



Kagathe t/a Euro Ltd v Tourism Finance Corporation & another (Tribunal Case E485 of 2023) [2023] KEBPRT 653 (KLR) (26 October 2023) (Ruling)

Neutral citation: [2023] KEBPRT 653 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E485 OF 2023
A MUMA, AG. CHAIR
OCTOBER 26, 2023**

BETWEEN

GEORGE KIMANI KAGATHE T/A EURO LTD APPLICANT

AND

TOURISM FINANCE CORPORATION 1ST RESPONDENT

NILE REAL APPRAISERS (EA LTD) 2ND RESPONDENT

RULING

A. Parties and Representatives

1. The Applicant George Kimani Kagathe trading as Euro Ltd is the tenant and had rented space for business in the suit property located at Utalii House Room No 219 within Nairobi County (hereinafter the “Tenant”).
2. The firm of Faith Oketch and Co. Advocates represents the Tenant in this matter.
3. The 1st Respondent Tourism Finance Corporation is the Landlord being part of Kenya Development Corporation Limited whereas the 2nd Respondent is Property Managing Agent of the suit property and had rented out the space on the suit premises to the tenant (hereinafter the “Landlord”).
4. The firm of Lazarus M.O Odongo represents the Landlord/ Respondents in the matter.

B. Background of the Dispute

5. The Applicant/Tenant avers that the Respondents illegally locked the door to the suit property in his absence and without serving him any court order or legal notice warranting them to do so.
6. The Tenant then moved this Tribunal vide an Application dated 8th September 2021 seeking an order compelling the Respondents to reopen the suit premises granting access to the tenant. He also sought



an injunction order seeking to restrain the Defendant/ Respondent by themselves and agents from harassing the Tenant or in any manner interfering with his tenancy.

7. The Tribunal on 14th September 2021 ordered the Tenant to pay August, September and October rent on a without prejudice basis, compelled the Landlord to reopen the door to the suit premises and issued an injunction restraining the Landlord from intimidating, harassing or evicting the Tenant from the suit premises.
8. The Tenant through his advocates on record moved this tribunal vide an application dated 20th February 2023 seeking that the Landlord be compelled to reopen the suit premises stating that the Landlord through his agents locked up and put an extra padlock in a bid to deny the Applicant access.

C. The Tenant's Claim

9. The Tenant avers that he had rented out the Respondent's space, at Utalii House Room No 219 within Nairobi County.
10. The Tenant avers that the Landlord has on several occasions denied him access to the suit premises despite him fulfilling his obligations as a Tenant by paying the monthly rent as and when the same falls due.
11. The Tenant avers the Landlord/ Respondent has neither issued him with a notice seeking to terminate tenancy nor a court order authorizing them to lock up his premises.
12. The tenant states that he has been paying rent save for two months' rent arrears.
13. Additionally, the Tenant states that the actions of the Respondent are illegal and not in conformity with the provisions of Cap 301.

D. The Landlord's Claim

14. In response to the Tenant's claim, the Landlord avers that the application filed by the Tenant lacks merit and ought to be dismissed for the reasons that a Landlord/ Tenant relationship did not exist as the agreement between the Tenant and the Landlord was for a period of five years and one month and the same has since lapsed and as such the Tenant/ Applicant lacked the locus standi to institute this suit.
15. The Landlord also contends that the Tenant is not worthy of the orders sought as he has consistently failed to pay rent and has fallen into arrears to the tune of Kshs 748,387.70 as at 31st January 2023 when the lease expired.

E. Jurisdiction

16. The Landlord contested the jurisdiction of this Tribunal on the grounds that the Tenant lacked *locus standi* to move this tribunal. The same was dismissed on 12th July 2023 with costs in the cause.

G. List of issues for Determination

18. The issues raised for determination are as follows;
 - a. Whether the actions of the Landlord are merited and should be upheld
 - b. Whether the Landlord ought to be restrained from evicting the Tenant

H. Analysis & Determination

19. The Reference filed by the Tenant/Applicant raises fundamental issues discussed herein below:



i. Whether the actions of the landlord are merited and should be upheld?

20. The Law is clear on the procedure to follow when seeking to terminate tenancy. According to section 4(2) of the [Land and Tenant \(Shops, Hotels and Catering Establishments\) Act](#) Chapter 301 Laws of Kenya:
- “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. No tenancy shall take effect until such date, not being less than two months after the receipt thereof by the receiving party.”
21. Section 4(4) of the Act provides that a notice shall take effect not being less than two months after the receipt thereof by the receiving party.
22. In [Munaver N Alibhai T/A Diani Boutique v South Coast Fitness & Sports Centre Limited](#) [1995] eKLR, the Court of Appeal held that the notice of termination of the tenancy was void for failing to comply with Section 4 of the Act stating as follows;
- “The Act lays down clearly and in detail, the procedure for the termination of a controlled tenancy. Section 4(1) of the Act states in very clear language that a controlled tenancy shall not terminate or be terminated, and no term or condition in, or right or service enjoyed by the tenant of, any such tenancy shall be altered, otherwise than in accordance with specified provisions of the Act. These provisions include the giving of a notice in the prescribed form. The notice shall not take effect earlier than 2 months from the date of receipt thereof by the tenant. The notice must also specify the grounds on which termination is sought. The prescribed notice in Form A also requires the landlady to ask the tenant to notify him in writing whether or not the tenant agrees to comply with the notice.”
23. From the foregoing, it is clear that the Landlord herein ought to have issued a notice to terminate or alter the term of a controlled tenancy and the same ought to have been issued not less than two months to the tenant and the indicating valid reasons for such termination.
24. The evidence tendered before this Honourable tribunal by the Tenant indicates that the Landlord did not at any point notify the Tenant of their intention to lock the suit premises nor did they issue him with a demand notice for him to pay up the rent arrears accrued. Instead, the Landlord went ahead and locked out the Tenant from the suit premises. It would therefore be inequitable and unjust to allow the Landlord to profit from his illegal actions.
25. Section 7 of the [Land and Tenant \(Shops, Hotels and Catering Establishments\) Act](#) Chapter 301 Laws of Kenya provides for the grounds on which a landlord may seek to terminate tenancy. The Landlord in this case should have relied on Section 7(c) that permits a landlord to issue a notice where the tenant has committed other substantial breaches of his obligations under the tenancy or for any other reason connected with the tenant’s use or management of the premises comprised in the tenancy. The Landlord on this ground is empowered by law to issue a notice where the Tenant defaults on rent, makes late payment or fails to observe obligations and terms as per the Lease Agreement between themselves.



ii. Whether the landlord ought to be restrained from evicting the tenant

26. The question before this Honourable Tribunal is whether the Applicant has fully established a case for grant of injunction.
27. The Tenant avers that the Landlord locked the suit premises with an aim of evicting him without adhering to the procedure set out in law. The Landlord on the other hand avers that the Tenant has been defaulting and has continuously failed to pay rent as and when it falls due. This is a clear indication that the Tenant seeks to reap this Tribunal's protection from his wrong doings. The Landlord filed evidence demonstrating the same. He who comes to equity must come with clean hands. The application for injunction being an application seeking equitable relief must fail the moment the Court finds the applicant's hands are tainted. This is what was stated in the case; *Caliph Properties Limited v Barbel Sharma & another* [2015] eKLR, where the Court stated:

“Secondly, the injunction sought is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the Plaintiff in this case betrays him. It does not endear him to equitable remedies. ... He who comes to equity must fulfill all or substantially all his outstanding obligations before insisting on his rights. The Plaintiff has not done that. Consequently, he has not done equity.”

I. Orders

28. The upshot is that the Tenant's Reference and Application dated 8th September, 2021 and 20th February 2023 is partially merited.
- a. The Tenant to pay monthly rent of Kshs 50,000.00 when due on or before the 5th of every month.
 - b. Tenant to pay arrears in 7 equal monthly instalments of Kshs 100,000.00 beginning 1st of December 2023 in default of payment of one, Landlord to proceed to distress and obtain vacant possession.
 - c. OCS Central Police Station to ensure compliance.
 - d. Each party to bear its own costs.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY BY HON A. MUMA THIS 26TH DAY OF OCTOBER, 2023 IN THE PRESENCE OF OKETCH FOR THE TENANT AND ODONGO FOR THE LANDLORD.

HON A. MUMA

AG CHAIR/MEMBER

BUSINESS PREMISES RENT TRIBUNAL

