



**Orchards Communications Limited v Suitable Hotels Limited (Tribunal  
Case E247 of 2023) [2024] KEBPRT 524 (KLR) (21 March 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 524 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E247 OF 2023  
CN MUGAMBI, CHAIR, N WAHOME & JOYCE MURIGI, MEMBERS  
MARCH 21, 2024**

**BETWEEN**  
**ORCHARDS COMMUNICATIONS LIMITED ..... TENANT**  
**AND**  
**SUITABLE HOTELS LIMITED ..... LANDLORD**

**RULING**

**Introduction**

1. The landlord's Application dated 24.10.2023 seeks orders that the Tribunal allows for the attachment of the Tenant's property for failure to pay monthly arrears amounting to Kshs. 3,561,037/= and for the eviction of the Tenant after the attachment of the Tenant's property. Costs of the Application have also been sought.

**The Landlord's depositions**

2. The landlord's affidavit in support of the Application sworn by one Mr. Titus Thuo Macharia and the landlord's further affidavit may both be summarized as follows:-
  - a. That on 15.1.2018, the parties herein entered into a lease agreement for a period of five years and three months.
  - b. That clause 4 of the lease agreement provided for an annual rent increment at the rate of 5% and an increment of 10% at the renewal of the said lease agreement.
  - c. That the initial rent at the beginning of the term of the lease was Kshs. 150,000/= per month.
  - d. That the Tenant has failed to pay the increased rent after every year and has also failed to pay the electricity bill for the premises it occupies.
  - e. That the Tenant has accumulated rent arrears amounting to Kshs. 3,561,037/=.



- f. That the lease agreement expired in March, 2023 and the Tenant has refused to renew the same despite reminders.
- g. That the rent arrears including the month of March, 2024 is Kshs. 1,135,016.98/= as shown in the spreadsheet annexed to the landlord's further affidavit and marked TTM 1.
- h. That the validity of the lease agreement has already been determined at the Tribunal.
- i. That the rent deposit is not refundable until the Tenant vacates the premises and the landlord repairs the property as the said deposit is to enable the landlord to reinstate the premises to its original state.
- j. That the Tenant has money to pay the rent arrears as it operates other businesses.

### **The Tenant's depositions**

3. The Tenant's replying affidavit sworn by M/S Janerose Njeri Kamau may be summarized as follows:-
  - a. That the landlord's claim of Kshs. 3,561,037/= is extremely high and unjustified.
  - b. That the Respondent admits to owing the landlord rent arrears in the sum of Kshs. 946,136/= and the Tenant is willing to liquidate the arrears in twelve monthly installments.
  - c. That the current rent demanded by the Applicant is not tenable and the Tenant cannot be able to meet its overheads and risks closing down.
  - d. That the execution of the lease agreement was contentious as the Tenant was not explained to nor did it acquire independent legal counsel.
  - e. That efforts to resolve this matter by way of review of the rent payable have not been successful.
  - f. That the Tenant is willing to vacate the suit premises with immediate effect to avoid accruing further rent arrears.
  - g. That the Tribunal ought to make orders for the deduction of the rent deposit of Kshs. 450,000/= paid to the landlord and the renovations made on the premises amounting to Kshs. 373,370/= as the landlord ought to cater for the cost of renovations which have upgraded the standards of the premises.
  - h. That the Tenant is not opposed to the payment of the electricity bill and is willing to settle the same.

### **Analysis and determination**

4. The issues that arise for determination in this Application are, in my view, the following:-
  - a. Whether the landlord is entitled to levy distress for rent against the Tenant?
  - b. Whether the landlord ought to deduct the deposit of Kshs. 450,000/= paid to it and costs of Kshs. 373,370/= worth of renovations from the rent owing
  - c. Whether the Tenant ought to be allowed to pay the rent arrears in twelve monthly installments.
  - d. Whether the landlord is entitled to the orders of eviction against the Tenant



**Issue A: Whether the landlord is entitled to levy distress for rent against the Tenant?**

5. By its replying affidavit, the Tenant admits to owing the landlord rent arrears in the sum of Kshs. 946,138/= while in the landlord's further affidavit, the landlord has confirmed that by March, 2024, the Tenant was in rent arrears of Kshs. 1,135,016.98/=. I have seen the table annexed to the landlords' further affidavit and it clearly shows how the figure of Kshs. 1,135,016.98/= is arrived at. The landlord's calculations are comprehensive and from the said calculations, I do find that indeed the Tenant as at March 2024, owed rent arrears in the sum of Kshs. 1,135,016.98/=. Whether by its own admission or on the calculations of the landlord, it is quite clear that the Tenant is in rent arrears. Is the landlord in the circumstances, entitled to levy distress for rent?

6. Section 3(1) of the [Distress for Rent Act](#) Cap 293 of the Laws of Kenya provides as follows:-

“Subject to the provisions of this Act and any other written law, any person having any rent or rent service in arrear and due upon a grant, lease, demised or contract shall have the same remedy by distress for the recovery of that rent or rent service as is given by the common Law of England in a similar case.”

It is clear from the above provision of the Law that once rent is in arrears, the landlord is entitled to levy distress for rent. In the instant case, there being no dispute that the rent is owing, the landlord is entitled to the prayer for the levy of distress for rent.

**Issue B: Whether the landlord ought to deduct the deposit of Kshs. 450,000/= paid to it and costs of Kshs. 373,370/= worth of renovations from the rent owing.**

7. Whereas the Tenant has made allegations that it has improved/renovated the suit premises at a cost of Kshs. 373,370/=: the replying affidavit does not contain the particulars of the said renovations. The tenant has further not demonstrated that if at all he renovated the premises in any manner, he had the written consent of the landlord as per the provisions of clause 1(c) of the lease agreement entered into between the parties. The Tenant has in the circumstances not established any basis upon which a refund of the alleged expenses incurred in the alleged renovations would be made and/or deducted from the rent arrears due to the landlord.

The Tenant's prayer that the rent deposit of Kshs. 450,000/= be deducted from the rent arrears is not tenable at this stage. Whereas it is not disputed that the Tenant paid a deposit of Kshs. 450,000/=: the same cannot be used to settle rent arrears as it is only refundable upon the termination of the lease agreement. In this case, the Tenant is still in the premises even though its lease has expired and continuous to express the desire to remain in the premises. moreover, the refund of the deposit is tied to other considerations which include but are not limited to the restoration of the premises to the state they were in at the time of the Tenant's entry into the premises.

**Issue C: Whether the Tenant ought to be allowed to pay the rent arrears in twelve monthly installments.**

8. The Tenant has deponed in his affidavit that it is willing to settle the rent arrears in twelve (12) months installments. From a rough calculation, the Tenant has not paid rent aggregating approximately seven (7) months. The Tenant attributes this situation to tough economic times and decline in business and has further stated it is constrained in continuing with the tenancy.

Under Section 12(1)(e) of Cap 301, the Tribunal has powers to inter alia make orders upon such terms and conditions as it thinks fit, for the recovery of possession and for the payment of arrears of



rent. The Tribunal has powers under the said Section therefore, to make orders for payment of rent in installments or upon any other condition that the Tribunal may consider fit. The exercise of this discretion must however be judicious and not whimsical or capricious.

9. The Tribunal appreciates that the arrears of rent claimed arose out of the annual increments which the Tenant failed to pay and the landlord failed to Implement and/or pursue as and when they fell due. The Tenant seems to have continued to pay the initially agreed rent of Kshs. 150,000/= per month completely ignoring the terms of the lease agreement while the landlord on the other hand, had completely slept on its rights to the increased rent!

I think in these circumstances, it is only fair to allow the Tenant to pay the outstanding rent arrears in installments. The period of twelve (12) months requested by the Tenant is on the higher side and unreasonable. I will allow the Tenant to clear the rent arrears on three equal monthly installments commencing April 2024.

#### **Issue D: Whether the landlord is entitled to the orders of eviction against the Tenant**

10. The Landlord has in its Application made a prayer for the eviction of the Tenant after the Tenant's goods have been attached. If the landlord is desirous of terminating the tenancy herein, then it ought to comply with the provisions of Section 4 of Cap 301 as to the issuance of a termination notice. This is so because Section 4(1) and 4(2) of Cap 301 provides as follows;-

“4(1) 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.”

“4(2) 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 to the tenant in the prescribed form.”

11. An order of eviction in the circumstances of this case would be contrary to the above provisions and would therefore amount to an illegal shortcut! The landlord having not demonstrated that it issued the mandatory notice to terminate tenancy under Section 4(2) of Cap 301 is not entitled to an order of eviction against the Tenant.
12. In disposing of this Application, the orders which commend themselves to the Tribunal and which I hereby make are the following;-
  - a. That the Tenant is hereby ordered to clear all rent arrears (Kshs. 1,135,016.98) in three equal monthly installments commencing April, 2024 in default of which the landlord will be at liberty to levy distress for rent for the recovery of the said rent using a licensed auctioneer.
  - b. That the Tenant will bear the costs of the Application.

**RULING DELIVERED VIRTUALLY BY HON. NDEGWA WAHOME, MBS AND HON. JOYCE MURIGI THIS 21<sup>ST</sup> DAY OF MARCH 2024.**

**HON. CYPRIAN MUGAMBI - CHAIRPERSON**

**BUSINESS PREMISES RENT TRIBUNAL**

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**HON. NDEGWA WAHOME, MBS HON. JOYCE MURIGI - MEMBER MEMBER  
BUSINESS PREMISES RENT TRIBUNAL BUSINESS PREMISES RENT TRIBUNAL**

Delivered in the presence of;

Waitere for the landlord

Ms. Wanja and Ms. Kivindu for the Tenant

