



Kamau t/a Victory Choma Roast v Kinyanjui; Mwangi (Interested Party) (Tribunal Case E742 of 2021) [2023] KEBPRT 36 (KLR) (Civ) (17 January 2023) (Ruling)

Neutral citation: [2023] KEBPRT 36 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
CIVIL
TRIBUNAL CASE E742 OF 2021
A MUMA, VICE CHAIR
JANUARY 17, 2023**

BETWEEN

PATRICK MUIRURI KAMAU T/A VICTORY CHOMA ROAST TENANT

AND

BONIFACE KAMANDE KINYANJUI RESPONDENT

AND

STEPHEN MWANGI INTERESTED PARTY

RULING

A. Parties and Representatives

1. The Applicant Patrick Muiruri Kamau instituted this suit as the Tenant of a rented business space known as Victory Choma Roast within Juventus Garden along Kenol- Sagana Highway. (hereinafter known as the Tenant/ Applicant)
2. The firm of M/S Daniel Henry & Co Advocates represents the Tenant/ Applicant.
3. The Respondent herein is the Lessee of a business space within Juventus Garden along Kenol-Sagana Highway. (hereinafter known as the Respondent)
4. The firm of M/S Solomon Mugo & Co Advocates represent the Respondent.
5. The Interested Party Stephen Mwangi is the Lessor of business spaces within Juventus Garden along Kenol- Sagana Highway. (hereinafter known as the Interested Party)
6. The firm of M/S Daniel Henry & Co Advocates also represent the Interested party.



B. The Dispute Background

7. The Tenant filed a reference to this Tribunal dated December 6, 2021. He also filed an Application under certificate of urgency supported by an affidavit sworn by himself on the even date.
8. This Tribunal issued orders on December 7, 2021 *inter alia*: Certifying the application urgent, ordering the Respondent to unconditionally reopen the premises or in default of the same allowing the Applicant to break in and get access of the premises pending hearing of the application interpartes.
9. The Tribunal also granted a temporary injunction against the Respondent, his agents and/or persons acting under his instructions from interfering with the ownership quiet possession, use, enjoyment and utilization of the business premises pending hearing of the application inter-partes. The OCS Kenol Police Station was ordered to provide security during execution of the of the aforementioned orders and the Tenant ordered to continue paying rent at Kshs 5,000 per month.
10. The Respondent filed a Replying Affidavit that was sworn in an unspecified date in February 2022.
11. The Tenant/ Applicant filed a further affidavit sworn by himself on April 7, 2022.
12. The Interested Party filed an Application dated May 16, 2022 under Certificate of Urgency and supported by an affidavit sworn on the even date seeking to be joined in the case as an interested party. The Application was granted as prayed by the Tribunal on the even date.
13. The Tenant/ Applicant filed a further affidavit sworn on October 28, 2022 together with his written submissions of even date.
14. This Tribunal also notes that the Applicant amended his reference to the Tribunal on November 29, 2022 albeit without leave.

C. Jurisdiction

15. The Respondent challenges the jurisdiction of this Tribunal on the basis that the Lease between himself and the Applicant's had expired by the time the suit was filed in this Tribunal.

D. The Tenant's/ Applicant's Claim

16. The Tenant contends that on December 1, 2021, he went to his premises where he operates a business of selling assorted meat, both raw and cooked only to find the premises locked in spite of him paying rent as and when it was. He asserts that the Respondent did not disclose the reason for the closure neither had he given prior notice that he intended to close the premises.
17. He further states that upon inquiry over the closure, the Respondent became hostile refusing to respond nor engage him.
18. The Respondent also refused to allow the Applicant to remove the perishables that comprise of assorted meat leading to immense loss.
19. Another contention by the Tenant is that he had already renovated the premises using a huge sum of money and the closure furthers his losses.
20. In his further affidavits the Applicant claims that the allegations by the Respondent that he has not been paying rent are untrue and that the Respondent is only using the rent tactic to avoid responding to the real issues at hand.



21. He then states that following the dispute with the Respondent herein, the owner of the premises approached him and stated that he had not been receiving his payment from the Respondent, as such, the Tenant should pay rent directly to the premises account which he begun doing.

E. The Respondent's Claim

22. In his Replying Affidavit, the Respondent claims that he is advised by his advocates which information he believes to be true that a person who is not a party to the contract cannot sue and/ or enforce any rights under the contract.
23. He then asserts that the present lease agreement is between himself and one Erastus Mbogo and the Applicant is a stranger to that agreement and should not enjoy the rights and obligations conferred by the lease agreement.
24. The Respondent denies being the Landlord of the premises and states that he only leased the same from Juventus Gardens Limited and the lease between himself and Juventus Gardens states that the lease is untransferable making the lease between himself and the Applicant's brother void. (paragraph 4)
25. He then states that the Lease agreement between himself and the Erastus Mbogo the Applicant's brother clearly stated that the lease will expire on November 30, 2021 and he cannot be forced to renew the Lease Agreement.
26. He further states that he did not ask the Applicant to renovate the premises and in any case the applicant did not expect to stay in the premises forever hence the purported cost of renovation was to the advantage of his business for the next six months till his lease expired.
27. He then contends that this Tribunal has no jurisdiction since it was filed on December 6, 2021 after expiry of the Lease.

F. The Interested Party's Case__

28. The Interested Party contends that he is the landlord of the demised property whilst the Respondent is the Tenant within the premises that are the subject matter of the case having gotten into an agreement in 2020.
29. He states that the Respondent started failing to remit the full rent and was in arrears. However, after a short while, he was able to cover the arrears and the usual rent.
30. He then contends that the Respondent went ahead to sublet the premises to the Applicant herein without his consent and with blatant disregard to the express clause of agreement barring such arrangements. For this reason he states that the actions of the Respondent were not only illegal but also in breach of an agreement between himself and the interested party.
31. He further states that he came to realize of the issue of subletting after he sent his manager to find out why the Respondent had paid rent between the months of August 2021 and January 2022. It was on this basis that the interested party sought to be joined as interested party to assist the Tribunal reach a fair and just decision in the matter.
32. In his Supporting Affidavit sworn on the May 16, 2022 the Interested Party states that after finding out the Applicant was the one in possession of the premises and finding out that the Applicant was not in fault with regard to arrears, he proceeded to get into a tenancy agreement with the Applicant and the Applicant has since been paying rent as and when it falls due.



33. The Interested Party adduced copies of the Lease agreements with both the Respondent and the Applicant which were marked as Exhibits “SM 1a”, “SM 1b” and “SM 2.”

G. List of Issues For Determination

34. The issues raised for determination before this Tribunal are as follows;
- a) Whether this Tribunal has jurisdiction to hear and determine this matter.
 - b) Whether the Respondent had the power to sublet the premises and whether his action of locking the premises was legal.

H. Analysis and Findings

a) Whether this Tribunal has jurisdiction to hear and determine this matter.

35. The Respondent challenges the jurisdiction of this Tribunal on the basis that the Tenant’s reference was filed at a time when the Tenant’s lease had expired.
36. The issues of jurisdiction of this Tribunal is spelt out in the provisions of the *Landlords and Tenants (Shops, Hotels and Catering Establishments) Act*, CAP 301 which regulates controlled tenancies.
37. Section 2 of the Act defines a controlled tenancy as “controlled tenancy” means a tenancy of a shop, hotel or catering establishment—which has not been reduced into writing; or which has been reduced into writing and which—is for a period not exceeding five years; or contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or relates to premises of a class specified under subsection (2) of this section.
38. The Respondent’s assertion is therefore neither here nor there and this dispute is well within the jurisdiction of this Tribunal.

b) Whether the Respondent had the power to sublet the premises and whether his action of locking the premises was legal.

39. The Respondent has rightly stated in Paragraph 4 of his Replying Affidavit that the Lease Agreement between himself and Juventus Gardens clearly stated that the Lease was untransferable and therefore the lease agreement with the Applicant’s brother was in his opinion, void. The same Lease Agreement has been annexed to the Interested Party’s Supporting Affidavit sworn on May 16, 2022 and marked as Exhibit “SM 1a.”
40. In addition to that Clause in the Respondent’s Lease Agreement, Clause (xii) of the Schedule to the *Landlord and Tenants (Shops, Hotels and Catering Establishments) Act*, CAP 301 states that a lessee shall not transfer, part with possession, or sublet the premises or any part thereof without the consent of the lessor.
41. In the instant suit, both the Lease Agreement and the terms and conditions implied in the tenancy by the *Landlord and Tenants Act* (CAP 301) preclude the Respondent from subletting the premises. This Tribunal therefore concludes that the Respondent did not have the power to sublet the premises.
42. On the second question of whether the Respondent’s action of locking the premises was legal, this Tribunal is guided by provisions of the law, particularly Section 12(h) of the *Landlord and Tenants (Shops, Hotels and Catering Establishments) Act*, CAP 301 which provides for the manner for distressing for rent. And if anything, the Respondent did not have the power to distress for rent since he did not have the power to sublet the premises.



43. Having made that conclusion the Tribunal is of the view that the Respondent's actions of locking up the premises was illegal and unjustified.
44. The Applicant seeks among others an order of injunction but he does not specify for what purposes, the injunctive orders issued by this Tribunal earlier on were to subsist pending hearing and determination of the instant. This Tribunal finds no merit in the prayer for an order of injunction since the Applicant has not demonstrated the need for that order. If anything, the Applicant has already gotten into a lease agreement with the Interested Party herein over the premises.

E.Orders

45. Having made a conclusion that the Respondent breached the Applicant's rights by unlawfully locking up his premises occasioning him loss and suffering, this Tribunal gives the following orders: -
- i. Status quo be maintained and Tenant to continue paying rent to the Interested Party, the Landlord of the premises as per the Lease Agreement entered by the two parties.
 - ii. The Respondent to cater for the losses incurred by the Applicant as a result of the illegal closure of the business premises contrary to CAP 301 assessed at Ksh 90,000 within 30 days.
 - iii. The Respondent to cover the Applicant's costs of the suit assessed at Kshs 10,000.

HON A. MUMA

VICE CHAIR

BUSINESS PREMISES RENT TRIBUNAL

Judgment dated, signed and delivered virtually by Hon A. Muma this 17th Day of January 2023 in the presence of Nyamu holding brief for Gachau for the Tenant and the Interested Party and in the absence of the Landlord.

HON A. MUMA

VICE CHAIR

BUSINESS PREMISES RENT TRIBUNAL

