



Ben Adipo Ongonga t/a the Amaruas Bar & Restaurant v Moses Ongalo t/a Ongalo Wayside Properties (Tribunal Case E043 of 2023) [2023] KEBPRT 709 (KLR) (8 December 2023) (Ruling)

Neutral citation: [2023] KEBPRT 709 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E043 OF 2023
A MUMA, MEMBER
DECEMBER 8, 2023**

BETWEEN

**BEN ADIPO ONGONGA T/A THE AMARUAS BAR &
RESTAURANT APPLICANT**

AND

MOSES ONGALO T/A ONGALO WAYSIDE PROPERTIES RESPONDENT

RULING

A. Parties and Representatives

1. The applicant, Ben Adipo Ongonga t/a The Amaruas Bar & Restaurant, is a Tenant who rented space for business at Business Unit B2 situate on Title Number Kisumu Block 6/75 (hereinafter known as the 'the Tenant').
2. The Firm of Onyango, Jonyo & Co. Advocates appears for Applicant/Tenant.
3. The Respondent, Moses Ongalo t/a Ongalo Wayside Properties is the Landlord and owner of the Business Unit B2 situate on Title Number Kisumu Block 6/75 (hereinafter known as the 'the suit premises').
4. The Firm of Mulanya & Maondo Advocates appears for Respondent/Landlord.

B. The Dispute Background

5. The Dispute in this matter arose when the Landlord issued the Tenant with a Notice vide a letter dated 24th April 2023 stating that the Tenant was in arrears of Kshs. 89,000 and was expected to pay the said rent within 30 days or vacate the suit premises no later than 31st May 2023.
6. In addition, the Landlord locked the Tenant's premises for failure to settle the rent arrears.



7. Through a Reference and Application both dated 7th July 2023, the Tenant moved this Honourable Tribunal seeking among other orders that pending the hearing and determination of the reference, the Tribunal grant the Tenant access to the demised premises by breaking the padlock fixed by the Landlord, permit the Tenant to continue accessing and using the demised premises peaceably and with quiet enjoyment and restrain the Respondent from harassing and/or interfering with the Tenant's and his customers' quiet occupation and quiet use of the demised premises.
8. Vide an Order issued on 12th July 2023, the Tribunal certified the matter as urgent, issued an Order allowing the Tenant to break the padlock(s) fixed by the Landlord and gain access and continue accessing and using the premises peaceably and with quiet enjoyment pending hearing of the application.

C. Tenant's Case

9. The Tenant avers that he entered into a tenancy agreement with the Landlord on 6th November 2022 being the date they executed of a tenancy agreement.
10. The Tenant contends that prior to commencement of the agreement, the Landlord acknowledged that the premises was in a bad state of disrepair and was in need of extensive repairs and renovations. He states that they had an agreement that he, the Tenant, would do the renovations and the repairs after which he would inform the Landlord of the costs incurred and the same would be reimbursed to him or defrayed through the payable rent by reducing the rent payable.
11. The Tenant contends that he incurred a total of KShs. 300,000 for the renovations and repairs. However, the same has never been reimbursed to him despite several reminders to the Landlord.
12. The Tenant further contends that he has been faithful in payment of rent arrears until when covid-19 hit that he defaulted in payment but he has since made attempts to settle the arrears.
13. He further contends that the Notice issued by the Landlord on 24th April 2023 was invalid as it was not issued in accordance with the law.

D. Landlord's Case

14. The Landlord avers that he entered into a tenancy agreement with the Tenant which he rented space at the suit premises at a monthly rent of KShs. 15,000. The Agreement provided that the rent would be increased to a sum of KShs. 20,000 from January 2023.
15. The Landlord contends that the Tenant failed to observe his duty to pay rent and fell into arrears of KShs. 108,000 as of August 2023. As a consequence, the Landlord vide a letter dated 24th April 2023, issued a notice to the Tenant, requiring him to pay all the rent that was due within 30 days of the demand or to vacate the premises.
16. The Landlord denies any agreement to reduce/ defray the rent payable on grounds of offsetting the Tenant's costs of the alleged renovation. Instead, he contends that the Tenant did the repairs and renovations on his own account, without the consent of the Landlord and in breach of the Tenancy Agreement.

E. Jurisdiction

17. The Jurisdiction of this Honourable Court has not been contested.



F. Issues for Determination

18. I have carefully perused all the pleadings and evidence presented before this Honourable Tribunal by the parties. It is therefore my respectful finding that the following issues are ripe for determination;
- a. Whether the Tenant is in arrears?
 - b. Whether the Notice issued by the Landlord on 24th April 2023 was valid?

G. Analysis and Findings

a. Whether the Tenant is in arrears?

19. The Tenant vide a letter dated 23rd May 2023, in response to the Notice issued by the Landlord on 24th April 2023, admitted to be in arrears and that the total rent due as of June 2023 was KShs. 95,000. Further, at paragraph 6 his Supplementary Affidavit dated 4th August 2023 averred that he had made attempts to settle the arrears such that the amount owing is KShs. 45,000 as opposed to KShs. 88,000 fronted by the Landlord.
20. The Landlord on the other hand in his Replying Affidavit dated 31st July 2023, contended that the Tenant had not paid any rent for the year 2023 and as at August 2023, the rent due was KShs. 108,000.
21. From the above, it is evident that the Tenant is in rent arrears for the suit property. The same has been admitted by both parties. The egress of their unity in mind is the amount owing in terms of the rent arrears.
22. I note that in disputing the amount of rent arrears, the Tenant disputed the monthly rent payable. According to the Tenant, the monthly rent payable is KShs. 15,000 while the Landlord contends that the rent payable is KShs. 20,000.
23. In determining the monthly rent payable, I make reference to the Tenancy Agreement dated 6th November 2022 between the Tenant and the Landlord. Paragraph 3 of the said agreement states;
3. The monthly rent shall be Kenya Shillings Fifteen Thousand (Kshs. 15,000.00) payable monthly in advance on the Fifth day of each month. The same shall be increased to a sum of Kenya Shillings Twenty Thousand (Kshs. 20,000.00) as from 1st January 2023.
24. In light of the foregoing, the Tribunal finds that the monthly rent payable is KShs. 20,000.
25. Having determined the monthly rent payable, I now move to determine the amount owed by the Tenant. I have considered the statements of rent payment filed by both the Landlord and the Tenant and the rent arrears in admittance by the Tenant and summarize the arrears as follows;



Month/Year	Rent Due (KSHS)	Rent Paid (KSHS)	Arrears
October 2022	3,000.00	00	3,000.00
November 2022	15,000.00	00	18,000.00
December 2022	15,000.00	00	33,000.00
January 2023	20,000.00	8,000.00	45,000.00
February 2023	20,000.00	20,000.00	45,000.00
March 2023	20,000.00	65,000.00	
April 2023	20,000.00	85,000.00	
May 2023	20,000.00	105,000.00	
June 2023	21,000.00	30,000.00	96,000.00
July 2023	21,000.00	117,000.00	
August 2023	21,000.00	30,000.00	108,000.00
TOTAL	196,000.00	88,000.00 Rent Arrears = Rent Due – Rent Paid KShs. (196,000.00 – 88,000.00) KShs. 108,000.00	

26. In view of the foregoing and in respect to issue of whether the Tenant is in rent arrears, this Tribunal finds that the Tenant is in rent arrears. The rent Amount owed is hereby found to be KShs. 108,000.00 as of August 2023.

b. Whether the Notice issued by the Landlord on 24th April 2023 was valid.

27. Termination of controlled tenancies is regulated by section 4 of the Landlord and Tenant (Shops, Hotels & Catering Establishments) cap 301 Laws of Kenya. The said provision obligates a landlord who wishes to terminate a controlled tenancy to issue a notice of termination of not less than two (2) months, failure to which such notice shall not take effect.



28. Further, Section 4(2) of Cap 301 Laws of Kenya provides that the notice ought to be in a preferred form. It provides thus:

“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 in the prescribed form”.

29. In the case of Manaver N. Alibhai T/A Diani Boutique vs. South Coast Fitness & Sports Centre Limited, Civil Appeal No. 203 of 1994 it was stated as follows;

“The Act lays down clearly and in detail, the procedure for the termination of a controlled tenancy. Section 4(1) of the Act states in very clear language that a controlled tenancy shall not 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 specified provisions of the Act. These provisions include the giving of a notice in the prescribed form. The notice shall not take effect earlier than 2 months from the date of receipt thereof by the tenant. The notice must also specify the ground upon which termination is sought. The prescribed notice in Form A also requires the landlord to ask the tenant to notify him in writing whether or not the tenant agrees to comply with the notice.”

30. In this case the Landlord issued the Tenant with a letter dated 24th April 2023 notifying the Tenant that his in arrears and requiring him to pay the said arrears within 30 days or to vacate the premises by 31st May 2023.

31. It is evident that the notice does not meet the threshold espoused in Section 4 of Cap 301 as it was not in the prescribed form. Further, the notice required the tenant to vacate the premises by 31st May 2023, a date that was less than 2 months from the date of the notice. The Tribunal therefore finds the notice invalid and ineffectual.

32. Having found the notice invalid and ineffectual, the purported enforcement thereof by the Landlord by way of closure and/or locking of the tenant’s business is unlawful.

33. Having made the above findings, I now turn to the prayers made by each party in these proceedings and make the following orders.

H. Orders

34. In the upshot, the Tenant’s Application dated 7th July 2023 is hereby allowed in the following terms:

- a. Prayers 2 and 3 are hereby affirmed.
- b. Tenant to pay the arrears owing to the Landlord on or before 30th January 2023.
- c. Failure by the Tenant to comply with order (b) above, the Landlord is at liberty to distress to recover the outstanding arrears and take vacant possession with assistance from OCS Police at Central Kisumu Police Station.
- d. Liberty to issue proper Notice to vacate granted to the Landlord.
- e. Each party shall bear their own costs.

HON A. MUMA

MEMBER



BUSINESS PREMISES RENT TRIBUNAL

Ruling dated, signed and delivered virtually by Hon. Muma this 8th day of December 2023 in presence of Onyango for the Applicant/Tenant and Dondo for the Landlord Respondents.

HON. A MUMA

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

