no tenancy notice served upon the Landlord for reassessment of rent in accordance with Section 4(3) of Cap. 301, Laws of Kenya which provides as follows:-
- “(3) A tenant who wishes to obtain a reassessment of the rent of a controlled tenancy or the alteration of any term or condition in, or of any right or service enjoyed by him under, such a tenancy, shall give notice in that behalf to the landlord in the prescribed form.”
60. The duty of this Tribunal is to enforce contracts made by parties and not to make new contracts for them. This is what the Court of appeal stated in *National Bank of Kenya Limited Vs Pipeplastic Samkolit (K) Limited* (2001) eKLR wherein it was held as follows;
- “Having directed himself so far quite properly, the learned judge proceeded to assume (when there was no basis for such an assumption) that the appellant bank would be willing to waive some of the interest charged. Stepping into the shoes of the appellant bank the learned judge decided that a large part of the
- interest would or could be waived. This, in our view, is a serious misdirection on the part of the learned judge. A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.
- As was stated by Shah JA in the case of *Fina Bank Limited vs Spares & Industries Limited* (Civil Appeal No 51 of 2000) (unreported):
- “It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part



of equity's function to allow a party to escape from a bad bargain". (emphasis added).

61. In view of the foregoing observations, it is quite clear to us beyond any peradventure that the tenant's case is founded on quick sand and the reliefs sought cannot inure in his favor. He has already admitted non-payment of rent as alleged by the Landlord and has therefore come to this Tribunal with unclean hands. He is therefore undeserving of the equitable remedies sought in his applications aforesaid. Justice is a double-edged sword which cuts both ways and the Tenant cannot demand protection while in breach of his covenant to the chagrin of the Landlord which is entitled to a return on its investment.
62. In the case of Samuel Kipkori Ngeno & Another Vs Local Authorities Pension Trust (Registered Trustees) (2013) eKLR at paragraphs 9 & 12, Justice H.P.G Waweru had the following to state;

“9. A tenant's first and main obligation is to pay rent as and when it becomes due, for the landlord has the right to an income from his investment. Why would a tenant allow himself to fall into such huge arrears of rent?”

.....

“12. The temporary injunction sought in the present application is an equitable remedy at the court's discretion. He who comes to equity must come with clean hands. A tenant who is in huge arrears of rent is undeserving of the court's discretion. The court cannot be the refuge of a tenant who fails to meet his principle obligation of paying rent as and when it becomes due.”

63. In regard to the Landlord's application dated 31st January 2024, we note that the Tenant does not deny failure to pay rent but blames the same on the state of the building housing the suit premises. We have not seen any expert report to prove the said allegation neither has the Tenant denied that he has sub-tenants in the same premises which are said to be uninhabitable. He has not served notice upon the Landlord to terminate the tenancy and he is therefore obligated to pay rent as per the tenancy agreement entered with it. Consequently, prayers 2, 3 ,4 & 7 are allowed.
64. However, prayer 5 & 6 of the said application cannot be granted as the sub-tenants have no privity of contract with the Landlord. The tenancy between the Tenant and the Landlord having not been terminated, the latter cannot take over the sub-tenants neither can it levy distress against them. The Landlord can however seek to attach the rental income accruing from the suit premises before the Subordinate court pursuant to Section 14(1) of Cap. 301, as read with Order 22 Rule 36 of the Civil Procedure Rules, 2010.
65. Award of costs in every action before this Tribunal are in 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 Landlord being the successful party.
66. Before we conclude this ruling, we note that the Tenant's Reference/Complaint filed herein raises the same issues as the applications considered above. We are therefore entitled under Section 12(4) of Cap. 301 to order the instant ruling to apply to the said Reference/Complaint.
67. In conclusion therefore, the following final orders commend to us;
- a. The tenant's applications dated 19th December 2023, 12th February 2024 and 26th February 2024 are hereby dismissed with costs to the Landlord.



- b. The Landlord's application dated 31st January 2024 is allowed in terms of Prayers 2, 3, 4 & 7 with costs.
- c. The Landlord's costs are assessed at Kshs 50,000/= all inclusive.

It is so ordered.

DATED, SIGNED & VIRTUALLY DELIVERED THIS 19TH DAY OF APRIL 2024

HON GAKUHI CHEGE - PANEL CHAIRPERSON

HON JOYCE A OSODO - PANEL MEMBER

In the absence of the parties

