



**Kenyatta & another v Mosongo (Tribunal Case E076 of 2023)
[2024] KEBPRT 1333 (KLR) (7 August 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 1333 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E076 OF 2023
N WAHOME, CHAIR & JOYCE MURIGI, MEMBER
AUGUST 7, 2024**

BETWEEN

MELZEDECK OKERO KENYATTA 1ST LANDLORD

EDWIN MOMANYI KENYATTA 2ND LANDLORD

AND

JOHN OGWAE MOSONGO TENANT

RULING

1. The Tenant originated these proceedings by his reference dated 28th December 2023. The same was founded on Section 12(4) of the [Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#) (Cap. 301) herein after “the Act”, The Tenant complained that the Landlord has without any lawful justification closed his business premises.
2. That all the proceeds from the accommodation was being paid directly to the Landlord, he had renovated the premises at a cost of Kshs.3,000,000/- and that the landlord had also received rent deposit of Kshs.500,000/- which is equal to 4 months rent.
3. The Tenant asserted that the Landlord merely wanted to unfairly evict him and install a new Tenant. He therefore sought to have this court restrain the landlord from interfering with his quiet possession of the premises.
4. With the reference, the Tenant also filed the notice of motion application dated 28th December 2023, in it he prayed that the landlord be ordered to re-open the demised premises otherwise known as C2 Lounge and Grill erected on L.R No. West Mugirango/[SIAMANI/3585](#) in Nyamira Town and also to allow the Tenant quiet possession thereof.
5. In response to the said motion, the landlord filed the replying affidavit sworn on the 16th January 2024. He was to later file a notice of motion application dated 17th January 2024. In the application, he sought



that the Tenant be restrained from removing any items from the demised premises, he be allowed to levy distress in recovery of the rent in arrears at Kshs.1.8 million and costs of the application.

6. On his part, the Tenant further filed what he titled as “Replying Affidavit dated 17th January 2024” and which was sworn on the 12th August 2024. He also filed the further Affidavit sworn on the same date of 12/8/2024. The parties thereafter agreed to canvass the two applications dated 28th December 2024 and 17th January 2024 by way of written submissions.
7. The Tenants submissions are dated the 12th March 2024 whereas those for the Landlord are dated 25th June 2024. We have perused all the pleadings filed herein, the submissions and even the caselaw cited. We from the same wish to state the respective cases for the parties as follows:-

A. Case for the Tenant

- i. That he has been a faithful Tenant for the landlord since January 2019 to date.
- ii. For no reason nor justification and against the law, the landlord had locked up his business premises.
- iii. Over and above payment of rent, he had also deposited Kshs.500,000/- as for rent.
- iv. By an agreement with the landlord, all monies received from accommodation were paid directly to the landlords paybill.
- v. He had developed the premises at a cost of Kshs.3,000,000/- and had therefore over paid the rent.
- vi. The relatives of the landlord could eat and sleep at the premises and the landlord had refused to account for the same.
- vii. The landlord intended to terminate the tenancy through illegal means and therefore benefit from the developments thereof by the Tenant.
- viii. He had satisfied the principles in the grant of injunction and that his application be allowed and that of the landlord be dismissed.

B. Case for the Landlord

- a. Pursuant to the lease agreement between the parties dated 7th January 2019, the lease agreement was to terminate effective 1st January 2022.
- b. The lease agreement terminated on the 1st January 2022 but the Tenant had refused to vacate in defiance of the lease Agreement.
- c. As at December, 2023, the Tenant was in rent arrears at Kshs.1,800,000/- and also owed Kshs.24,585 in utility bills.
- d. The Tenant was evacuating from the demised premises with a view to avoiding payment of the rent in arrears.
- e. He therefore sought that the lease agreement be considered as having been determined, he be allowed to levy distress in recovery of rent and the Tenant’s suit be dismissed with costs.
- f. Having perused all the evidence on record including the parties respective submissions, we are of the view that the issues for determination in this matter are the following:-



- A. Whether the parties application's dated 28th December 2023 and 17th January 2024 have merit.
- B. Who should bear the costs of the applications herein.

8. It is our view that a determination of the applications herein will also conclusively resolve the issues in the Tenant's reference dated 28th December 2024.

The reference will therefore be deemed as resolved in the same terms with the said applications. This is to include the question of costs.

Issue No. A- whether the applications dated 28/12/2023 and 17/1/2024 are merited

- 9. We start by looking at the Tenant/Applicant's application dated 28th December 2023. Though the Tenant claims to be a compliant Tenant, this did not come out from the evidence presented to this court. According to the parties lease agreement dated 7/1/2019, the Tenant was to take up the lease for a period of three (3) years. The rent for the year 2019 was to be Kshs.600,000/-, for the year 2020 at Kshs. 900,000/- and for year 2021 at Kshs.1,200,000/-. A total of Kshs.2,700,000/- payable annually and in advance.
- 10. From all the evidence presented by the Tenant, there is no evidence that the Kshs.2,700,000/- has ever been paid. Indeed what can be made out from the scattered pieces of evidence is that less than Kshs.1,000,000/- has been paid as rent to the Landlord since January 2019 to date.
- 11. We have also not seen any evidence that the lease agreement was ever renewed after its expiry on the 31/12/2021. Nor is there any evidence that the Tenant has ever paid any rent or mesne profits for the period between the 1/1/2022 to the date of this Ruling.
- 12. We find the claims by the Tenant that he caused developments on the premises at Kshs.3,000,000/- inexplicable. According to clause 14 and 16 of the lease agreement, the tenant was barely allowed to carry out very minor repairs like replacement of bulbs, nuts that may have fallen out, door locks mirror breakage /mirror leakage on the roof, electrical plugs and such other mundane things.
- 13. The lease agreement was categorical that such minor repairs were to be at the expense of the Tenant. In any event, the Tenant has not presented any evidence to witness the alleged colossal expenditure on alleged development of the demised premises. No consent was also demonstrated by the Tenant from the landlord to carry out the same. Section 12 (L) of the Act provides that among the powers of this Tribunal are 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".
- 14. We therefore decline the invitation by the Tenant to find that he spent Kshs.3,000,000/- on developing the demised premises nor that he is entitled to consideration of the same as part of his rental obligations on the demised premises.
- 15. The Tenant also claimed that the Landlord's relatives partook of food, drinks and accommodation on the demised premises. To him, the same was to be offset from the rent payable. However, the Tenant did not in any way whatsoever present any evidence on those persons that were related to the landlord that lodged at the demised premises, the days of accommodation and the foods and drinks that they partook.



16. Section 107 of the Evidence Act provides that:-

“whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”.

In our view, the Tenant failed dismally on this particular responsibility.

17. In all, we find that the Tenant’s application and reference thereof must fail. The same seek for equity but the Tenant has not been equitable in his conduct. He has failed to discharge his cardinal obligations to pay rent and is not deserving of the orders sought.

18. In this, we rely on the case of Samuel Kipkorir Ngeno – vs- Local Authorities Pension Trust (Registered Trustees) & Another (2013) eKLR where the court held that:-

“The temporary injunction sought in the present application is an equitable remedy at the Court’s discretion. He who comes to equity must come with clean hands. A tenant who is in huge arrears of rent is underserving of the court’s discretion. The court cannot be a refuge of a tenant who fails to meet his principal obligation of paying rent as and when it becomes due”.

19. On whether the application dated 17/1/2024 by the landlord is merited, we opine that the landlord had a right to secure his interest by having the status quo maintained at the demised premises pending the determination of the issues herein. The Landlord was apprehensive that the Tenant would cart away all the valuables and leave him without any recourse in the event that his application and/or prayer to levy distress for the rent in arrears was allowed. We do find the prayer meritorious and as we did granted the same in the interim, the same is confirmed to the same effect.

20. The landlord also prayed to be allowed to levy distress in recovery of the rents in arrears which were at Kshs.1,800,000/- as at December 2023. There was also Kshs.24,585/- in arrears for utility bills. The Tenant has not in anyway been able to dislodge this assertion by the landlord. As we had earlier found, the evidence on record show payment of rent at less than Kshs.1,000,000/- out of a possible Kshs.2,700,000/- for the Tenancy period of between January 2019 and 31/12/2021.

21. Assuming that the rent for 2024 would also have been paid at Kshs.1,200,000/-. That is an additional Kshs.800,000/- for the last 8 months amounting to Kshs.2,400,000/-. In this, the expenditure on utility bills have not been taken into account. Section 3(1) of the Distress for rent Act Cap. 293 of the Laws of Kenya provides:

“Subject to the provisions of this Act and any other written law, any person having any rent or rent service in arrears and due upon a grant, lease, demise or contract shall have the same remedy for the recovery of that rent or rent service as is given by the common law of England in a similar case”.

22. It therefore follows that when it is established that there is indeed rent in arrears, the landlord has unfettered authority to execute distress in recovery of the rent in arrears. This is a right that does not require the License of this court. In the case of John Nthumbi Kamwithi - vs- Asha Juma Akumu (2018) eKLR the High court sitting at Embu held that:-

“I have perused the Act but I find no provision to the effect that such permission be sought. I find that the appellant had no obligation to seek permission from the tribunal to levy



distress. The fact that the tenancy is controlled does not mean that the landlord applies to the Tribunal to levy distress. Distress is a right the landlord is entitled to for recovery of rent”.

23. Though that prayer was not necessary in the circumstances of this case, the same was however not in breach of the law and is granted.
24. The parties herein entered into a free contract on the 7/1/2019. No coercion nor distress has been pleaded nor asserted by the Tenant. The same was to terminate on the 31/12/2021. No request nor offer for renewal of the same was made by either party. There is also no evidence that any rent was paid for the period after the 31/12/2021. We would therefore determine that the same terminated effective the 31/12/2021. What the landlord can claim in the circumstances is mesne profits for the period after the 31/12/2021.
25. We are alive to the reality that this courts mandate is to interpret and enforce parties agreements and/or contracts. It cannot create for the parties. In the case of David Gullen – vs- Smauel Kaptalai & Others (2021) eKLR the court held that:

“This is what the parties entered into hence the terms were specific for lease of a house. The Tribunal had no business rewriting the contract for the parties”.

Issue No. B- Who should bear the costs of the reference and the application.

26. The landlord deserved to be awarded costs in this matter. He however lost that right when the court has made recognition that he took the law into his own hands and locked up the premises. We would therefore direct that each party do bear own costs of the suit.
27. In the final analysis, the orders that commend to us are the following,
 - i. That the reference and application both dated 28/12/2023 are dismissed as lacking in any merit.
 - ii. That the landlord is granted leave to levy distress in recovery of all the rents and mesne profits in arrears and for the utility bills at the cost of the Tenant.
 - iii. That the Tenancy herein terminated effective the 31/12/2021 pursuant to the lease agreement dated 7/1/2019 and the Tenant should vacate the demised premises known as C2 Lounge and Grill a club and Restaurant erected on L.R NO. West Mugirango/[Simani/3585](#) by the 31/8/2024 and in default be evicted therefrom at his cost.
 - iv. That each party do bear own costs of the reference and Applications.
 - v. That this file is ordered closed.

Those are the orders of the court.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 7TH DAY OF AUGUST, 2024 AT NAIROBI.

HON. NDEGWA WAHOME, MBS HON. JOYCE MURIGI

PANEL CHAIRPERSON MEMBER

BUSINESS PREMISES RENT TRIBUNAL

RULING DELIVERED ON THE 7TH DAY OF AUGUST 2024 IN THE PRESENCE OF MR. ONGOTO FOR THE LANDLORD AND M/S BUNDI FOR THE TENANT.



HON. NDEGWA WAHOME MBS HON. JOYCE MURIGI
PANEL CHAIRPERSON MEMBER
BUSINESS PREMISES RENT TRIBUNAL

