



Gulamali v Mwembe Tayari Tyre Traders Limited (Tribunal Case E321 of 2023) [2024] KEBPRT 701 (KLR) (3 May 2024) (Ruling)

Neutral citation: [2024] KEBPRT 701 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E321 OF 2023
CN MUGAMBI, CHAIR
MAY 3, 2024**

BETWEEN

ISMAIL GULAMALI LANDLORD

AND

MWEMBE TAYARI TYRE TRADERS LIMITED TENANT

RULING

1. The Landlord's notice of motion dated 15.12.2023 seeks orders that the Tribunal issues orders directing the Tenant to execute an agreement with the Landlord, that the landlord be permitted to review the rent based on the current market rate value and an order that the Tenant failing to execute an agreement or to effect the payment of the revised rent, the Tenant be ordered to hand over vacant possession of the premises.
2. The Application is supported by the Affidavit of the Landlord Mr. Esmail Gulamal who has deponed that he is the registered proprietor of the L.R. Mombasa Block XVI/343 wherein the Tenant herein has been paying the monthly rent of Kshs. 112,000/=.
3. The Applicant has also deponed that the Tenant currently pays Kshs. 1,344,000/= per year while the valuation by the Applicant's valuers show that the rent per year at the current market rates should be Kshs. 2,268,480/= translating to the monthly rent of Kshs. 189,040. The landlord therefore seeks to review the rent from Kshs. 112,000/= per month to Kshs. 189,040/= per month.
4. The Applicant also depones that the Tenant has failed to execute a lease agreement for the premises while all the other Tenants in the premises have executed their lease agreements with the landlord.
5. It is further deponed by the Applicant that the rent was last revised in the year 2015 from Kshs. 60,000/= to Kshs. 112,000/= in BPRT Case No. 116 of 2013.



6. It is the landlord's case therefore that failure to execute a lease agreement in the terms proposed by the Landlord amounts to an infringement of the Landlord's right to exercise control and will over his property.
7. The Application is opposed by the Tenant by its replying affidavit sworn by MR. SIMON NDOLO, the Respondents director.
8. The Respondent has deponed in its Affidavit that the Application and the complaint filed herein are incompetent and bad in law for failing to comply with the provisions of Cap 301 and more particularly Section 4(1)(2)(3) and (4) of the said Act.
9. The Tenant has also deponed that the Landlord herein is bound by previous rental covenants agreed upon between the Tenant and the previous Landlord of the premises.
10. The Tenant further depones that the Landlord cannot force it to sign an agreement whose terms have not been agreed upon. The Tenant therefore depones that the rent increment and other proposed terms are unlawful, unreasonable and unjust.
11. Both parties have filed their submissions, I have read the same and I will consider them in this Ruling.

Analysis and determination

12. The Landlord/Applicant in these proceedings basically seeks orders permitting him to increase the monthly rent from Kshs. 112,000/= to Kshs. 189,040/= and a further order directing the Tenant to execute a lease agreement essentially agreeing to the said rent increment amongst other terms.
13. To achieve this end, the Landlord has approached the Tribunal by filing a Complaint/Reference under Section 12 of Cap 301, Article 40 of [the Constitution](#), Section 56(9) of the [Land Registration Act](#), and order 51 Rule 1 of the Civil Procedure Rules.
14. The Landlord has not annexed any written agreement between the parties and it is safe therefore to conclude that none exists and therefore the tenancy between the parties herein is a controlled tenancy as defined under Section 2(1) of Cap 301. This conclusion is buttressed by the Landlord's own Application to have the Tenant compelled to execute a lease agreement with the Landlord. The tenancy relationship between the parties is therefore governed by the provisions of Cap 301.
15. A Landlord who desires to alter the terms of a controlled tenancy to the detriment of the Tenant or to terminate such tenancy, is required to initiate any such activity by issuing a notice to that effect under Section 4(2) of Cap 301 which provides as follows:-

“A landlord who wishes to terminate a controlled tenancy or to alter to the detriment of the Tenant any term or condition in or right or service enjoyed by the Tenant under such a tenancy shall give notice in that behalf to the Tenant in the prescribed form.”

16. The Landlord/Applicant has not given to the Tenant the mandatory notice required by Section 4(2) above. The Landlord's reliance on Section 56(9) of the [Land Registration Act](#) to push for rent review cannot avail him on the face of the provisions of Section 4(1) of Cap 301 which provides as follows:-

“Notwithstanding the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be terminated and no term or condition in or right or service enjoyed by the Tenant or any such tenancy shall be altered otherwise than in accordance with the following provisions of this Act.”



17. I have looked at Section 56 of the [Land Registration Act](#) which deals with CHARGES and therefore has no relevance to the dispute at hand.
18. I agree with the submissions of the Landlord that the Tribunal has the jurisdiction to review rent under Section 12(1)(h) of the Act but this jurisdiction can only be exercised after the Landlord complies with the mandatory provisions of Section 4(1) and 4(2) of Cap 301 as far as the giving of the notice to terminate or alter terms of a controlled tenancy is concerned.
19. It is my finding in these circumstances, that the Landlord's endeavor to review the rent in incrementally amounts to an alteration of the terms and conditions of the tenancy to the detriment of the Tenant and therefore the giving of the notice under Section 4(2) of the Act was not only desirable and necessary but mandatory. Failure to issue the said notice is needless to say, fatal to the Landlord's endeavor to increase rent.
20. The Landlord has also applied for an order that the Tenant be ordered to execute a lease agreement. I have perused the Act (Cap 301) which governs the parties relationship and I have not seen any provision that empowers the Tribunal to compel any party to a controlled tenancy to execute an agreement. In my view, this would be an invitation by the Landlord to the Tribunal to offer supervisory jurisdiction over the parties in arriving at an agreement. This cannot be as it is trite law that courts cannot draft agreements for parties.

The Landlord finds himself in the unfortunate situation where every action he intends to take and which is detrimental to the Tenant has to be regulated by the strict provisions of Cap 301. I am not therefore in agreement with the landlord that the Tenant can be forced to execute a lease agreement and I agree with the view of the Tenant that any such agreement can only be executed on mutually agreed terms, otherwise, it cannot amount to an agreement as plainly understood.

Disposition

21. Consequent to the above findings, I do not find any merits in the landlord's Application dated 15.12.2023 and the same is dismissed with costs to the Tenant.
22. The Reference by the Landlord dated 15.12.2023 raises the same issues raised in the Application and which have been determined in this Ruling. In view of the determination in the Application, I do not find any merits in the Reference filed by the Landlord and no useful purpose will be served by having the same pending any further in court. The Reference is therefore dismissed with costs to the Tenant. This file is ordered closed.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 3RD DAY OF MAY, 2024

HON. CYPRIAN MUGAMBI

CHAIRPERSON

BUSINESS PREMISES RENT TRIBUNAL

Delivered in the presence of Mr. Gathu for the landlord and Mr. Mutisya for the Tenant

