



Mwaniki v King'oly Investment Limited & 2 others (Tribunal Case E398 of 2023) [2023] KEBPRT 1231 (KLR) (25 July 2023) (Ruling)

Neutral citation: [2023] KEBPRT 1231 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E398 OF 2023
CN MUGAMBI, CHAIR
JULY 25, 2023**

BETWEEN

EVA MWANIKI APPLICANT

AND

KING'OLY INVESTMENT LIMITED 1ST RESPONDENT

KALI MOHAMED GURE 2ND RESPONDENT

FANTASY AUCTIONEERS 3RD RESPONDENT

RULING

1. The tenant's application dated 17.4.2023 seeks an order that a statement of accounts be reconciled and the first Respondent to ascertain that the Applicant has paid all the rent with no rent arrears pending. The application also seeks orders restraining the Respondents from levying distress, advertising and/or selling the Applicant's goods listed in the proclamation notice dated 6.4.2023. Police assistance in the enforcement of the orders has also been sought.

The Tenant's Depositions.

2. The affidavits of the tenant sworn on 18.4.2023 and 30.5.2023 may be summarized as follows:
 - a. That the tenant's entry and operation of her business in the rent premises was authorized and consented to by the 1st Respondent.
 - b. That on 6.4.2023, the 3rd Respondent proclaimed the tenant's goods and greatly undervalued them.
 - c. That the tenant does not owe any rent arrears and the amount sought to be recovered also includes service charge which according to the tenant, is not recoverable by way of service charge.



- d. That it is only proper and just that a reconciliation of accounts be conducted to ascertain that the tenant has no pending rent arrears.
- e. That the tenant/Applicant has no connection with the lease agreement between the 1st and 2nd Respondents as she pays her rent independently.
- f. That the 1st Respondent is aware that the 2nd Respondent vacated the premises and indeed the service of the termination notice was effected on the tenant and not the 2nd Respondent.
- g. That the tenant has been operating her business in the suit premises for the last four and half years remitting rent on a monthly basis to the 1st Respondent, which effectively creates a landlord/tenant relationship.
- h. That the 1st Respondent has not denied that it has been receiving rent from the tenant.
- i. That the 1st Respondent has not explained why
- j. the proclamation drawn in the name of the 2nd Respondent was served upon the tenant/Applicant and why the auctioneer/3rd Respondent marked the tenant's goods for collection.

The Landlord's Deposition

- 3. The landlord's replying affidavit sworn by SAMUEL GAKIRIA on 10.5.2023 may be summarized as follows:
 - a. That on 1.11.2017, the 1st and 2nd Respondents entered into a lease agreement for the lease of the suit premises for a period of five years and two months, the lease was to expire on 31.12.2022.
 - b. That on 3.11.2022, the 2nd Respondent's representatives were served with a notice of expiry of the lease.
 - c. That the 2nd Respondent did not vacate the suit premises neither did he renew his lease precipitating the 1st Respondent to issue another notice of expiry of lease dated 8.3.2023, in this notice, the 2nd Respondent was invited to renew the terms of his lease.
 - d. That the 2nd Respondent failing to vacate and/or renew the lease, the 1st Respondent issued a demand notice to vacate and pay rent arrears amounting to Kshs. 215,000/= for the period up to 31.12.2022.
 - e. That the landlord has never authorized and/or consented to any other 3rd party inclusive of the tenant/Applicant herein to take up the suit premises as a lessee or tenant.
 - f. That the Applicant herein is not a tenant of the 1st Respondent and the tribunal therefore does not have jurisdiction to entertain this suit.
 - g. That in the circumstances, the issue of reconciliation of accounts with the tenant who is not the 1st Respondent's tenant does not arise.
 - h. That the suit premises is not a dwelling house.

Analysis and Determination

- 4. As at the time of writing this ruling, only the tenant had filed her submissions. I have read the same and will consider them in this ruling.



5. The issues that arise for determination in this application are in my view, the following:-
- a. Whether there exists a controlled landlord and tenant relationship between the Applicant and the 1st Respondent within the meaning of Section 2 of Cap 301
 - b. Whether the tenant/Applicant is entitled to the orders sought in her application.

Issue A

6. The tenant's position in this matter is that she is a tenant of the 1st Respondent pursuant to an oral agreement. It is the tenant's further deposition that she has been in occupation of the suit premises for the last four and half years and that she has been dutifully paying rent to the 1st Respondent. She further states that the 2nd Respondent long vacated the premises and the 1st Respondent has all along been aware of this.
7. The 1st Respondent on its part has denied that the Applicant is its tenant and further takes the view that the Tribunal has no jurisdiction in this matter.
8. The 1st Respondent has not denied that the tenant/Applicant is in occupation of the suit premises and has further not denied that it has been receiving rent from the tenant. Whereas the tenant explains the payments as rent, the 1st Respondent has not denied the same, neither has it explained the purpose for which it was receiving the money. From the tenant's affidavit, it is clear that she has made payments to NICOLE WANJA GAKIRIA and SAMUEL GAKIRIA. SAMUEL GAKIRIA on his affidavit sworn on 10.5.2023 has described himself as a director of the 1st Respondent.
9. At this juncture, I am willing to find, and I do find that, the Applicant and the 1st Respondent are in a tenancy relationship whose terms have not been reduced into writing and the said tenancy is therefore a controlled tenancy within the meaning ascribed to the same under Section 2 of Cap 301 of the Laws of Kenya.

Issue B

10. The tenant has deposed in her further affidavit that she does not owe the 1st Respondent any rent, the 1st Respondent does not actually demand any rent from the tenant herein. The tenant's complaint is that the 1st Respondent has proclaimed the Applicant's goods in the guise of proclaiming goods belonging to the 2nd Respondent. It is the tenant's contention that whereas the proclamation is done in the name of the 2nd Respondent who has since vacated from the premises, the goods actually proclaimed belong to the tenant/applicant. The 1st Respondent has not responded on the issue of the ownership of the goods proclaimed save to assert that the premises is not a residential premises from where personal items would be attached. On this score and based on the uncontroverted evidence of the tenant, I do find that the goods proclaimed indeed belong to the tenant/Applicant and not the 2nd Respondent as purported by the proclamation notice.
11. The landlord/1st Respondent is at liberty to follow the laid down procedure to levy distress for rent against the tenant if there be any rent arrears and is further legally entitled to terminate the tenancy between itself and the tenant if it so desires. All the landlord is required to do is to follow/comply with the law relevant to his choices.
12. It is therefore my view that the tenant is entitled to the protection she has sought from the tribunal and I consequently allow her application in terms of prayers 6, 7 and 8 of the said application.



13. The findings above have substantially dealt with the tenant's complaint and the same is determined in similar terms.
14. The tenant's application and complaint are allowed as above with costs to the tenant assessed at Kshs. 25,000/=.

RULING DATED, SIGNED & DELIVERED VIRTUALLY THIS 25TH DAY OF JULY 2023.

HON. CYPRIAN MUGAMBI

CHAIR PERSON

25. 7.2023

In the presence of;-

Mr. Ngetich for the tenant

No appearance by the landlord

