



**Waitere t/a Kangethe Waitere & Co Advocates v Tourism Finance Corporation & another
(Tribunal Case 774 of 2018) [2023] KEBPRT 1292 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 1292 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE 774 OF 2018
CN MUGAMBI, CHAIR & JOYCE MURIGI, MEMBER
OCTOBER 6, 2023**

BETWEEN

**PERPETUA WANGECHI WAITERE T/A KANGETHE WAITERE & CO
ADVOCATES APPLICANT**

AND

**TOURISM FINANCE CORPORATION 1ST RESPONDENT
NILEREAL APPRAISES (EA) LTD 2ND RESPONDENT**

RULING

Introduction

1. On May 21, 2021, the following cases were consolidated: 774/2018, 1254/2019, 453/2019, 813/2019, 1282/2019 and 571/2020. File Number 774/2020 was ordered to be the lead file. For ease of reference later on in this ruling, I will list the parties in the following manner: -

Applicant Particulars

- 1st Perpetua Wangechi Waitere (774/2018)
- 2nd Gaitare & Company Advocates (1254/2019)
- 3rd Kahuthu & Kahuthu Advocates (453/2019)
- 4th Kalee Confectioners Ltd (813/2019)
- 5th Micronet Services Ltd (1282/2019)
- 6th Vincent Chokaa (571/2020)



The 1st Tenant's Case

2. The complaint filed by the 1st Tenant under Section 12(4) of [Cap 301](#) dated September 26, 2015 is brought on the grounds:-
 - a. That the landlord has threatened to levy distress unlawfully upon the office furniture and goods of the tenant.
 - b. That the landlord has appointed Gallant Worldwide Auctioneers to levy distress and they have proclaimed the office furniture of the tenant.
 - c. That the landlord has failed to furnish accounts of rents paid.
 - d. That the landlord has failed to keep a rent book
3. The 1st Tenant/Applicant alongside the complaint, filed an application dated September 26, 2018 wherein she sought orders restraining the landlord from unlawfully distressing for rent, an order for rents paid by the tenant, and a declaration that the tenant is entitled to offset the cost of repairs to her office from the rent due to the 1st Respondent. The affidavit in support of the said application may be summarized as follows hereunder:-
 - a. That she has been the Respondents tenant at Utalii house since the year 2010.
 - b. That in December 2016, the landlord failed to repair a blocked toilet as a result of which raw sewage and dirty water flowed into the 1st Applicant's offices.
 - c. That the 1st tenant costed the cost of repairs as a result of the blocked toile outflow to Kshs. 111,450/=, the landlord refused to respond to the tenant's letters communicating the said costs.
 - d. That the tenant informed the landlord through its agents, Nilereal that she would offset the cost of repairs against the rent due but Nilereal insisted on recovering the rent from the tenant and on 24.9.2016, Nilereal instructed the 3rd Respondent to recover rent from the tenant in the sum of Kshs. 165,055/=
 - e. That on September 17, 2018, the tenant forwarded a cheque to the landlord for the payment of rent for the quarter ending November 2018.

The 1st Respondent's Replying affidavit

4. The 1st Respondent's replying affidavit sworn by Ms. Carolyn Kinuthia may be summarized as follows hereunder:-
 - a. That she is the 1st Respondent's investment officer, duly authorized to swear the affidavit.
 - b. That this matter is not properly before the Tribunal.
 - c. That the tenant's lease dated October 19, 2010 ended on November 30, 2014.
 - d. That the tenant has not executed a letter of offer for a new lease forwarded to her on August 25, 2017.
 - e. That as at October 22, 2018, the tenant was in rent arrears to the tune of Kshs. 217,587/=.
 - f. That the Respondent denies the alleged damages brought on the tenant's premises and the tenant has never demanded that the landlord makes good any damage.



- g. That the tenant in her affidavit failed to exhibit the entire lease document leaving out pages 2 and 4 of the document.

The 2nd Respondent's Replying Affidavit

5. The 2nd Respondent's affidavit sworn by Ms. Jesse Kiharo may be summarized as follows:-
- a. That he is a director of the 2nd Respondent, the 1st Respondent's property agent in charge of Utalii House wherein the Applicant is a tenant.
 - b. That the tenant's account has always been in arrears since she moved into the suit premises.
 - c. That the 2nd Respondent denies the damages allegedly suffered by the tenant in the suit premises as the tenant has not produced any evidence to show that there was any such damage.
 - d. That the 2nd Respondent instructed the 3rd Respondent by a letter dated September 14, 2018 to recover rent arrears from the tenant and the 3rd Respondent proceeded to proclaim the tenant's goods.
 - e. That as at October 22, 2018, the tenant was in rent arrears amounting to Kshs. 217,587/=.

The 2nd Tenant's/Applicant's Case

6. The complaint filed by the 2nd Applicant/Tenant, Gaita & Company Advocates, dated December 5, 2019, is brought on the grounds that the landlord has threatened to increase rent without following due process, harassment through correspondences, intimidations, unannounced visits, locking the premises, levy of distress, threatening to disconnect power and water supply and eviction. The tenant has stated in its complaint that it is not in any rent arrears.
7. Contemporaneously with the filing of the complaint, the tenant also filed an application (dated December 5, 2019) seeking restraining orders against the Respondents, the tenant also sought an order that it be allowed to deposit rent starting January 2020 at the Tribunal based on the letter of offer dated 2.11.2009, an order that the letters dated July 17, 2017, February 7, 2019 and 4.12.2019 be declared null and void and finally a declaration that the tenant is a protected tenant and its tenancy is a controlled tenancy.

The tenant's affidavit in support of its motion may be summarized as follows:-

- a. That in November 2009, the tenant took up office space as a tenant of the 1st Respondent at an agreed quarterly rent of Kshs. 56,797.35/= plus VAT and a refundable security deposit, all of which the tenant paid upon acceptance of the offer.
- b. That the landlord, never provided a standard lease for the tenant's execution as provided for under Clause 20 of the letter of offer dated November 2, 2009.
- c. That by notice of the expiry of the first term, the tenancy became a controlled tenancy.
- d. That the initial lease expired on December 30, 2014 and the tenant has not executed any other letter of offer after December 30, 2014.
- e. That the tenant has paid all its lawfully due rent including the rent of December 2019 in full.
- f. That by a letter dated February 7, 2019, the 2nd Respondent demanded from the tenant Kshs. 300,065.67/= being undercharged rent.



- g. That on November 27, 2019, the 2nd Respondent illegally blocked the key access to the tenant's office locks and on 28.11.2019, the landlord put a wooden block across the tenant's office door.
- h. That the tenant has annexed the invoices and payments of rents to its affidavit.

The 3rd Applicant's/Tenant's case

8. The complaint filed by the 3rd Respondent is the one dated 9.4.2019 and is brought on the grounds similar to the ones brought forth in the 2nd tenant's application complaint. The 3rd tenant's affidavit in support of the application may be summarized as follows:-
 - a. That in December 2012, the tenant took up space in the landlord's premises, Utalii House at the quarterly rent of Kshs. 116,040.60/= and a security deposit of Kshs. 100,035/=.
 - b. That the landlord never provided a standard lease for the execution of the tenant as required by clause 20 of the offer letter dated December 21, 2012.
 - c. That the terms of the letter of offer expired on January 31, 2018 and no lease was ever executed before or after the expiry.
 - d. That the landlord through the 2nd Respondent has written several demand letters to the tenant resting with the one of February 7, 2019 demanding Kshs. 200,719.25/= which the tenant says is unknown to it.
 - e. That the tenant has paid rent diligently up to March 2019 and has annexed receipts and invoices in proof thereof.

The 1st Respondent's Replying Affidavit

In Reply to the 3rd Tenant's affidavit

9. The 1st Respondent's replying affidavit sworn by Mr. Dominic Ndwa on November 13, 2019 may be summarized as follows:-
 - a. That he is the head of investments of the 1st Respondent.
 - b. That the terms of the tenant's occupation have not been agreed upon.
 - c. That the tenancy between the parties is not a controlled tenancy.
 - d. That the monthly rent agreed between the tenant and the 1st Respondent was Kshs. 116,040/= and a security deposit of Kshs. 100,035/= and the agreement between the parties lapsed on January 31, 2018.
 - e. That the tenant has rent arrears totaling Kshs. 391,544.43/=.
 - f. That the tenant has refused to execute a new offer and lease but has remained in occupation of the premises and therefore a periodic tenancy may be construed.
 - g. That the rent arrears in dispute arose because the Applicant failed to adhere to the new rental terms and instead made payment while referring to the premises letter of offer.

The 4th Tenant/Applicant's case

10. The 4th tenant/Applicant's complaint dated August 27, 2019 is brought on the grounds that the landlord has unlawfully increased rent without following due process and purported to backdate the



new rent rates resulting in the imminent threat of levying distress, locking the premises and/or possible eviction. That further, the landlord has threatened to levy distress and/or forcibly evict the tenant on account of contested rent arrears based on irregular and illegal reconciliations.

11. The tenant, alongside the complaint, also filed an application seeking restraining orders against the landlord, a declaration that its tenancy is controlled and that the letter dated August 6, 2019 is a nullity. The tenant's affidavit in support of its application, sworn by Mr. Michael Mwenda Kigunda may be summarized as follows:-
 - a. That the Applicant has been a tenant of the 1st Respondent since the year 2001 paying a quarterly rent of Kshs. 283,313/=.
 - b. That in April 2019, the 1st Respondent unlawfully increased the rent from Kshs. 283,313/= to Kshs. 432,309/= and without any justification, the tenant objected to this rent increment by a letter dated June 11, 2019.
 - c. That the 2nd Respondent has backdated the new rent rates as a consequence of which the 1st Respondent demanded from the tenant rent arrears in the sum of Kshs. 1,645,106.98/=.
 - d. That the landlord has neglected to maintain the common washrooms despite numerous reminders from the tenants.

The 1st Respondent's Replying Affidavit

12. The 1st Respondent's affidavit in response to the depositions of the 4th tenant/Applicant may be summarized as follows:-
 - a. That the Applicant was issued with a letter of offer dated 19.12.2016 for a period of five years and one month but he has failed to sign the new letter of offer and lease.
 - b. That the new letter of offer increased the tenant's quarterly rent to Kshs. 402,148.80/= and Kshs. 432,309.96/= for the 1st and 2nd year and 3rd and 4th years respectively. It is also deposed that the tenant is aware of the reasons for the increment of rent.
 - c. That a periodic tenancy may be construed between the parties.
 - d. That the tenant has been the source of problems with the common washrooms.
 - e. That the Applicant was not billed on the basis of the new rates due to an error but once the error was corrected, the tenant was invoiced for the amount of Kshs. 990,291.67/= being the amount payable as per the letter of offer dated December 19, 2016.
 - f. That the tenant's continued occupation of the premises meant or was construed to mean that it had accepted the new lease terms.
 - g. That the tenant is in rent arrears of Kshs. 1,717,416.94 which has risen because the tenant failed to adhere to the new rental terms.
 - h. That the Applicant has not come to court with clean hands.

The 5th Applicant/Tenant's case

13. The 5th Tenant's/Applicant's complaint dated December 16, 2019 is brought on the grounds that the landlord closed the tenant's premises without notice and further unilaterally increased the rent without good cause and contrary to the laid down provisions of the law relating to the tenancy.



14. The tenant's application filed the same day sought restraining orders against the landlord and also sought police help in ensuring compliance with the court orders. The tenant's affidavit in support thereof may be summarized as follows:-
- a. That on December 19, 2016, the 1st tenant entered into a tenancy agreement with the landlord herein and has since been paying its rent on time at Kshs. 78,000/= quarterly.
 - b. That in the year 2019, the landlord unilaterally increased rent without any consultation or upgrading of the services to the tenants.
 - c. That the landlord's actions are in disregard of the tenant's rights under the law and not in tandem with current market rates in the city.
 - d. That the landlord now wants its new rates to operate retrospectively contrary to fair business practice and the law.
 - e. That on 29.11.2019, the landlord locked the tenant's premises in a bid to force the tenant to execute new lease documents which had never been discussed.
 - f. That the landlord has backdated the rent and is now demanding Kshs. 400,000/= from the tenant and which the tenant considers punitive.
15. The Respondents have not file any responses to the application by the 5th tenant/Applicant.

The 6th Applicant/tenant's case

16. The 6th tenant's complaint dated June 5, 2020 is brought on the grounds that the landlord has increased rent in a protected tenancy without the authority of the Tribunal and is threatening to levy distress for that rent increase.
17. The tenant also filed an application on the same date seeking orders restraining the landlord from levying distress against the tenant without an order from the Tribunal. The affidavit in support of the tenant's application may be summarized as follows:-
- a. That in November 2019, the Respondents increased the quarterly rent payable for the premises from Kshs. 141,604/= to Kshs. 202,292/= without an order from the Tribunal.
 - b. That the Respondents have now threatened to levy distress for the illegal rent.

The 1st Respondent's Replying affidavit

18. The 1st Respondent's replying affidavit sworn by Ms. Caroline Kinuthia may be summarized as follows:-
- a. That the tenant was issued with a letter of offer for renewal of lease together with new lease terms but they declined to sign. The said offer letter informed the tenant of the rent increment.
 - b. That there is a periodic tenancy in favour of the tenant.
 - c. That by its continued occupation of the suit premises, the tenant is deemed to have accepted the new terms and the rent arrears in dispute arose because the tenant did not adhere to the new terms.
 - d. That the tenant is in rent arrears in the sum of Kshs. 557,612.26/= as at June 30, 2020.



- e. That the tenant cannot continue occupying the landlord's premises and carrying out its business thereon while not paying rent.

Analysis and determination

- 19. The issues that arise for determination in these consolidated suits are in my view the following:-
 - a. Whether there exists a controlled tenancy between the Applicants/Tenants and the 1st Respondent.
 - b. Whether the Applicants are entitled to the orders they have sought in their applications.

Issue A

- 20. All the Applicants have demonstrated that they had lease agreements with the 1st Respondent and it is also clear that as at the time the tenants filed their respective suits, all their tenancies had expired and they were still in occupation and use of the suit premises. The status of the tenancies therefore became periodic tenancies under the provisions of Section 60(2) of the [Land Act](#) which provides as follows:-

“A lessor who accepts rent in respect of any period after the lease has been terminated or the term of the lease has expired shall not by reason of that fact be deemed to have consented to the lessee remaining in possession of the land or as having given up on the rights or remedies of the lessor against the lessee for breach of covenant or condition of the lease and if the lessor continues to accept rent from a tenant who remains in possession for two months after the termination of the lease a periodic lease from month to month shall be deemed to have come into force.”

- 21. The tenancy between the tenants and the 1st Respondent being from month to month and no longer in writing, the same therefore became a controlled tenancy under the provisions of Section 2 of [Cap 301](#).

Issue B

- 22. All the consolidated suits revolve around the increment of rent by the 1st Respondent without the authority of the Tribunal. The 1st and 2nd Respondents have in their replying affidavits deposed that after the expiry of the various leases, the tenants were issued with new letters of offer but which they refused to execute. The new letters of offer sought to increase the rents for all the tenants. I do note that by the time the 1st Respondent was giving the tenants new letters of offer, their lease agreements had already expired and they were already under controlled tenancies. For example, the lease for the 1st tenant expired on 30.11.2014 and the letter of offer is dated 28.8.2017. The lease for the 2nd tenant expired on 30.12.2014 and the letter of offer was received by the 2nd tenant on 20.7.2017. The 3rd tenant's lease expired on 31.1.2018 and the letter of offer to the said tenant was dated 25.4.2018.

- 23. The landlord's letter of offer which sought to increase the rent amounted to an alteration of the terms of the tenancy to the detriment of the tenants contrary to the provisions of Section 4(2) of [Cap 301](#) which provides as follows:-

“A 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 of such a tenancy shall give notice in that behalf to the tenant in the prescribed form.”

- 24. The tenants who were already in a controlled tenancy having declined to execute the new letters of offer, the only avenue open to the landlord/1st Respondent was the issuance of the mandatory notice



under Section 4(2) so as to alter the terms of the controlled tenancies which terms may have included the increment of rent amongst others.

25. In the circumstances, any and all letters purporting to increase the rent and which do not amount to the prescribed notice under Section 4(2) of Cap 301 are invalid and of no effect.
26. Another issue that arises as of necessity is what is the applicable rent? Having found that the purported increment of the rent by way of the letters of offer which were never executed to have been illegal, then it follows that the rent payable is the last rent each of the tenants was paying in accordance with their respective leases. All rent calculations should therefore be based on the rent each of the tenants paid in the last month of the expired lease.
27. The 1st tenant has also prayed that an order be made that she is entitled to offset the cost of repairs to her office from the rent due. I have not found any evidence of wrong doing on the part of the landlord to warrant the grant of this prayer neither have I found from the material placed before me, any evidence of such loss. I decline the invitation to make that declaration.

Disposition

28. In conclusion and based on the above prayers, I do hereby make the following orders:-
 - a. That the Respondents are hereby restrained from illegally increasing the rent payable by each of the tenants in the consolidated suits.
 - b. That the letters of offer issued to the tenants seeking to increase the rent payable by the tenants were all in contravention of the provisions of Section 4(2) of Cap 301 and therefore illegal and of no legal effect.
 - c. That the rent for each of the tenants shall be calculated based on the terms of their expired leases and any rent due after the expiry of the respective leases shall be calculated based on the rent paid in the last month of the respective lease.
 - d. That the Respondents are further restrained from levying distress for rent against the tenants in the consolidated suits pursuant to the illegal rent increments in all the letters of offer issued to the tenants.
 - e. That all the applications and complaints are determined on the terms above.
 - f. That the tenants will have the costs of the applications and the complaints to be agreed upon or to be assessed by the Tribunal.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 6TH DAY OF OCTOBER 2023.

HON. CYPRIAN MUGAMBI JOYCE MURIGI

CHAIRPERSON MEMBER

6.10.2023

In the presence of;

Ms. Waitere, (774/2018

Mr. Kahuthu (453/2019)

Mr. Gaita (1254/2019)

Mr. Ngui (774/2018, 453/2019, 571/2020)



Mr. Chokaa (571/2020)

