



**Victor Dora Swai t/a Dan Associates v Maendeleo Ya Wanawake Organization (MYWO)
(Tribunal Case E755 of 2023) [2024] KEBPRT 399 (KLR) (9 April 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 399 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E755 OF 2023
A MUMA, AG. CHAIR & J ROP, MEMBER
APRIL 9, 2024**

BETWEEN

VICTOR DORA SWAI T/A DAN ASSOCIATES APPLICANT

AND

MAENDELEO YA WANAWAKE ORGANIZATION (MYWO) RESPONDENT

RULING

A. Parties And Representatives

1. The Applicant, Victor Dora Swai T/A Dan Associates, is the tenant of an office premise, Suite No. 203, situated at LR No. 209/8663 on the 2nd Floor of Maendeleo House (hereinafter the “suit property”).
2. The firm of Atego & Associates Advocates represents the Applicant in this matter.
3. The Respondent, Maendeleo Ya Wanawake Organization (MYWO), is the owner of the suit property (hereinafter the “Landlord”).
4. The firm of Kirwa Koskei Advocates LLP represents the Landlord in the matter.

B. Background Of The Dispute

5. The Applicant (hereinafter the “Tenant”) moved this Tribunal vide a Reference and Application dated 8th August 2023 under a Certificate of Urgency seeking restraining orders against the Respondent/ Landlord, its agents and/or its servants, employees, heirs or assigns restraining them from varying or introducing new terms of the tenancy pending the determination of this Application. The Tribunal granted the first two prayers.
6. The parties were directed to file a Valuation Report for the suit property to which they both complied.



7. The Tenant also filed a Further Affidavit in support of the Valuation Report and Further Submissions contesting the Landlord's Valuation Report.

C. The Landlord's Claim

8. The Landlord avers that it is the lawful owner of the suit property.
9. The Landlord also avers that the Tenant has on several occasions procrastinated and deliberately avoided to honour the Landlord's request to suit the Tenant to a contract in form of a lease by avoiding to sign the Landlord's Offer Letter dated 10th March 2023 (hereinafter "the Offer Letter").
10. Moreover, the Landlord claims that the Tenant has not had his rent reviewed and/or varied for a period of close to twenty (20) years despite the prevailing economical variations that touch on cost of living. As such, the Tenant continues to enjoy the below-market rates for rent payable of the suit premises while other tenants have been suited to the standardized rates.
11. Following the refusal by the Tenant to sign the aforementioned Offer Letter, the Landlord issued the Tenant with a Notice to Terminate dated 8th May 2023.
12. Thereafter, the Landlord issued the Tenant with a Notice to Vacate dated 21st August 2023 with effect from the date of the Notice.

D. The Tenant's Claim

13. The Tenant avers that it has been a Tenant of the Landlord since 1st January 2004 operating without a written and signed lease agreement since the date of occupancy.
14. During this time, the Tenant dutifully paid a quarterly rent of Kshs. 99,585.00.
15. It is the Tenant's claim that on or about 10th March 2023, the Landlord purported to unlawfully and unilaterally vary and/or alter the terms of the tenancy by issuing the Tenant with an Offer Letter containing new terms and conditions without following the due process laid out in law. The Tenant did not accept these new terms and conditions.
16. However, the Tenant paid the quarterly rent for the period of May to June amounting to Kshs. 99,585.00 as earlier stated.
17. The Tenant further avers that the Landlord has consequently neglected and/or refused to issue the Tenant with an invoice detailing the 3rd quarter's rent arrears following the offer letter.

E. Jurisdiction

18. The jurisdiction of this Tribunal has not been disputed.

F. List Of Issues For Determination

19. The issues that fall for determination are as follows;
- i. Whether the Notice to Terminate dated 8th May 2023 is valid according to the provisions of the law governing controlled tenancies as envisaged in Cap. 301 of the Laws of Kenya?
 - ii. Whether the rent payable by the tenant as per the terms of their implied tenancy relationship should be varied and/or altered to the new terms of the Offer Letter?



G. Analysis & Determination

20. The Reference filed by the Applicant raises fundamental issues discussed herein below:
- i. Whether the Notice to Terminate dated 8th May 2023 is valid according to the provisions of the law governing controlled tenancies as envisaged in Cap. 301 of the Laws of Kenya?
21. The *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Chapter 301 Laws of Kenya (the “Act”) provides for the jurisdiction of the Tribunal to determine whether or not any tenancy is a controlled tenancy as per Section 12 where it states:
- A Tribunal shall, in relation to its area of jurisdiction have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in addition to and without prejudice to the generality of the foregoing shall have power—
- a. to determine whether or not any tenancy is a controlled tenancy;
22. Section 2 defines a controlled tenancy as;
- “a tenancy of a shop, hotel or catering establishment—
- a. which has not been reduced into writing; or
 - b. which has been reduced into writing and which—
 - i. is for a period not exceeding five years; or
 - ii. contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof;”
23. Therefore, for there to exist a controlled tenancy, in addition to the requirements provided in the Act above, there must be a clear Landlord and Tenant relationship which is clearly defined according to the terms of the tenancy agreement or implied from their conduct.
24. The parties do not dispute that the tenancy created between them was a controlled tenancy. The dispute is therefore properly before the tribunal.
25. I have well established that there existed a controlled tenancy between the Landlord and the Tenant. Termination of the said tenancy requires issuance of a termination notice in prescribed form. It is incumbent upon this tribunal to assess that the notice issued to the Tenant by the Landlord is properly as prescribed in law by Cap 301.
26. The position of the law on the issue of a termination notice as per Section 4 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* is now settled. The court in *Manaver N Alibhai T/A Diani Boutique v South Coast Fitness & Sports Centre Limited*, Civil Appeal No 203 of 1994, stated that: -

“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.”

27. It is evident that the notice of termination of the tenancy herein was in Form A as prescribed by the Act. Further, the notice of termination of the tenancy was issued on 8th May 2023 and purposed to take effect on 1st August 2023, being a period exceeding two months as required by the Act.
28. The Landlord has therefore satisfied the tribunal that the notice was regular and proper as envisaged under the law.
 - iii. Whether the rent payable by the Tenant as per the terms of their implied tenancy relationship should be varied and/or altered to the new terms of the Offer Letter?
29. Section 12 (1)(b) and (d) of the Landlord and Tenant Act, Cap 301 confers jurisdiction upon the Tribunal to vary rent and service charge payable by a Tenant in stating:
 - b. to determine or vary the rent to be payable in respect of any controlled tenancy, having regard to all the circumstances thereof;
 - c. where the rent chargeable in respect of any controlled tenancy includes a payment by way of service charge, to fix the amount of such service charge
30. The Landlord’s Valuation Report has 5 comparables and recommends the rate in the sum of Kshs. 100 per square feet, being Kshs 75 rent per square feet and an additional service charge of Kshs. 25. Given that the approximate area of the suit property is 591 square feet, the recommended total monthly rent payable is Kshs. 59,100.
31. Comparatively, The Tenant’s Valuation Report has 2 comparables and recommends a monthly rental rate of Kshs 70 per square feet and an additional service charge of Kshs. 20 amounting to Kshs. 90 per square feet.
32. However, the Tenant’s Valuer has adopted a reduced rate of 20% thus, assessing the new rental rate at Kshs 56 per square feet and a new service charge of Kshs. 16 per square feet thus, amounting to Kshs. 72 per square feet and a monthly total of Kshs. 42,552.
33. Notably, the difference of the initial market valued price as assessed by both parties is negligible.
34. The issue that remains is the 20% reduction rate imposed by the Tenant’s Valuer on the final amount which is not clearly stipulated by law.
35. The reasons for imposition of the aforementioned 20% reduction rate have been given as the deplorable state of the building in comparison to neighboring buildings and the existence of old tenants who have been in occupation for approximately 20 – 30 years.
36. Section 9 (2) of the Landlord and Tenant Act, Cap 301 with regard to matters that should be disregarded by the Tribunal in varying rent payable by a Tenant, provides as follows:

Without prejudice to the generality of this section, a Tribunal may, upon any reference—

- (a) determine or vary the rent to be payable in respect of the controlled tenancy, having regard to the terms thereof and to the rent at which the premises concerned might reasonably be expected to be let in the open market, and disregarding—
 - (i) any effect on rent of the fact that the tenant has, or his predecessors in title have, been in occupation of the premises



37. In light of the above, the existence of old tenants who have been in occupation for approximately 20 – 30 years is not a factor to be considered in assessing the market value of the suit property.
38. The Tribunal notes that the Landlord's Valuation Report acknowledges the need for minor repairs in Paragraph 11.0 and the same is reflected in the Tenant's Valuation Report. Accordingly, the state of the building affects the market value of the suit property and should thus be treated in the same magnitude.
39. However, the Tenant's Valuer has not provided the technical expert rationale used in arriving at 20% as the reduction rate imposed on the final rent market value of the suit property as opposed to 10% or 15%. The statement that some facilities were in disrepair does not in any way justify a particular rate of reduction in any event the Tenant is at liberty to file a complaint to have the said facilities repaired by the Landlord.
40. As conferred to this Tribunal by Section 12 (1)(b) and (d) of the Landlord and Tenant Act, this tribunal has the power to vary rent and service charge payable by a Tenant. This discretion has been exercised in determining the rent payable by the Tenant in this matter as follows:
- i. Kshs. 70.00 per square feet as the monthly rent payable;
 - ii. Kshs. 25.00 per square feet as the monthly service charge payable;

H. Orders

41. The upshot is that the Tenant's Reference and Application dated 8th August 2023 is partially upheld in the following terms:
- i. The Tenant is ordered to pay a quarterly rent at the rate of 70 shillings per square feet and 25 Shillings per square feet as monthly service charge.
 - ii. Costs of this Application to be borne by the Landlord.

HON A. MUMA

AG CHAIR/MEMBER

HON. JACKSON ROP

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

Ruling dated, signed and delivered at Nairobi by Hon A. Muma this 9th day of April 2024 in the presence of Akinyi holding brief for Odhiambo for the Tenant and Kirwa for the Landlord.

HON A. MUMA

AG CHAIR/MEMBER

HON. JACKSON ROP

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

