



Mohamed t/a Septar Solution Limited v Harsha Construction Limited (Tribunal Case E607 of 2022) [2023] KEBPRT 43 (KLR) (Civ) (14 February 2023) (Ruling)

Neutral citation: [2023] KEBPRT 43 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
CIVIL
TRIBUNAL CASE E607 OF 2022
A MUMA, VICE CHAIR
FEBRUARY 14, 2023**

BETWEEN

AHMED ANWAR MOHAMED T/A SEPTAR SOLUTION LIMITED ... TENANT

AND

HARSHA CONSTRUCTION LIMITED RESPONDENT

RULING

1. The Tenants/Applicants Ahmed Anwar Mohamed T/A Septar Solution Limited (hereinafter referred to as the “Tenants”) have been in occupation of the Landlord pursuant to a controlled tenancy arrangement.
2. The firm of Awuor & Company Advocates represent the Tenant.
3. The Respondent/Landlord, Harsha Construction Limited (hereinafter referred to as the “Landlord”) is the owner of the demised premises.
4. The Firm of S.M. Muhia & Company Advocates represents the Landlord.

The Dispute Background

5. On July 8, 2022, the tenants filed a reference in this tribunal contending that the landlord is interfering with his peaceful possession of the demised premises, has instructed auctioneers who have attached his property in realization of non-existent rent arrears, and that the Landlord has denied the Tenant access to the demised premises. The Tenant therefore urged this Tribunal to investigate his complaint and make necessary orders including an award for costs.
6. The Tenant also filed a notice of motion application dated July 8, 2022 under Certificate of Urgency seeking that the said application be certified urgent, an order directing the respondent to open the



demised premises, a temporary injunction restraining the Landlord from selling the Tenant's property by public auction, an order directing the Landlord to stop interfering with the tenants peaceful occupation of the demised premises, the OCS Central police station to ensure compliance as well as the costs of the suit.

7. The Honourable court certified the said application as urgent and an order directing the Landlord to reopen the Applicants Godowns was issued on July 13, 2022. The respondents were also precluded from selling the tenants property pending the hearing of the application interpartes. The court further directed the Tenant to pay rent for July and August 2022. It also directed that the OCS Central Police Station to ensure compliance with the said orders as sought in the application filed by the tenants.
8. On September 20, 2022, the Landlord filed a notice of motion application under certificate of urgency claiming that the Tenant has changed the locks of the demised premises yet he, the tenant, knows too well that the landlord operates a business within the said premises.
9. These applications were canvassed on various dates and the parties filed their respective submissions.

Landlords and Tenants Claims

10. The Tenant contends that he is not in arrears yet the Landlord has instructed auctioneers to attach his property. He also argues that he cannot do business because the demised premises are obstructed by a tractor that has been placed in front of it by the Landlord. The Tenant further argues that while the agreed rent payable was KShs.150,000/= the Landlord re-entered three of the premises such that they share the demised premises. As such, the rent was to be downscaled to KShs.100,000/= or less.
11. The Tenant's claim therefore is that he is not in any rent arrears, and that he also leased out his Motor vehicle for 50 days to the Landlord at a cost of KShs.2,500/= a day and as such, the rent payable was to be set off from the car rental costs. Further to that, the Tenant argues further that he once was requested to pay the security guards.
12. The Landlord in reply to the tenants' claim, refuted the said allegations. He argues that the tenant has been paying the rent erratically. He also denies blocking the tenants access to the demised premises.

Jurisdiction

13. The jurisdiction of the Honourable Tribunal is not disputed by the parties.

List of Issues for Determination

14. The Parties raised certain issues for determination and the Tribunal shall proceed to distill the issues discussed by the Parties and their Counsels who submitted in writing as below:
 - a. Whether Tenant is in rent arrears
 - b. Whether the Landlord is entitled to levy distress for Rent against the Tenant as per the proclamation Notice dated 4th July 2022
 - c. Whether the Tenant is entitled to rent assessment sought.

Analysis and Findings

Whether Tenant is in rent arrears

15. The Landlord argues that the Tenant is in arrears and by October 2022, the said arrears had accumulated to KShs.1,118, 000/=



16. The *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* at section 3 (3) provides that the landlord of a controlled tenancy shall keep a rent book in the prescribed form, of which he shall provide a copy for the tenant and in which shall be maintained a record, authenticated in the prescribed manner, of the particulars of the parties to the tenancy and the premises comprised therein, and the details of all payments of rent and of all repairs carried out to the premises.
17. The law also provides at section (5) of the Act that if “Any person who— (a) being a landlord, fails to keep a rent book or to provide a copy thereof as required by subsection (3) of this section;...shall be guilty of an offence and liable to a fine not exceeding two thousand shillings or to imprisonment for a period not exceeding two months, or to both such fine and imprisonment.
18. It is common ground that the Landlord has not provided to this Honourable Tribunal a Statement of Accounts, despite the allegation that the tenant is in rent arrears. All that the Landlord has stated is that the tenant is guilty of late payment of rent. Accordingly, this issue is answered to the negative. The Court has no evidence that the Tenant is actually in rent arrears but the court is aware there is a claim that space was reduced and as such the rent of 150,000/- is no longer payable which could be the cause of the disputed arrears as the tenant has since unilaterally decided to pay 100,000pm albeit sporadically as alleged by the landlord, this issue will be dealt with at the hearing of the reference.

Whether the Landlord is entitled to levy distress for rent against the Tenant as Per the Proclamation Notice Dated 4th July 2022

19. The Act provides at section 12 (1) (h) that this Tribunal has the authority to issue an order for the Landlord to levy distress for rent. The landlord instructed Regent Auctioneers to levy distress for rent without leave of this honorable tribunal to so do. Accordingly, the Proclamation Notice dated 4th July 2022 is irregular and offends the provisions of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* cap 301.
20. The Landlord can only levy distress for rent with leave of the tribunal. There appears to be no such leave granted prior to the issuance of the instruction to the abovementioned Auctioneers.

Whether the tenants are entitled to assessment of rent.

21. The tenant wants this tribunal to intervene and ensure that he has peaceful and quiet possession of the demised premise. This tribunal in its order dated October 3, 2022 instructed its officer to visit the demised premises and ascertain who locked the premises, if there are any obstructions and whether indeed the landlord shares the premises with the Tenant. The Report of inspection of the tribunal found all these instructions to the affirmative.
22. The report also found that a tractor was obstructing the free and quiet possession of the demised premises as alleged by the Tenant. There is a machine on the entry of the Tenants premises.
23. The report also established that the goods in the store are mixed, some are the Tenant’s while others are the Landlord’s, this aspect offends the doctrine of exclusive possession on a lease.
24. The Tenant shares the premises with the landlord, and as such the lettable area utilized by the tenant appears reduced from the report. This Tribunal therefore finds that it cannot at this point determine with finality the assertion by the Tenant that the arrangement in order to have the rent downscaled to KShs.100,000 is merited.



25. A valuer need to visit the premises and establish the lettable area and the rent payable after which the Tribunal will be able to determine the rent rates that the tenant should pay going forward. In light of this I proceed to find as hereunder;

Order

For the reasons given above i order as follows that;

- a. The tenants' application dated July 8, 2022 is allowed in the following terms: -
- b. The tenant shall carry out a valuation to establish the rent payable and the lettable area within 30 days. The landlord will be at liberty to do their independent report in 30 days.
- c. Joint report on the lettable space by both valuers should accompany the said reports.
- d. The Tenant to continue paying rent at the rate of Kshs. 100,000.00 and in default, the landlord shall be at liberty to distress for rent.
- e. The landlord to remove the machine blocking the entrance the Tenants go downs away to allow quiet possession to the Tenant.
- f. Mention on April 20, 2023 to confirm compliance.
- g. Costs shall be in the Cause.

HON A. MUMA

VICE CHAIR

BUSINESS PREMISES RENT TRIBUNAL

RULING DATED, SIGNED AND DELIVERED VIRTUALLY BY HON A. MUMA THIS 14TH DAY OF FEBRUARY 2023 IN THE PRESENCE OF MS. AWUOR FOR THE TENANT AND MS. MWANGI FOR THE LANDLORD.

HON A. MUMA

VICE CHAIR

BUSINESS PREMISES RENT TRIBUNAL

