



Colour Gemstones Limited v Absa Pension Services Limited (Tribunal Case E292 of 2023) [2023] KEBPRT 1233 (KLR) (Civ) (14 September 2023) (Ruling)

Neutral citation: [2023] KEBPRT 1233 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
CIVIL
TRIBUNAL CASE E292 OF 2023
CN MUGAMBI, CHAIR
SEPTEMBER 14, 2023**

BETWEEN

COLOUR GEMSTONES LIMITED TENANT

AND

ABSA PENSION SERVICES LIMITED LANDLORD

RULING

1. The tenant's application dated 17.3.2023 seeks orders that pending the hearing and determination of the application, the Respondent be restrained from casting away or selling the tenant's goods proclaimed in the proclamation notice dated 9.3.2023, evicting the tenant unlawfully and from unlawfully interfering with the tenant's use and occupation of the suit premises.

The Tenant's depositions

2. The tenant's affidavit sworn on 17.3.2023 may be summarized as follows:-
 - a. That the tenant had a written lease agreement with the landlady which later became a controlled tenancy at a monthly rent of Kshs. 53,000/=.
 - b. That the landlord's previous agents were Regent Limited before NW Realite Agents took over the management of the suit premises on 1.4.2018.
 - c. That the rent payable by the tenant from March 2018 to March 2023 is Kshs. 3,152,709.30/ = which the tenants have for some period made payments amounting to Kshs. 4,015,000.00/ = which translates to an over payment of Kshs. 938,508.70/=.
 - d. That the figures shown as rent arrears by the landlord are completely unknown to the tenant and the new agents have not given the tenant a chance to reconcile the figures.



- e. That the new agents have declined to reconcile their accounts with the accounts of the previous agents and have instead proceeded to do a proclamation
 - f. That the only rent arrears the tenant admits to owing is Kshs. 150,000/= and not the Kshs. 920,000/= demanded by the landlord.
 - g. That the tenant is willing to pay the Kshs. 150,000/= within three months
3. The Respondent's affidavit sworn by one Mr. Evans Muema may be summarized as follows:-
- a. That there does not exist a controlled tenancy between the parties herein and the provisions of Cap 301 of the Laws of Kenya have therefore no application to the proceedings herein.
 - b. That the Applicant has admitted in his motion that he was in substantial rent arrears by 1.4.2018.
 - c. That the only figure the Applicant was conceding was that of Kshs. 300,000/= and which the tenant never substantiated.
 - d. That the Applicant did not honour its rental obligations even during the tenure of the previous management agent as can be seen from paragraphs 9, 11, 13 and 14 of the tenant's affidavit.
 - e. That on 25.11.2022, the landlord instructed M/S Bensure auctioneers to levy distress for rent against the tenant for the rent arrears of Kshs. 1,257,017.90/=.
 - f. That the tenant as at March 2023 owed rent arrears in the sum of Kshs. 920,197/= and the application by the tenant is therefore without merits.
 - g. That the Applicant's conduct is unequitable and inimical to the landlord's legitimate expectation to generate revenue from his investment.

Analysis and determination

4. The issues that arise for determination in this application are the following:-
- a. whether the tenancy relationship between the parties herein is a controlled tenancy and therefore whether the Tribunal has the jurisdiction to hear and determine this matter.
 - b. Whether the tenant is entitled to the orders sought in its application.

Issue A

5. The tenant has deponed in its affidavit that it had a written lease agreement with the Respondent which later turned into a controlled tenancy agreement. The tenant does not explain how the written lease agreement metamorphosed into a controlled tenancy but suffice it to say that none of the parties have exhibited a written lease agreement to their affidavits. The Respondent who also depones that there does not exist a controlled tenancy between the parties has not annexed any written lease agreement to its affidavit. In the premises, I will safely find that there does not exist a written agreement between the parties and the tenancy between them is therefore a controlled tenancy in terms of Section 2 of Cap 301.

Issue B

6. The dispute between the parties is one of the rent arrears due from the tenant to the landlord. It is clear from the affidavit of the Applicant that M/S Regent Auctioneers was the previous management



agents of the landlord and to whom the tenant paid rent. The premises were later taken over by a new management agent whose property manager has sworn a verifying affidavit. The position taken by the tenant is that it has overpaid rent by Kshs. 988,508.70/= based on the allegation that the total payable from March 2018 to March 2023 is Kshs. 3,152,709/= (plus Kshs. 76,218/= being covid rebates) against the paid sum of Kshs. 4,015,000/=. The tenant in proof of this allegation has not exhibited any evidence of proponents, merely contenting itself with the table produced as exhibit No. 2 which in my view does not amount to evidence of proponents in a matter such as this one.

7. The landlord on its part has alleged that as at March 2023, the tenant owed it rent in the sum of Kshs. 920,197.62/=. According to the landlord's exhibit No. 5, the tenant's rent statement, the opening balance is Kshs. 1,260,663/= which has been printed from the previous statements. The exhibit No. 5 shows the closing balance to be Kshs. 920,197/=.
8. I have also seen the demand notices for the payment of rent arrears;
Date Kshs.
25.10.2021 1,119,976.61
30.3.2022 883,020.81
14.4.2022 883,020.81
10.5.2022 823,020.81
27.5.2022 793,020.81
18.7.2022 683,020.81
9.2.2022 912,153.41
8.2.2023 950,197.61
17.2.2023 950,197.61
24.1.2023 980,197.61
9. The tenant has not challenged any single entry in the statements of account produced/annexed to the landlord's affidavit, the tenant has further not challenged the demand letters by the landlord as being not factual on the rent arrears owing. The tenant does not indicate what particular amount is disputed and further does not state what particular problem if any, it has with the previous management agents.
10. Although the tenant at paragraph 13 of the affidavit seeks to have a reconciliation of accounts to establish the rent arrears, in the same affidavit at paragraph 14, the tenant proceeds to depone that the rent arrears due are in the sum of Kshs. 150,000/= which the tenant seeks to clear in three months.
11. Having found that the landlord's statement of account for the tenant has not been challenged in any material way, and the tenant having admitted to being in rent arrears, it is my view and I do find that the tenant is in rent arrears and therefore in fundamental breach of its lease agreement and duty to pay rent to the landlord.
12. Consequently, the application dated 17.3.2023 has no merits and it is dismissed with costs to the landlord.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 14TH DAY OF SEPTEMBER 2023

HON. CYPRIAN MUGAMBI



CHAIRPERSON

14.9.2023

In the presence of Mr. Ombati for the tenant

In the absence of the landlord

