



**Levorin v Pure Lounge Limited (Tribunal Case E396 of 2023)
[2023] KEBPRT 697 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 697 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E396 OF 2023
J OSODO, CHAIR & GAKUHI CHEGE, MEMBER
NOVEMBER 30, 2023**

BETWEEN

DANIEL NJIRU LEVORIN LANDLORD

AND

PURE LOUNGE LIMITED TENANT

RULING

A. The Dispute Background

1. The landlord/applicant moved this tribunal by way of a reference under Section 12(4) of the *Landlords and Tenants (Shops, Hotels and Catering) Establishments Act* Cap 301 dated 15th April, 2023 stating that the tenant has failed, refused and neglected to vacate from the suit premises known as LR 12715/10048 despite being served with a notice to vacate dated 13th December 2022 and has also failed to clear rent arrears of Ksh. 549,950.
2. The landlord also filed a Notice of Motion under a certificate of Urgency dated 15th April, 2023 in which he sought for the following orders; -
 - i. That the application be certified as urgent.
 - ii. That the tenant/respondent be prohibited and restrained from unlawfully using the landlord's premises without paying rent pending the hearing inter-partes and determination of this application.
 - iii. That this honorable tribunal be pleased to issue an order to the landlord to levy distress for rent from the respondent.
 - iv. That this honorable tribunal be pleased to issue a termination and/or eviction order against the tenant/respondent from the landlord's premises.



- v. That the cost of this application be provided for.
3. The landlord simultaneously filed a supporting affidavit of even date in which he swore the following; -
- i. That on 1st November, 2019 he entered into a tenancy agreement with the tenant to let out shops No. 05,08,09,10 and stalls No. 01,02,03,04 against a monthly rent of Ksh. 46,000 for shops and Ksh. 45,000 for the stalls and outside space.
 - ii. That on or about the year 2021, the tenant herein failed to pay rent for several months accumulating arrears in the sum of Ksh. 576,850 as at 31st October, 2022.
 - iii. That on several months in 2021 and 2022, the tenant/respondent drew several cheques in the landlords favor but they all bounced and were returned by the bank for reasons that the drawer's account had insufficient funds. Copies of the said cheques are annexed as "DNL 1".
 - iv. That on various occasions between July 2022 and September 2022 the landlord contacted the tenant via WhatsApp in a bid to recover the rent arrears, which arrears the tenant acknowledged and confirmed to be accurate promising to pay. Copies of the screenshots of WhatsApp conversations are annexed as "DNL 2".
 - v. That the tenant did not make any effort to pay the rent arrears despite a telephone conversation on 22nd October, 2022 whereby they agreed on a payment plan for the outstanding arrears.
 - vi. That on 14th October, 2022, the landlord wrote a demand letter annexed herein as "DNL4" with regard to the rent arrears owed and the landlord's intention to sue in the event the tenant failed to meet the demand. The tenant through his advocate denied being in arrears despite the fact that he has always been made aware of his outstanding arrears.
 - vii. That on 7th December, 2022, the landlord issued a statutory termination notice against the tenant annexed as "DNL 7" which the tenant ignored and continued to refuse to pay rent.
4. The application is opposed vide a replying affidavit dated 2nd June, 2023 in which the tenant/respondent deposes as follows; -
- i. That the allegations that the tenant was personally served with the Notice to terminate tenancy are untrue as he has never met the Process Server one Willis Agayi neither has he received any document from the said Process Server as stated in the Affidavit of Service dated 16th December, 2022. They only talked on phone.
 - ii. That the averments in the Affidavit of Service being untrue ought to be considered and at the opportune moment, with leave from the tribunal, the deponent be cross-examined on the said affidavit and have the same expunged from the records.
 - iii. That prior to commencing his business he undertook extensive improvements on the shop adding fixtures and fittings which costed a substantial amount.
 - iv. That he denies the averment that he failed to pay rent in the year 2021. The landlord stated that the Covid-19 pandemic affected business in 2020 but he still ensured that he paid rent arrears to ensure that the rent does not accumulate and therefore did not ignore nor neglect to pay rent.
 - v. That the returned cheques were due to circumstances out of his control
 - vi. That he has worked tirelessly to pay the rent arrears while ensuring that he also pays the rent due so that the arrears do not accumulate any further. He has been paying an additional Ksh.



50,000 every month which goes to settle the arrears. Attached thereto are copies of Mpesa statements annexed as “FA-2”.

- vii. That he let go 2 shops which he had taken up whose total deposit was Ksh. 51,000 which was to settle the arrears. However, the landlord/applicant did not apply this amount to clear part of the arrears.
 - viii. That the landlord has frustrated his business in many ways including; cutting off water to the suit premises leading to purchase of water every fortnight, incurring extra electricity expenses due to illegal connections and drainage system issues which cause flooding at the suit premises when it rains.
 - ix. That the tenant filed a matter with this tribunal being Case No. E225 OF 2023 seeking to restrain the landlord from evicting him from the premises. However, due to the discussions between the parties, the tenant withdrew the matter being certain that the matter had been resolved.
 - x. That the tribunal allows the tenant time to settle the arrears in the installments he is currently paying and that he has chosen to indulge the landlord and settle the problems he is experiencing at the suit premises amicably.
5. The landlord filed a supplementary affidavit dated 22nd June, 2023 in which he addressed the issues raised by the tenant/respondent in the replying affidavit.
6. The application was canvassed by way of written submissions with the landlord/applicant filing submissions dated 14th July, 2023 and the tenant/respondent filing submissions dated 14th August, 2023. We shall consider the submissions while dealing with the issues for determination.

B. Issues For Determination

7. The following are the issues for determination; -
- a. Whether the notice to terminate tenancy dated 13th December, 2022 is valid.
 - b. Whether the landlord is entitled to the orders sought in the application dated 15th April, 2023.
 - c. Who shall bear the costs of the application?

Issue (a) Whether The Notice To Terminate Tenancy Dated 13th December, 2022 Is Valid

8. In the case of *Manaver N Alibhai t/a Diani Boutique – vs- South Coast Fitness & Sports Centre Limited* Civil Appeal No. 203 of 1994 it was held as follows: -

“The Act lays down clearly 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.”



9. In the instant case, the landlord/applicant issued the tenant a notice to terminate tenancy dated 13th December, 2022. Upon perusal of the said notice, we find that the notice is in the prescribed form and in accordance with section 4 (2) of Cap 301 Laws of Kenya.
10. The tenant/respondent in his replying affidavit dated 2nd June, 2023 denies being personally served with the Notice of termination of tenancy, but admits that he and the process server Willis Agayi only talked on phone. A cursory look at the affidavit of Service dated 16th December, 2022 herein reveals a detailed narration of the service that took place on the 15th of December, 2022. According to the Affidavit of Service, the tenant was duly served.
11. It is further revealed in the Landlord's supplementary affidavit that the tenant herein wrote a WhatsApp message on 2nd March, 2023 to the landlord's advocate in which among other issues requested for 30 days extension on the notice. The message stated as follows; -

“I introduced my team and we requested for a one month (30days) extension on the notice”
12. The landlord notes that the reference to “30 days extension” refers to the landlord's notice which was given and was due to take effect on 1st March, 2023.
13. Based on the analysis above, we find that the tenant was duly served with the said notice to terminate tenancy which is in the prescribed form and we have no reason to invalidate the said notice which has already taken effect. The landlord's insistence on the tenant vacating the suit premises is therefore merited.

Issue (b) Whether The Landlord/applicant Is Entitled To The Orders Sought In The Application Dated 15th April, 2023.

14. The landlord approached this tribunal complaining that the tenant herein is in rent arrears of Ksh. 549,950 aside from refusing to vacate the suit premises.
15. The tenant/respondent in his replying affidavit admits that indeed he has rent arrears as stated in the following paragraphs; -

“22.We have equally exchanged correspondences in this regard. These talks culminated to an arrangement that would allow me to clear the outstanding arrears.”

“33. That in the circumstances I pray that this honorable Court allows me to settle the arrears in the installments I am currently paying.”
16. The tenant in his submissions states that the rent arrears accrued during the Covid-19 pandemic period and that since then he has made efforts to clear the rent arrears and allegations that he has not paid rent since December 2022 are incorrect as evidenced by bank messages confirming payment annexed as “FA-2”. A cursory look at the messages herein reveals partial payments made in April 2023 and May 2023 which the landlord acknowledges and submits that the tenant has completely refused to pay any arrears beyond the amounts paid in May 2023. The tenant is therefore still in arrears.



17. In the case of *Samuel Kipkori Ngeno and Another – vs- Local Authorities Pension Trust (Registered Trustees) & Another* (2013) eKLR at paragraphs 9 and 12, the court held as follows: -

“9. A tenant’s first and main obligation is to pay rent as and when it becomes due for the landlord has the right to an income from his investment. Why would a tenant allow himself to fall into such huge arrears of rent”?

“12. The temporary injunction sought in the present application is an equitable remedy at the court’s discretion. He who comes to equity must come with clean hands. A tenant who is in huge arrears of rent is underserving of the court’s discretion. The court cannot be refuge of a tenant who fails to meet his principal obligation of paying rent as and when it becomes due”.

18. The foregoing case provides sufficient guidance in allowing the current application as the tenant is still in rent arrears and we therefore find and hold that he is underserving of this Tribunal’s protection.

Issue (c) Who Shall Bear The Cost Of The Application?

19. As regards costs, the same are in the Tribunal’s discretion under Section 12(1)(k) of Cap. 301, but always follow the event unless for good reasons otherwise ordered. We shall award costs to the landlord/ applicant.

C. Orders

20. In conclusion, the following final orders commend to us;

- a. The Notice to terminate tenancy dated 13th December, 2022 is hereby upheld and the tenant’s tenancy in respect to the suit premises is hereby terminated.
- b. The application dated 15th April, 2023 is hereby allowed with costs.
- c. The tenant shall forthwith vacate the suit premises and in default shall be forcibly evicted therefrom by a Licensed Auctioneer who shall be provided with security by the OCS within whose jurisdiction the premises are situate.
- d. The tenant is liable to pay rent arrears owing to the landlord up to and including the date of such vacation or eviction.
- e. The landlord is at liberty to use all lawful means to recover rent arrears against the tenant.
- f. The tenant shall pay costs of Kshs.40,000/- to the landlord.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF NOVEMBER 2023.

HON. JOYCE AKINYI OSODO

(PANEL CHAIRPERSON)

BUSINESS PREMISES RENT TRIBUNAL

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HON GAKUHI CHEGE



(MEMBER)

In the presence of:

Mwachofi for the tenant/respondent

