



**Belcom Agencies Limited v Transline Classic Limited (Tribunal Case
E009 of 2021) [2023] KEBPRT 1293 (KLR) (18 October 2023) (Judgment)**

Neutral citation: [2023] KEBPRT 1293 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E009 OF 2021
P MAY, MEMBER
OCTOBER 18, 2023**

BETWEEN

BELCOM AGENCIES LIMITED LANDLORD

AND

TRANSLINE CLASSIC LIMITED TENANT

JUDGMENT

1. The landlord approached the Tribunal by filing the reference dated 19/8/2021 under section 12(4) of CAP 301 seeking to have the tenant pay the outstanding rent arrears. The parties have in the course of the present proceedings filed applications which the Tribunal has had to dispense with vide the rulings delivered on diverse dates. The hearing of the reference proceeded on 22nd May, 2023 where each party called a single witness who testified in support of their respective positions. At the close of the hearing, the parties were directed to file written submissions.

Background

2. The parties herein got into tenancy relationship which both are in agreement that it commenced on 1st August, 2013 and was to last for a period of 10 years. The said tenancy relationship was governed by a tenancy agreement which was duly executed by the parties. The terms of the said lease were explicit. I will proceed to give a summary of the evidence tendered by the parties.

Landlord's Case

3. The landlord in their statement and testimony during the hearing of the reference stated that they were the owners of the demised property. The landlord stated that the agreed rent was as follows:
 - a. 1st November, 2013 to 31st October, 2015 Kshs. 70,000/ plus VAT
 - b. 1st November, 2015 to 31st November, 2020- Kshs. 100,000/ plus VAT



- c. 1st November, 2020 to 31st October 2023 – Kshs. 200,000 plus VAT.
4. The landlord acknowledged that at the time of executing the lease agreement, the tenant had made a payment of Kshs. 4,000,000/ and which was the only amount that the tenant had paid during the course of the tenancy. The landlord stated that the rent arrears owed as at 31st July, 2021 was Kshs. 5,480,000/ and which the tenant had continued to default payment including during the course of the present proceedings despite a clear order directing the tenant to pay rent as when it falls due.
5. The landlord has in their submissions denied being advanced any other payments by the tenant during the course of the proceedings and the tenancy. The landlord maintains that alluded prior payments made vide cheques was done long before the landlord and tenant relationship was created and the cheques were addressed to individuals rather than the company which is a separate legal entity. There was therefore no nexus between the cheques issued and the tenancy relationship created therein.

Tenant's Case

6. The tenant through its testimony stated that it was granted the demised premises by the landlord as from 1st August, 2013 and that the terms of the lease agreement were well captured. The tenant averred that the landlord had previously borrowed another amount of Kshs. 8,050,000/- and had issued cheques which remained unbanked in support of the same. This had been undertaken before the tenant took possession of the demised premises. The tenant stated that it had thus failed to pay the agreed rent as it had expected to have the same recovered from the money advanced.
7. The tenant urged the Tribunal to consider the said advanced payment to offset the rent arrears. The tenant urged the Tribunal to dismiss the reference as it was based on an unfounded rent arrears.

Analysis

8. The crux of the present dispute between the parties herein is the alleged default in rent arrears and or claims of overpayment of rent by the tenant. The parties have taken extremely divergent positions over the question of the rent owing. When the Tribunal retired to draft this judgement, it had the opportunity to assess and examine the evidence tendered and submissions deeply and place the arguments advanced by the parties in their proper context.
9. The parties do not dispute to the existence of a landlord and tenant relationship. They do not equally dispute to having entered a lease agreement dated 1st August, 2013 and whose terms were explicit.
10. The duty to pay rent is a cardinal one and there is a plethora of decisions which have affirmed this position. In Samuel Kipkori Ngeno and Another – vs- Local Authorities Pension Trust (Registered Trustees) & Another (2013) eKLR Justice HPG Waweru had the following to say on the issue: -

“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.”

11. In order to determine whether the tenant is in arrears or not it is important to rehash the facts that gave rise to the lease. The parties entered into a lease agreement which established the terms of the tenancy. At the time of executing the lease, the landlord acknowledged receipt of Kshs. 4,000,000/- as advance rent payment. The landlord has stated that this is the only payment that the tenant has made.
12. It is now well settled that parties are bound by their pleadings. In the case of; Daniel Otieno Migore v South Nyanza Sugar Co. Ltd (2018) eKLR: “It is by now well settled by precedent that parties are



bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded.”

13. Parties are further bound by the terms of their contracts. See *National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd* (2002) 2 E.A. 503, (2011) eKLR where the Court of Appeal at page 507 stated as follows: -

A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and prove

14. The parties have identified themselves as registered companies. A Company is a judicial person. The law expressly permits the incorporation of a business for the very purpose of enabling its shareholders and directors to escape personal liability. In *Salomon v Salomon & Co* (1897) AC 22 where Lord Macnaghten affirmed the separation between the corporation and its members in the following eternal words:

The company is at law a different person altogether from its subscribers...and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers, as members, liable, in any shape or form, except to the extent and in the manner provided by the act.

15. The privilege of incorporation is not without its limits; and that Courts and Tribunals will disregard the corporate form and allow the piercing of the corporate veil so as to allow a creditor to reach the personal assets of shareholders or directors in certain circumstances.
16. In Kenya, the judicial bodies have a strong presumption against piercing the corporate veil, and will only do so if there has been serious misconduct or if the Company, shareholders or directors who are asserted to be the Company’s alter egos have acted in fairly egregious manner. This it is well understood that the benefits of limited liability are expressed in the statute.
17. The corporate persona of a company will be dispensed with in cases where it is apparent that the company is being used as ‘A creature of [the controlling director], a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity.’ (See *Jones vs. Lipman & Another* [1962] 1 All ER 442) and *H. L. Bolton (Engineering Co. Ltd vs. T. J. Graham & Sons Ltd* [1956] 3 ALL ER where it was held;

“A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work, and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by law as such”

18. In general, therefore, Courts and Tribunals in Kenya will only allow for the piercing of the corporate veil when two requirements are met:



- a) First, the company is a mere instrumentality or alter ego of the shareholder or director in question such that there is such unity of interest and ownership that one is inseparable from the other; and
 - b) Second, the facts must be such that adherence to the fiction of separate entity would, under the circumstances, sanction a fraud or promote injustice.
19. Some of the factors the Court or Tribunal would likely look at to determine if the two requirements have been met include the following:
- i. Whether the company is adequately capitalized;
 - ii. Whether there is a failure to maintain adequate corporate records or to comply with corporate formalities;
 - iii. Whether there has been demonstrated commingling of funds or assets between the company and the asserted alter ego;
 - iv. Whether the alter ego has treated the assets or finances of the corporation as his own.
20. In the present proceedings the tenant has submitted a CR12 which indicate the directors of the landlord company as a proof of the debt incurred by the landlord and which it seeks to have settle the rent arrears. I have taken note that the said debt was incurred before the lease agreement was entered into. The 2 entities herein are corporate units with personnel possessing the requisite skillset to protect their interests as was seen by their actions of ensuring that the lease agreement was drafted by a qualified advocate. There is no plausible reason given by the tenant over the failure to include a clause on this debt advanced in 2012 fairly a year before the parties entered into a tenancy agreement.
21. The transaction between the parties prior to entering into the lease does not give rise to any fraud or other condition that would warrant this Tribunal to lift the corporate veil. The issue of the alleged debt does not fall within the purview of the Tribunal and I would respectfully decline any further invitation to delve into the merits of the same. The parties can claim for recovery at the appropriate fora.
22. I have perused through the documents filed by the parties herein. The question of the rent payable is not contested as the same was clearly stipulated in the agreement and could be arrived at through simple mathematical calculations. I have observed that the tenant had not advanced any payments other than the Kshs. 4,000,000 that has been acknowledged by the landlord after the filing of the reference and which is agreed covers the period from the inception of the tenancy to November 2018.
23. In view of the foregoing and having found that the landlord has proven their claim for rent arrears, I would now deal with the question of costs. It is trite law that costs follow an event. There is however variance between the amount claimed by the landlord in the reference being Kshs. 10,080.000/ which had clearly failed to factor the Kshs. 4,000,000/ advanced and the final claim during the hearing. Costs being made at the discretion of the Tribunal; I would decline to award the landlord the costs of the present proceedings.
24. In the end the following orders commend itself:
- a. The reference dated 19th August, 2021 is allowed to the extent that the tenant owes rent arrears from December 2018 to date.
 - b. The landlord shall send a demand to the tenant within 14 days and the tenant shall settle the arrears within 90 days of receipt of the demand. In default, the landlord shall be at liberty to commence recovery without any further reference to the Tribunal.



c. Each party shall bear their own costs.

JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY THIS 18TH DAY OF OCTOBER 2023.

HON. P. MAY - MEMBER

18.10.2023

In the absence of the parties.

