



Itabuild Imports Limited v Bamrah Holdings Limited (Tribunal Case E381 of 2024) [2024] KEBPRT 1110 (KLR) (Civ) (31 July 2024) (Ruling)

Neutral citation: [2024] KEBPRT 1110 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
CIVIL
TRIBUNAL CASE E381 OF 2024
J OSODO, CHAIR & GAKUHI CHEGE, MEMBER
JULY 31, 2024**

BETWEEN

ITABUILD IMPORTS LIMITED APPLICANT

AND

BAMRAH HOLDINGS LIMITED RESPONDENT

RULING

A. Dispute Background

1. The tenants/applicants moved this Tribunal vide a Reference under Section 12(4) of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act Cap 301 dated 22nd March 2024 with a Complaint that the landlord had issued a notice to terminate tenancy which is unlawful and not in the correct format.
2. The tenant/applicant filed a notice of motion under a certificate of urgency dated 22nd March 2024 in which he sought for the following orders; -
 - i. That the application be certified urgent.
 - ii. That the landlord be prohibited from unlawfully evicting the tenant pending hearing and determination of the reference/application.
 - iii. That the landlord be compelled to accept the monthly rent due or in the alternative, the tenant be allowed to pay the said rent through the tribunal pending the hearing and determination of the reference.
 - iv. That the costs of the reference and application be provided for.



3. The tenant/applicant simultaneously filed a supporting affidavit of even date in which he deposes as follows; -
- i. That it took possession of the suit premises situated on LR No. 12144/121 from January 2012 to date pursuant to a tenancy agreement for a period of 6 years and 3 months which has since expired.
 - ii. That upon expiry of the said tenancy agreement, parties agreed to extend the tenancy on similar terms which agreement has not been reduced into writing.
 - iii. That it has consistently paid its rent except for the period of the global pandemic whose impact was beyond the it's control. However, the matter was resolved amicably by the parties.
 - iv. That on 22nd January 2024, the landlord issued a notice of non-extension of a purported lease agreement which was due to expire on 31st March 2024. A copy of the said letter is annexed as "VV-2".
 - v. That upon engaging the landlord on the same, the landlord stated that they would not grant any extension under the purported lease to the applicant and that they needed vacant possession.
 - vi. That the applicant has invested heavily in the suit premises over the years with the approval of the landlord. Investments include extending the bungalow, building all the warehouses, workshop, external yard and building two showrooms. Image of the premises showing the extensions is annexed as "VV-3".
4. On 25th March 2024, this tribunal issued ex-parte orders of temporary injunction prohibiting the respondent from evicting the tenant and interfering with the tenancy pending the hearing of the application inter-partes.
5. The respondent filed a replying affidavit dated 2nd May 2024 in which he deposes as follows; -
- i. That the relationship between the parties flows from a lease dated 20th April 2018 commencing on 1st April 2018 and which was for a term of 6 years. A copy of the lease dated 20th April 2018 is annexed "JB-1".
 - ii. That it is not true that the tenant has consistently paid rent without fail or that the dispute relating to rent arrears during the global Covid pandemic was amicably resolved.
 - iii. That in July 2021, the applicant filed a suit against the landlord in CMC Civil Case Number E916 of 2021- Italbuild Imports Limited Versus Bamrah Holdings Limited seeking to restrain the landlord from levying distress or evicting it from the suit premises on account of rent arrears owed.
 - iv. That the said application was dismissed by a ruling delivered on 20th September 2021 and the suit filed was withdrawn by vide a consent dated 15th December 2021.
6. The respondent filed a notice of preliminary objection dated 2nd May 2024 based on the following grounds; -
- a. That the notice issued to the applicant/tenant dated 22nd January 2024 is not a termination notice as contemplated under Section 4(2) of the Act



- b. *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Cap 301, Laws of Kenya. That the relationship between the parties is governed by the terms of the lease agreement dated 20th April 2018 for a term of 6 years from 1st April 2018 to 31st March 2024.
 - c. That the tribunal lacks jurisdiction to hear and determine the reference.
7. The tenant filed a further affidavit dated 14th May 2024 in which he deposes as follows; -
- i. That the tenant does not remember signing the purported lease dated 20th April 2018 attached to the replying affidavit.
 - ii. That the purported lease had no date next to the signature of the advocate certifying the signatures.
 - iii. That while the purported lease is dated 20th April 2018, by 15th August 2018, there were still ongoing discussions on amending the new lease. A copy of the email dated 15th August 2018 from Judith Ochieng, the Human resource Manager at Italbuild is annexed as “VV-1”.
 - iv. That the email of 3rd October 2018 shows that the lease was still awaiting execution from the respondent. A copy of the email dated 3rd October 2018 is annexed “VV-2”.
 - v. That the tenant was never served with an executed lease by the landlord and failure to send the same made the tenant believe that there was no lease agreement existing between the parties as the landlord continued to accept rent from the tenant.
 - vi. That the tenant has consistently paid rent and is up to date with payments. A copy of rent payment receipt and bank statement showing clearance of cheques for January 2024 to May 2024 are annexed as “VV-3(a-f)”.
 - vii. That the signed lease is not complete as it does not have the signature appended to it neither has it been registered as a lease rendering it to be of no effect.
8. Additionally, the tenant/applicant filed a supplementary affidavit dated 17th April 2024 in which he deposes that should it be evicted from the premises, it will not be able to get a suitable property immediately which can support the size of the business operations currently ongoing in the said premises.
9. At a court hearing on 6th May 2024, this tribunal directed that both the application and notice of preliminary objection be canvassed together by way of written submissions. Both parties complied with the tenant filing his dated 20th May 2024 and the landlord filing his dated 5th June 2024. We shall deal with both written submissions as we deal with the issues for determination.

B. Issues for determination

10. The following are issues for determination; -
- a. Whether the tribunal has jurisdiction to hear and determine the matter.
 - b. Whether the tenant is entitled to the orders sought in the application dated 22nd March 2024
 - c. Who shall bear the costs of the application?



Issue (a) Whether the tribunal has jurisdiction to hear and determine the matter.

11. The respondent herein has raised the issue of jurisdiction in its notice of preliminary objection dated 2nd May 2024 based on the ground that the notice issued to the tenant dated 22nd January 2024 is not a termination notice and that there exists a lease agreement dated 20th April 2018 which is for a period of 6 years due to expire on 31st March 2024.
12. We have perused the letter/notice dated 22nd January 2024 which is annexed to the tenant's supporting affidavit and we find that the said notice is not a termination notice under Section 4 of Cap 301 Laws of Kenya, but it is a letter from the landlord regarding non-extension of the impugned lease agreement between the parties dated 20th April 2018.
13. We have also perused the impugned lease agreement dated 20th April 2018 and we find that the same has a termination clause at paragraph 17 making it a controlled tenancy under Section 2 (1) of Cap 301, Laws of Kenya which defines a controlled tenancy as; -

“controlled tenancy” means a tenancy of a shop, hotel or catering establishment—

(a)	which has not been reduced into writing; or
(b)	which has been reduced into writing and which—
(i)	is for a period not exceeding five years; or
(ii)	contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or



(iii)	relates to premises of a class specified under subsection (2) of this section:"	
(i)	is for a period not exceeding five years; or	
(ii)		contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or
(iii)	relates to premises of a class specified under subsection (2) of this section:"	

14. The tenant/applicant on the other hand in his written submissions and filed affidavits has stated that upon expiry of the initial lease agreement signed on 1st January 2012, the parties agreed to extend the tenancy on similar terms which agreement was not reduced into writing and that it did not result into another signed/executed lease agreement as claimed by the respondent.
15. We have perused the impugned lease agreement dated 20th April 2018 and we find that the lease was signed by both parties and is therefore a valid agreement.
16. Based on the analysis above, we find that the tribunal has jurisdiction to determine this matter as this tenancy falls under the dictates of a controlled tenancy and the notice of preliminary objection dated 2nd May 2024 is therefore dismissed.

Issue (b) Whether the tenant is entitled the orders sought in the application dated 22nd March 2024

17. The tenant/applicant approached this tribunal seeking that the landlord be prohibited from illegally evicting it and that the landlord be compelled to accept rent from the tenant.
18. We have already established that the notice issued to the tenant dated 22nd January 2024 is not a notice to terminate tenancy but a notice informing the tenant of non-renewal of the lease agreement dated 20th April 2018.
19. The tenant has submitted that the lease agreement between the parties dated 20th April 2018 is unregistered and that the same cannot be enforced. The tenant has however not denied signing the lease agreement but in its director's further affidavit, he states that he could not remember signing the same.
20. The respondent in his written submissions directs the court to the decision in Mega Garment Limited Vs Mistry Jadvart & Co. (EPZ) Limited (2016) eKLR where the Court of Appeal held that an unregistered document operates as a contract inter-partes and that the covenant arising from such a document would be enforceable as against the parties to the agreement.



21. The applicant in his submissions also states that the lease agreement dated 20th April 2018 cannot be admitted as evidence for reasons that the stamp duty has not been paid pursuant to Section 19 of the Stamp Duty Act. The respondent directs the court to the decision of Odunga J in Shadrack Mathias & another v Agnes Muluki Wambua [2021] eKLR where the court held as follows; -
- “32. Therefore, the mere failure to pay the stamp duty does not nullify the instrument in question. My position is supported by the decision in Azad Kara v Mwangi Mutero Mombasa HCCC No. 222 of 1997 where it was held that whereas it is mandatory under section 19 of the Stamp Duty Act, Cap 480 Laws of Kenya for an agreement to be stamped in order for it to be admissible in evidence however that does not make the document useless in evidence as the omission is curable under section 20 of the Stamp Duty Act.”
22. This tribunal therefore finds that the lease agreement dated 20th April 2018 is enforceable and that Clause 3(k) requiring the tenant/applicant to yield up vacant possession of the premises upon expiry of the lease ought to take effect.
23. We note that the tenant/applicant in its director’s supporting affidavit has sworn that it has heavily invested in the suit premises as evidenced by the photographs annexed thereto. Additionally, in the supplementary affidavit, the tenant’s director has sworn that the livelihood of 64 employees stands at risk should the tenant be evicted from the suit premises. This is evidenced by the list of staff annexed to the supplementary affidavit.
24. The tenant in its written submissions have sought for 6 months to vacate the suit premises should the tribunal find that the tenant/applicant ought to vacate the suit premises. We shall consider this plea as we make our final orders.
25. In view of the foregoing analysis, the tribunal finds that the tenant/applicant is not entitled to the orders sought in the application as it has been established that the tenant is bound by the lease agreement dated 8th April 2018.

Issue (C) Who shall bear the costs of the application?

26. As regards costs, the same are in the tribunal’s discretion under Section 12(1)(k) of Cap. 301, but always follow the event unless for good reasons otherwise ordered. We shall order each party to bear own costs.

C. Orders

27. In conclusion, the following final orders commend to us; -
- a. The notice of Preliminary objection dated 2nd May 2024 is hereby dismissed.
 - b. The application dated 22nd March 2024 is hereby dismissed with no orders as to costs.
 - c. The Interim Orders issued on 26th March, 2024 are hereby discharged and/or vacated forthwith.
 - d. The tenant shall vacate the suit premises within 60 days hereof and in default it shall be evicted by a licensed auctioneer who shall be provided with security by the OCS of the police station within whose jurisdiction the suit premises is situate.
 - e. Each party shall meet their own costs.
- It is so ordered.



RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 31ST DAY OF JULY 2024.

HON. JOYCE AKINYI OSODO

(PANEL CHAIRPERSON)

BUSINESS PREMISES RENT TRIBUNAL

HON GAKUHI CHEGE

(PANEL MEMBER)

In the presence of:

Ms Kioko for tenant/applicant

No appearance for landlord/respondent.

