



Transcon Development Limited v Ngecha Mbari Ya Thaara Co Limited (Tribunal Case E819 of 2023) [2023] KEBPRT 1227 (KLR) (6 December 2023) (Ruling)

Neutral citation: [2023] KEBPRT 1227 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E819 OF 2023
CN MUGAMBI, CHAIR
DECEMBER 6, 2023**

BETWEEN

TRANSCON DEVELOPMENT LIMITED TENANT

AND

NGECHA MBARI YA THAARA CO LIMITED LANDLORD

RULING

Introduction

1. On 21.9.2023, Case Number E781 of 2023 and E819/2023 were ordered consolidated, file No. E787 of 2023 was elected the lead file and the applications in both cases were to proceed for hearing together.
2. The tenant's application dated 21.8.2023 seeks orders that the 2nd Respondent be restrained from carting away the tenant's goods on its premises pending the hearing and determination of the application. The Applicant has also sought an order that the proclamation herein be set aside pending the hearing of the application.
3. The Landlord's application dated 2.8.2023 filed by the Landlord seeks orders that the Tribunal be pleased to issue orders of eviction against the Respondent to be enforced by the OCS Kasarani police station. The landlord has also sought orders that the tenant be ordered to pay the unpaid rent of Kshs. 3,060,000/=.

The Tenant's depositions in support of his application dated 21.8.2023

4. The tenant's affidavit in support of its application may be summarized as follows:-
 - a. That on or about the year 2024, the parties entered into a lease agreement for land for plot No. 28 Zimmerman wherein the tenant constructed structures with the consent of the landlord.



- b. That towards the expiry of the lease, the tenant requested for an extension of the lease but the landlord declined and instead asked the tenant to vacate.
- c. That on 9.8.2023, the 2nd Respondent illegally proclaimed the tenant's goods for false rent arrears over a premises developed by the tenant and to which the tenant claims ownership.
- d. That the 2nd Respondent's actions amount to illegal dispossession of the tenants investments and business.
- e. That the tenant should be allowed at lease one year to vacate the premises in order to relocate its structures.

The Landlord's Replying affidavit

- 5. The 1st Respondent/Landlord's replying affidavit sworn on 16.9.2023 may be summarized as follows:-
 - a. That the tenancy for the suit premises was with/without improvements.
 - b. That the tenant does not deny that before the pandemic they were paying the rent of Kshs. 140,000/=.
 - c. That at the request of the tenant, the landlord decreased the rent payment to Kshs. 50,000/= and the reduction was to last until the lifting by the Government of the COVID-19 restrictions which restrictions were finally lifted in October 2020.
 - d. That the tenant owes the landlord in the sum of Kshs. 3,060,000/= and the landlord continues to suffer due to the non-payment of the said rent.

The Landlord's depositions in support of its application dated 2.8.2023

- 6. The landlord's affidavit aforesaid may be summarized as follows:-
 - a. That the parties entered into a lease agreement dated 21.1.2014 wherein the tenant was to pay a monthly rent of Kshs. 140,000/= which was reduced to Kshs. 50,000/= due to the COVID-19 Government imposed restrictions.
 - b. That the COVID restrictions were lifted in October 2020 but the tenant has continued paying the reduced rent of Kshs. 50,000/= as a consequence of which the tenant owes the landlord rent for 34 months amounting to Kshs. 3,060,000/=.
- 7. The Tenant's Replying affidavit in respect to the Landlord's Affidavit may be summarized as follows:-
 - a. That it reiterates the contents of its affidavit sworn on 21.8.2023.
 - b. That it is unknown to the tenant that the COVID-19 restrictions were lifted by the Government in October 2020 as the variant of Covid was in its peak between December 2021 and February 2022.
 - c. That at a meeting between the parties, it was agreed on 21.4.2021 that the tenant would continue paying the rent of Kshs. 50,000/= pending a five (5) year lease offer by the landlord.
 - d. That pending the offer of a new lease, the landlord was to avail to the tenant copies of the title deed to the land and also install sewerage services to the property.
 - e. That there has never been an agreement to increase rent.



- f. That it is in the interest of both parties that the tenant be granted a five year lease to cushion the tenant against the costs of renovations and also to enable the tenant to recover its investment in the property.
- g. That the tenant also prays to be given a notice of 18 months to enable it to vacate from the suit premises.

Analysis and determination

- 8. The only issue that arises for determination is whether each of the parties is entitled to the respective orders they have sought in their applications.
- 9. It is common ground that the Applicant and the 1st Respondent entered into a lease agreement for all that undeveloped piece of land known as Plot No. 28, a sub division of L.R. No. 8725. Clause B and C of thein the lease agreement provide as follows:-
 - B The demised premises is planned and designated for use for commercial purposes.
 - C The lessee is desirous of leading the demised premises for the purposes of his trade. Clause 1(3) and (4) of the lease agreement provides as follows:-
 - 3 The lessee may construct or erect buildings not of a permanent nature on the demised premises for any purpose of this business and in so doing he shall observe all the applicable laws and by laws and shall in no event put up buildings that are unsightly or spoil the view.
 - 4 To use the demised premises for his business and trade of Bar and Restaurant.
- 10. I am raising the above clauses because the tenant in its affidavit sworn on 21.8.2023 at paragraph 2 states as follows:-

“That on or about the year 2014, the tenant entered into a lease agreement with the landlord/1st Respondent for plot No. 28 located in Zimmerman which lease was solely on land”

It being clear from the lease agreement that the lease was for an undeveloped piece of land, the issue I need to determine at this stage is whether the “lease of undeveloped land wherein the lessee erects semi permanent structures can give rise to a controlled tenancy under the provisions of Section 2 of Cap 301 and therefore whether the Tribunal has jurisdiction to hear and determine this dispute.

- 11. Under Section 1 of Cap 301;

“the Act may be cited as the *landlord and Tenant (shops, Hotels and Catering Establishments) Act...*”

Under Section 2 (interpretation Section)

- a. Catering establishment means any premises on which is carried out the business of supplying food or drinks for consumption on such premises by persons other than those who reside and are boarded on such premises.
- b. Hotel means any premises in which accommodation or accommodation and meals are supplied or are available for supply to five or more adult persons in exchange for money or other valuable considerations.



- c. Shop means premises occupied wholly or mainly for the purposes of a retail or wholesale trade or business.
12. The tenant's business in the suit premises is that of a catering establishment and it is recognized as such even in the lease agreement. It is therefore clear that even though the tenant leased out an undeveloped land, what he created thereon is a business premises "for the purposes of his trade." In the circumstances, the Tribunal has the jurisdiction to hear and determine the disputes.
13. The agreed monthly rent for the suit premises as per the lease is Kshs. 140,000/=. This amount was reduced by mutual agreement to Kshs. 50,000/= at the request of the tenant for the duration of the Government restrictions on social places during the COVID-19 Pandemic. The tenant's letter dated 9.6.2020 sought to be allowed to make payments of Kshs. 50,000/= per month until business resumes. On 21.6.2020, the landlord wrote back to the tenant in the following terms at paragraph 2 in a letter of even date;
- "the Board has considered your request and has declined to grant your requested rent payments of Kshs. 100,000/= for the month of March and subsequently a monthly payment of Kshs. 50,000/= until the recourse of the Government imposed curfew of 2100 hours – 0400 hours."
14. It is therefore clear that the payment of the reduced rent of Kshs. 50,000/= was to go on only up to the time the Government imposed curfew was in force. Once the curfew was removed, the concession ended. I have perused the other documents exhibited by the tenant and none of them shows any other "meeting of the minds" between the parties. It was the prerogative of the landlord to accept or decline the request made by the tenant in its letter of 9.6.2020 and the landlord exercised this prerogative in the manner suggested in its letter of 21.6.2020, beyond that, the tenant did not have much of choice!
15. The issue that arises from the foregoing is therefore "when did the Government imposed curfew of 2100 hours – 0400 hours come to an end?"
- According to the landlord, the curfew and other COVID-19 related restrictions on businesses of the type the tenant was carrying out came to an end in October 2020 while according to the tenant, the COVID variant was at its peak between December 2021 and February 2022.
16. The tenant has exhibited minutes of a meeting held on 21.4.2021 between the parties. In the said minutes, Stanley Mwangi and George Gachoka represented the tenant while the landlord is recorded as having been represented by four unidentified representatives. The minutes are also not signed by the participants. The minutes are not clear as to when the tenant would stop paying the rent of Kshs. 50,000/= but only decry the prevailing economic conditions due to the COVID-19 pandemic. I do not think the unsigned minutes are of any probable value.
17. The tenant's suggestion that the COVID-19 pandemic went on until February 2022 is not supported by any evidence.
18. I am constrained to agree with the landlord that the COVID-19 restrictions were lifted in October 2020 and after October, the rent payable was to be the old rent of Kshs. 140,000/=. All rent calculations from November 2020 should therefore be based on the old figure of Kshs. 140,000/= and not Kshs. 50,000/=. The tenant must have understood this to be the position when it negotiated for a reduction of rent and which reduction was accepted subject to the conditions set out in the landlord's letter of 21.6.2020. The landlord's claim for the payment of rent based on the unpaid amount of Kshs. 90,000/= per month is therefore well founded in the correspondence forming the agreement between the parties.



19. The upshot of this is that, the tenant continues to be in rent arrears as far as the amount payable in excess of Kshs. 50,000/= per month remains unpaid.

20. The tenant in its application has sought orders restraining the respondent from levying distress for rent. I have already found that the tenant is in rent arrears and therefore the right of the Respondent to levy distress for rent has arisen and crystalized under Section 3 of Cap 293, the distress for rent Act.

It is trite law that a tenant who fails to pay rent It is trite law that a tenant who fails to pay rent breaches a fundamental covenant on his part and is not deserving of the equitable relief of injunction. In the case of; *Samuel Kipkorir Ng'eno & another v Local Authorities Pension Trust (Registered Trustees) & another* [2013] eKLR, the High Court held as follows:-

9 “A tenant’s first and main obligation is to pay rent as and when it becomes due, for the landlord has the right to an income from his investment. Why would a tenant allow himself to fall into such huge arrears of rent?

12 “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 undeserving of the court’s discretion. The court cannot be the refuge of a tenant who fails to meet his principle obligation of paying rent in and when it becomes due.”

21. I do not therefore find any merits in the tenant’s application seeking to restrain the landlord from levying distress for rent for the unpaid rent as earlier found in this ruling.

22. The landlord in its affidavit has sought that eviction orders would amount to terminating the tenancy between the parties. Termination of tenancies is provided for under Section 4 of Cap 301 and the landlord cannot seek to circumvent the said provisions. The Act, where relevant provides as follows:

Section 4(1)

“Notwithstanding the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be terminated and no term or condition in or right or service enjoyed by the tenant of any such tenancy shall be altered, otherwise than in accordance with the following provisions of this Act.”

Section 4(2)

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

23. The landlord was therefore obligated to issue the required mandatory notice to terminate under Section 4(2) of the Act (Cap 301) if it was desirous of terminating the tenancy herein. That, the landlord did not do and he can therefore not be entitled to terminate the tenancy. Whereas it is true that the tenancy can be terminated for the reasons of non-payment of rent under Section 7(1)(b) of Cap 301, that reason is to be set out in the notice to terminate under paragraph 3 of the prescribed Form in the Act.

Disposition

24. In view of the foregoing circumstances, the orders which commend themselves to the Tribunal and which I hereby make are as follows:-



- a. The tenant's application dated 21.8.2023 is hereby dismissed.
- b. The Tenant is ordered to pay the unpaid rent arrears of Kshs. 3,060,000/= to the Respondent within the next sixty (60) days from the date of this ruling.
- c. That the tenant failing to pay the rent as ordered in order (b) above, the Respondent will be at liberty to levy distress for the unpaid rent.
- d. That the Tenant shall bear the costs of the application.

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

HON. CYPRIAM MUGAMBI

CHAIRPERSON

06.12.2023

Ruling delivered in the presence of Ms. Kirui for the Tenant

No appearance by the Landlord

