



**Walela v Chatur & 2 others (Tribunal Case E664 of 2023)
[2024] KEBPRT 970 (KLR) (Civ) (2 July 2024) (Judgment)**

Neutral citation: [2024] KEBPRT 970 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
CIVIL**

TRIBUNAL CASE E664 OF 2023

P MAY, MEMBER

JULY 2, 2024

BETWEEN

ELIAS BARASA WALELA TENANT

AND

MADATALI CHATUR 1ST LANDLORD

MIRIHI LIMITED 2ND LANDLORD

AND

PETER JOHN CARETAKER

JUDGMENT

1. The present proceedings were commenced vide the reference filed by the tenant on 6th July, 2023. The tenant complained against the landlords' actions of breaking into the demised premises and confiscating their tools of trade. The tenant averred that the actions were illegal, irregular and unlawful hence sought for the intervention of the Tribunal.
2. The parties herein do not dispute to the existence of a landlord and tenant relationship. They entered into a tenancy agreement in October, 2022 whose terms were explicit. The parties however disagreed in the course of their dealings which finally precipitated the filing of the present proceedings.
3. During the hearing of the reference each party called witnesses who testified in support of their respective positions. At the close of the hearing, the parties were directed to file written submissions. There has been compliance by both parties. It is against this background that the Tribunal shall proceed to summarize each party's case.



Summary of the tenant's case

4. The tenant stated that he runs a family business with his wife where they engage in sale of computers and their accessories. The tenant admitted to having entered into a tenancy agreement with the landlords in October, 2022 whereby they began their operations from the leased premises.
5. It was the tenant's contention that sometimes in mid- December his wife called him to inform that the shop had a padlock and the caretaker had refused to open insisting that rent had to be paid in full before the shop would be reopened. The wife wrote to the management complaining of the closure.
6. The tenant stated that upon paying the amount demanded in April, 2023 the shop remained closed until sometimes on 17th April, 2023 when he escorted the wife to have the shop reopened. It was at that instance that they learnt that their items were confiscated. They lodged a report with the police but the same has never been acted on to date.
7. The tenant further stated that the caretaker refused or ignored to cooperate with the police in the investigations. In his own evidence the same implied that the landlords were guilty of the illegal confiscation that had been undertaken.
8. The tenant averred that even during the pendency of the proceedings, the landlords broke into the shop and soldered the shutter making it inaccessible to them. The tenant urged the Tribunal to return the confiscated stock valued at Kshs. 1,410,250 and compensation for loss of business among other orders sought against the landlord.
9. During cross examination tenant affirmed that they had itemized what they had in stock.

Summary of the landlord's case

10. The landlord's case was fairly straightforward. They admitted to the existence of the tenancy. The landlord accused the tenant of failing to pay rent as when it fell due. It was the landlords' testimony that the tenant voluntarily closed the shop and stop conducting business. He admitted that the tenant would look for them in March, 2023 whereby they persuaded him to be allowed to operate at the demised premises. He stated that they also learnt of the alleged theft when the tenant went to the demised premises and caused drama.

Analysis

11. Having laid out the above background and considered the pleadings, evidence on record and the submissions, the Tribunal has to determine whether the tenant has proven their case to the required standard.
12. The standard of proof in civil cases is on a balance of probability. The burden of proof is on the party alleging the existence of a fact which he wants the Tribunal to believe.
13. Section 107 (1) and (2) of the [Evidence Act](#) provides as follows: -

“107(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 he burden of proof lies on that person”



14. In *Miller v Minister of Pensions* 1947 ALL E.R 372, Lord Denning puts this standard in the following terms: -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: We think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

15. In [*James Muniu Mucheru v National Bank of Kenya Ltd C.A Civil Appeal No. 365 Of 2017*](#) [2019 eKLR], the Court stated as follows: -

“Indeed, it is settled law that in civil cases the standard of proof is on a balance of probability. This is in effect to say that the Courts will make a finding based on which party’s version of the story is more believable.”

16. In the present proceedings the parties do not dispute that the shop was closed at some point. The question however is who effected the closure. The tenant has stated that the landlord closed the premises. The landlord has denied closing the premises. It is important to consider the facts that preceded the closing of the premises. It is not denied that the tenant defaulted in making rent payments. The messages shared of the communication between the caretaker and the tenant infer that the said caretaker was to facilitate the reopening of the premises.

17. It is clear therefore that the premises were closed at the behest of the landlord. Once the landlord closed the premises, they took control of the premises and whatever operations that followed thereafter. There is a reason the law gives a proscribed procedure of the manner of levying distress. Adopting guerrilla tactics though convenient to a party ill bent to subvert the laid down process and the law has consequences. It comes with a cost. Landlords should operate within the purview of the law and not allow themselves to lord over their tenants.

17. The prayers sought by the tenant are largely for award of special damages. In regard to special damages the law is quite clear; special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in *Hahn V. Singh*, Civil Appeal No. 42 Of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:

“Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

18. A natural corollary of this has been that the Courts have insisted that a party must present actual evidence of the losses they incurred. The tenant has provided an itemized list of the stock that was in the premises which has been costed. The landlord has merely denied its involvement in the alleged theft/ confiscation of material. They did little to challenge the authenticity of the said list. The tenant has therefore proven that there was loss of items when the landlord had illegally seized control of the



premises. He has also produced a list that has been unchallenged. The tenant is therefore entitled to the stock lost.

19. Proceeding to the prayer for loss of business, the claim to be compensated for loss of business at the rate of Kshs 100,000/- per month is not supported by the evidence on record. The tenant has not attached a profit and loss statement to substantiate their claim. While the tenant may have suffered loss, the same has not been proven. The Tribunal can only empathize with them. In our adversarial system, the Tribunal cannot come to the aid of an indolent party. The prayer for compensation for repairs and renovations done suffers the same fate.
20. As regards costs, the same are in the tribunal's discretion under section 12(1) (K) of cap 301, Laws of Kenya. The tenant has demonstrated that he came to this tribunal after the landlord closed the premises thus terminating the tenancy contrary to the provisions of Section 4(2) of CAP 301.
21. In conclusion, the final orders which commend to me under section 12 of cap 301 Laws of Kenya are:
 - (i) The tenant's reference dated 6th July, 2023 is allowed to the extent that the tenant shall forthwith be allowed to remove any of their items that are still within the demised premises.
 - (ii) The tenant's rent for the month of December to date when the premises were locked is hereby waived.
 - (iii) The tenant's claim for compensation for stock valued at Kshs. 1,410,250/- is allowed. The same to be repaid within 45 days from the date hereof.
 - (iv) The OCS Central police station or any other police station that is nearer to the suit premises shall ensure compliance with the order (i) above.
 - (v) The tenant is awarded costs of Kshs 100,000/- against the landlord which shall be defrayed against the rent account if not paid within thirty (30) days hereof.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 2ND DAY OF JULY 2024.

HON. PATRICIA MAY

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

Delivered in the presence of the Tenant and in the absence of the Respondents

