



**New Island Limited v Isray Chemist Limited (Tribunal Case  
E103 of 2023) [2023] KEBPRT 1334 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 1334 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E103 OF 2023  
M MAKORI, MEMBER  
SEPTEMBER 28, 2023**

**BETWEEN**

**NEW ISLAND LIMITED ..... LANDLORD**

**AND**

**ISRAY CHEMIST LIMITED ..... TENANT**

**RULING**

1. The present claim was filed vide Landlord's Application dated 12/6/2023 that was supported by the Supporting Affidavit of Hammerton Jesbiab Maloba and grounds on the face of the said Application.
2. On the 19/06/2023 the Honourable Tribunal directed that the Tenant/Respondent does pay Kshs 200,000 and slated the matter for hearing on 27/07/2023. From the record filed in the court, the Tenant/Respondent was served on 08/07/2023 as indicated on the Affidavit of Service dated 24/7/2023.
3. It was the Landlord's/Applicant's averment that the Tenant/Respondent had accumulated rent arrears of Kshs 499, 904.00 as at 19/5/2023 and where the monthly rent payable was Kshs 62, 400.00 on the 5<sup>th</sup> day of every month.
4. On all occasions that the matter came up before court, the tenant never appeared in person nor through a representative.
5. On further perusal of the documents before court, the tribunal motes that as at 27/7/2023 the Tenant/Respondent had cleared all its outstanding arrears and that by consensus the only outstanding issue was that of the termination of tenancy relationship.
6. It is a rule of thumb that has crystalized in section 107 of the [Evidence Act](#), Cap 80 Laws of Kenya on the burden of proof provides that; -



- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist
  - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
7. In absence of the Tenant/Respondent meant that the Landlord/Applicant could only be granted the prayers it sought and that which it had proved either orally or by filing relevant evidence in the support of the claim.
  8. The Landlord/Applicant appeared again on the 6/9/2023 confirming that the tenant left the subject premises on the 31/8/2023 and that the issue outstanding was rent for the month of August, 2023.
  9. The Landlord/Applicant while adopting its statement noted that only two months' worth of rent had accrued and where the monthly rent for the said premises was for Kshs 64,400.00. These averments are diametrically at a departure from the record filed by the Landlord/Applicant and where they sought Kshs 499, 904.00 being the accrued rent arrears as at 19/5/2023.
  10. The single most issue for determination before this Tribunal in consideration of the totality of all materials filed is whether this Honourable Tribunal can enforce a Tenancy where a tenant had voluntarily left the suit premises.
  11. In addressing the above underscored issues, the Court wishes to re-state the mandate it has in determining the disputes brought before it pursuant to the provisions of section 12 (1) of the *Landlords & Tenants (Shops, Hotel & Catering Establishments Act*, Cap 301 Laws of Kenya) that; -
    1. A Tribunal shall, in relation to its area of jurisdiction have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in addition to and without prejudice to the generality of the foregoing shall have power—
      - a. to determine whether or not any tenancy is a controlled tenancy;
      - b. to determine or vary the rent to be payable in respect of any controlled tenancy, having regard to all the circumstances thereof;
      - c. to apportion the payment of rent payable under a controlled tenancy among tenants sharing the occupation of the premises comprised in the controlled tenancy;
      - d. where the rent chargeable in respect of any controlled tenancy includes a payment by way of service charge, to fix the amount of such service charge;
      - e. to make orders, upon such terms and conditions as it thinks fit, for the recovery of possession and for the payment of arrears of rent and mesne profits, which orders may be applicable to any person, whether or not he is a tenant, being at any material time in occupation of the premises comprised in a controlled tenancy;
      - f. for the purpose of enabling additional buildings to be erected, to make orders permitting landlords to excise vacant land out of premises of which, but for the provisions of this Act, the landlord could have recovered possession;
      - g. where the landlord fails to carry out any repairs for which he is liable—
        - i. to have the required repairs carried out at the cost of the landlord and, if the landlord fails to pay the cost of such repairs, to recover the cost thereof by requiring the tenant;



- ii. to pay rent to the Tribunal for such period as may be required to defray the cost of such repairs, and so that the receipt of the Tribunal shall be a good discharge for any rent so paid;
  - iii. to authorize the tenant to carry out the required repairs, and to deduct the cost of such repairs from the rent payable to the landlord;
  - h. to permit the levy of distress for rent;
  - i. to vary or rescind any order made by the Tribunal under the provisions of this Act;
  - j. to administer oaths and order discovery and production of documents in like manner as in civil proceedings before the High Court, to require any landlord or tenant to disclose any information or evidence which the Tribunal considers relevant regarding rents and terms or conditions of tenancies, and to issue summons for the attendance of witnesses to give evidence or produce documents, or both, before the award costs in respect of references made to it, which costs may be exemplary costs where the Tribunal is satisfied that a reference to it is frivolous or vexatious;
  - k. to award compensation for any loss incurred by a tenant on termination of a controlled tenancy in respect of goodwill, and improvements carried out by the tenant with the landlord's consent;
  - l. to require a tenant or landlord to attend before the Tribunal at a time and place specified by it, and if such tenant or landlord fails to attend, the Tribunal may investigate or determine the matter before it in the absence of such tenant or landlord;
  - m. to enter and inspect premises comprised in a controlled tenancy in respect of which a reference has been made to the Tribunal.
12. It is clear that in exercising the powers conferred under the *Landlord and Tenants, Shops, Hotels, and Catering Establishments Act*, the Tribunal must restrict itself to the powers conferred under section 12 aforesaid.
  13. Given that the matter was already before this Tribunal but the Tenant at its own volition decided to vacate the premises. The record presented by the Landlord/Applicant is incoherent to allow this Honorable Court clearly note the subsisting difference if any.
  14. I therefore hold that and on the admission of Landlord/Applicant that the tenancy is no longer subsisting and the reference stands as settled. The subsisting dispute if any can be ventilated in the appropriate forum.
  15. From the entirety of the documents filed in this Honourable Tribunal no evidence had been tendered so as to determine the exact date of the tenant's departure from the Landlords premises for that reason the tribunal shall restrain itself from making and find on the same.
  16. The Landlord/Applicant is awarded Costs of the application and the other prayers are declined.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2023**

**HON. MIKE MAKORI**

**MEMBER**

In the absence of the parties

