



**Nderi & another v Paul Otieno Olewe t/a Min Piny International Limited  
(Tribunal Case E453 of 2023) [2024] KEBPRT 400 (KLR) (8 April 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 400 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E453 OF 2023  
A MUMA, AG. CHAIR & J ROP, MEMBER  
APRIL 8, 2024**

**BETWEEN**

**SUSAN NANCY MUMBI NDERI ..... 1<sup>ST</sup> APPLICANT**

**SAMUEL KIBOCHA T/A BROADLINK ESTATE MANAGEMENT .... 2<sup>ND</sup>  
APPLICANT**

**AND**

**PAUL OTIENO OLEWE T/A MIN PINY INTERNATIONAL  
LIMITED ..... RESPONDENT**

**RULING**

**A. Parties and Representatives**

1. The 1<sup>st</sup> Applicant, Susan Nancy Mumbi Nderi, is the Landlord ('the Landlord') of property LR.No. 82/8746 at Donholm Estate shopping centre within Nairobi County in particular Shop No.2 ('the suit premises').
2. The 2<sup>nd</sup> Applicant, Samuel Kibocha trading as Broadlink Estate Management is the agent of the Landlord ('the Agent').
3. The Respondent, Paul Otieno Olewe trading as Min Piny International Limited, is the Tenant who has rented the space for business at the suit premises('the Tenant').
4. The Firm of Rosemary Monyangi and Company Advocates represents the Tenant in this matter.

**B. The Dispute Background**

5. The Landlord moved this Honorable Tribunal vide a Reference and Application evenly dated 2<sup>nd</sup> May 2023. The Landlord sought, among other orders, the following from this Honorable Tribunal:



- i. The Tenancy agreement dated 7<sup>th</sup> January 2019 be vacated and an order for vacant possession be issued for the suit premises.
  - ii. An injunction be issued preventing any further construction interference with the building structure of the suit premises by the Tenant and his agents.
6. Having considered the Landlord's Application, the Tribunal vide an Order dated 15<sup>th</sup> May 2023 ordered, among other orders, that:
  - i. A temporary injunction be issued preventing any further construction, interference with the building structure of the suit premises by the Tenant pending the hearing of the application;
  - ii. The Tenant to continue paying Kshs.25,000/- rent per month.
7. Subsequently, the Tenant filed a Notice of Preliminary Objection accompanied by a Replying Affidavit evenly dated 28<sup>th</sup> August 2023 in response to the Landlord's Application and Reference dated 15<sup>th</sup> May 2023.
8. The Application and Reference dated 2<sup>nd</sup> May 2023 was dismissed for want of prosecution vide an Order dated 18<sup>th</sup> September 2023.
9. The Landlord and Agent filed their Application dated 19<sup>th</sup> October 2023 seeking, among other orders, the reinstatement of the Application and Reference dated 2<sup>nd</sup> May 2023.
10. In response, the Tenant filed an Application dated 16<sup>th</sup> November 2023 seeking various orders, including:
  - i. Re-opening the suit.
  - ii. Restraining the Landlord, their servants, agents, caretaker, and/or employees from unlawfully interfering with the Tenant's quiet possession and lawful enjoyment of the premises.
  - iii. Requesting oversight from the OCS Donholm Police Station for compliance and uninterrupted peace.
11. Subsequently, the Tenant moved this Honorable Tribunal vide a Reference and Application evenly dated 16<sup>th</sup> November 2023 seeking the same Orders as outlined in his Application dated 16<sup>th</sup> November 2023.
12. Having considered the Applications of the Parties, the Tribunal via an Order dated 28<sup>th</sup> November 2023, reinstated the suit.

### **C. Landlord's Claim**

13. The Landlord's Application, dated 2<sup>nd</sup> May 2023, is based on grounds that the Tenant declined to pay the agreed rent, refused to vacate the premises, and has unlawfully carried out unauthorized constructions.
14. The Landlord avers that the suit premises were rented to the Tenant from January 2019 pursuant to a Tenancy Agreement dated 7<sup>th</sup> January 2019 for a period of 5 years and 3 months in which they agreed on a monthly rent of Kshs.25,000 with an annual increase of Kshs.5,000, resulting in an expected current rent of Kshs.35,000.
15. The landlord claims that the tenant violated the terms of the lease agreement by failing to pay 6 months' rent in advance and neglecting to provide a security deposit of Kshs.50,000, resulting in rent arrears of



Kshs.168,000. Furthermore, the landlord asserts that the tenant has paid a total of Kshs.1,075,250 in rent since 2019, which is less than the amount due for the 56 months of occupation.

16. The Landlord further claims that the Tenant has erected an iron sheet (mabati) perimeter fence and commenced construction without notifying her. As a result, she has been summoned and charged by the Nairobi City Council.
17. She also asserts that despite serving a termination notice specifying the lease's expiration as January 2024 without an option for renewal, the Tenant has not vacated the premises.
18. Moreover, the Agent avers that the Tenant has removed his property from the premises, making any order for distress for rent by this Tribunal ineffective.

#### **D. Tenant's Defence**

19. The Tenant avers that he has consistently paid the Landlord Kshs.25,000 per month and asserts that his rent is fully settled, with no outstanding arrears.
20. The Tenant further avers that he paid the six-month security deposit during the lease execution, in the presence of the lawyer who drafted and witnessed the lease in which both parties also signed a handwritten note acknowledging payment of Kshs.130,000.
21. Furthermore, the Tenant states that he has not carried out any construction or renovation in the premises and only intends to repair a leaking roof in an extension that does not form part of the premises, a process which he has not initiated.
22. The Tenant avers that he has not caused any damage to the walls and challenges the Landlord to provide evidence to the contrary.
23. Additionally, in his Application dated 16<sup>th</sup> November 2023, he avers that the Tenancy agreement is set to expire on 17<sup>th</sup> March 2025, and that the Landlord has served him with another purportedly illegal termination notice dated 8<sup>th</sup> November 2023 threatening eviction if he does not vacate the premises by 10<sup>th</sup> December 2023.

#### **E. Jurisdiction**

24. The Jurisdiction of this Honourable Court has been contested by the Tenant vide a Notice of Preliminary Objection dated 26<sup>th</sup> August 2023.
25. It is the Tenant's submission that the Application dated 2<sup>nd</sup> May 2023 is fatally defective for want of form asserting that the pleadings and prayers sought by the Landlord can only be granted by the Environment and Land Court.
26. Furthermore, the Tenant contends that the prayers sought in the Application dated 2<sup>nd</sup> May 2023 are based on Section 40 of the Civil Procedure Act, Cap 21 Laws of Kenya (the "Civil Procedure Act"), which, in his view, does not fall within the scope of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301 Laws of Kenya (the "Act").

#### **F. Issues for Determination**

27. Having 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 this Honourable Tribunal has jurisdiction to grant an order of injunction



- b. Whether the notice of eviction dated 8<sup>th</sup> November 2023 is valid
- c. Whether the Tenant is in arrears
- d. Whether the construction done by the Tenant is lawful?

## **G. Analysis and Finding**

### **a. Whether this Honourable Tribunal has jurisdiction to grant an order of injunction**

- 28. This Tribunal is guided by Article 159(1) of *the Constitution* of Kenya 2010 (the “COK”) which stipulates that judicial authority is derived from the people and is vested in, and to be exercised by, the courts and tribunals established by or under this Constitution.
- 29. Furthermore, Article 159(2)(d) of the COK emphasizes on the principle of ensuring justice without undue delay and without excessive regard for procedural technicalities.
- 30. The Tribunal is further guided by Sections 1A, 1B and 3A of the *Civil Procedure Act* which also features the principles outlined in *the Constitution* with emphasis on Section 3A which outlines the inherent powers of the court to make necessary orders for the ends of justice and to prevent abuse of the court's process.
- 31. Section 12(4) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Cap 301 Laws of Kenya (the “Act”) reinforces Section 3A of the *Civil Procedure Act* and provides that
 

“A Tribunal may investigate any complaint relating to a controlled tenancy made to it by the landlord or the tenant, and may make such order thereon as it deems fit” (Emphasis added).
- 32. The Tenant has filed grounds challenging the jurisdiction of this Tribunal based on the argument that the Landlord's pleadings are fatally defective in want of form and should be addressed by the Environment and Land Court. However, the Tribunal asserts that it will not prioritize procedural technicalities, such as the alleged lack of form.
- 33. In light of this, the Tribunal has the jurisdiction to issue orders in relation to controlled tenancies as is the case herein as well as to issue appropriate orders including orders of injunctions.

### **b. Whether the notice of eviction dated 8<sup>th</sup> November 2023 is valid?**

- 34. It is a well-established principle that parties are bound by the terms of their agreement and therefore they are legally obligated to adhere to the terms as set forth in the agreement.
- 35. In this instance, Clause 11 of the Agreement stipulates that:
 

“Either party terminating the Tenancy before the expiry of the aforesaid period for breach of any conditions within the Tenancy Agreement or for any other cause that impedes the continued subsistence of the agreement, then a period of 3 months is duly granted to either party taking into account the nature of the agreement, the character of the business and the magnitude the aforesaid termination may affect either party.”
- 36. The Tribunal recognizes that the notice of eviction was issued on 8<sup>th</sup> November 2023 and was to take effect on 10<sup>th</sup> November 2023 from the aforementioned date of issuance.
- 37. It is therefore the Tribunal's contention that notice of eviction failed to adhere to the mandatory three-month period as set out in Clause 11 of the Agreement.



38. Additionally, section 4(1) of the Act provides that:

“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.”

39. Section 4(5) further provides that:

“A tenancy notice shall not be effective for any of the purposes of this Act unless it specifies the grounds upon which the requesting party seeks the termination, alteration or reassessment concerned and requires the receiving party to notify the requesting party in writing, within one month after the date of receipt of the notice, whether or not he agrees to comply with the notice.”

40. From the aforementioned provisions it is quite clear that in the event of termination the provisions of the Act shall apply despite any other written law or the terms and conditions of a controlled tenancy. Additionally, in providing a termination notice, the requesting party is obligated to provide grounds upon which the party seeks termination.

41. From the above, the notice of eviction did not only adhere to provisions of clause 11 of the Agreement but also failed to set out the grounds of the termination.

42. However, this Tribunal notes that the Tenancy Agreement between the parties has lapsed as the same was set for a period of 5 years and 3 months from January 2019 to March 2024.

43. The Tribunal also acknowledges that the Landlord has issued the Tenant with several notices of eviction without an option of renewal evidencing the fact that the Landlord does not look forward to renew the Tenancy Agreement.

44. It is therefore this Tribunal's finding that despite the notice of eviction dated 8<sup>th</sup> November 2024 being invalid, the Tenancy Agreement is void due to effluxion of time.

### **c. Whether the Tenant is in arrears?**

45. Clause 3 of the Agreement outlines the terms of consideration to which the parties are bound to adhere to.

46. It specifies that the monthly rent for the premises shall be Kshs.25,000 paid on or before the 5<sup>th</sup> day of each month. Additionally, it stipulates that the Tenant is obligated to remit Kshs.150,000 to the Landlord as rent for a 6-month period.

47. Furthermore, the Agreement obligates the Tenant to provide a security deposit of Kshs.50,000, equivalent to two months' rent. The clause also states that the rent shall be reviewed at the expiry of one year to Kshs.30,000 or subject to the mutual agreement between the parties.

48. It is very evident that the wording of the Agreement is that the rent is to be increased once after the lapse of one year and not annually as construed by the Landlord.

49. According to the Landlord's Application, the Parties had mutually agreed on a monthly rent of Kshs.25,000, with an annual increase of Ksh.5,000, resulting in an expected current rent of Ksh.35,000, a fact which the Tenant has disputed.



50. Despite the Agreement provides for room for the mutual agreement between the parties and no proof showing the mutual agreement of the annual increment of rent is before this Tribunal, hence it is presumed the agreements were entered into orally.
51. It is well established that the provisions of a written agreement bear more evidentiary weight than those of an oral agreement. This Tribunal is guided by the provisions of the Evidence Act, Cap 80, where under section 98 which provides that:
- “When the terms of any contract or grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 97 of this Act, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to or subtracting from its terms:” (Emphasis added)
52. In the absence of written mutual agreements varying the rent payable as provided in the Agreement, the Tenant is obligated to pay the monthly rent of Kshs.25,000 that is during the year of 2019 and subject to review at the expiry of one year to Kshs.30,000 being rent for the years 2020 onwards.
53. Therefore, in determining the rent arrears payable by the Tenant, this Tribunal shall be guided by the Tenancy Agreement.
54. As per the Landlord’s application dated 19<sup>th</sup> October 2023, the Landlord avers that the Tenant has paid a total of Kshs.1,075,250 in rent since 2019, which is less than the amount due for the 56 months of occupation.
55. The rent he was supposed to pay for the 56 months which he has been in occupation is Kshs.1,400,000 if there is no rental increase and Kshs.1,580,000 when the rental increase is in effect.
56. The Landlord has provided this Tribunal with the M-pesa statements showing the total rent paid by the Tenant since 2019 to 2023 as at August.
57. The Honorable Tribunal has calculated the total rent arrears, based on the Agreement’s monthly rent of Kshs.25,000 in 2019 and Kshs.30,000 from 2020 onwards, in relation to the M-pesa statements provided by the Landlord. The accumulative rent arrears amount to approximately Kshs.563,900.
58. Additionally, this Tribunal is convinced on the validity of the handwritten acknowledgement receipt of Kshs.130,000 executed in the presence of the lawyer drafting it, that is, Onyango Oyieko and Associate Advocates and therefore acknowledges it.
59. Therefore, on this issue, this Tribunal finds that the Tenant is in default of paying rent and consequently, he is liable to pay to the Landlord the outstanding rent arrears in the sum of Kshs. 563,900.00.
- e. Whether the construction done by the Landlord is lawful?
- f. Clause 6 of the Agreement provides that repairs to the demised premises shall only be carried out by the Landlord to as so far as the common part affecting the premises will be concerned.
- g. As stated earlier, parties are bound by the terms of their agreement and therefore they are legally obligated to fulfill their duties as set forth in the agreement. In this instance, it is the duty of the Landlord to conduct repairs to the suit premises and not the Tenant.
- h. Orders



- I. In the upshot, the Tenant's Notice of Preliminary Objection dated 28<sup>th</sup> August 2023 is hereby dismissed on grounds that the Tribunal has jurisdiction.
- J. Additionally, the Landlord's Reference and Application dated 2<sup>nd</sup> May 2023 is hereby upheld in the following terms:
- a. The Notice of termination by the Landlord dated 8<sup>th</sup> November 2023 is invalid and the same is of no legal effect.
  - b. The Tenant to pay the rent arrears of Kshs. 563,900 within 30 days.
  - c. The lease having expired the Tenant is ordered to vacate and hand over vacant possession within 30 days.
  - d. The OCS Donholm Police Station to ensure compliance of the above orders of this Honorable Tribunal.

**HON A. MUMA - AG CHAIR/MEMBER**

**HON. JACKSON ROP - MEMBER**

**BUSINESS PREMISES RENT TRIBUNAL**

**RULING DATED, DELIVERED AND SIGNED AT NAIROBI ON THIS 8<sup>TH</sup> DAY OF APRIL 2024  
IN THE PRESENCE OF ROSEMARY MONYANGI FOR THE TENANT/APPLICANT AND  
MANANI FOR THE RESPONDENT/LANDLORD.**

**HON A. MUMA - AG CHAIR/MEMBER**

**HON. JACKSON ROP - MEMBER**

