Arvees Fashions Limited v Kuria Holdings Limited (Tribunal Case 502 of 2019) [2024] KEBPRT 1006 (KLR) (18 July 2024) (Judgment)

Neutral citation: [2024] KEBPRT 1006 (KLR)

REPUBLIC OF KENYA

IN THE BUSINESS PREMISES RENT TRIBUNAL

TRIBUNAL CASE 502 OF 2019

N WAHOME, CHAIR & JOYCE MURIGI, MEMBER

JULY 18, 2024

BETWEEN

ARVEES FASHIONS LIMITED ..... TENANT

AND

KURIA HOLDINGS LIMITED ..... LANDLORD

JUDGMENT

1. The 1st Tenant M/S Nanak Crankshaft and Grinders Ltd filed Tribunal case No. 787 of 2018 by the reference dated 27th September 2018. The complainant by the Tenant was that:-

   " The Landlord has increased rent from Kshs.56,000/- to Kshs.200,000/-.

2. The 1st Tenant filed the reference contemporaneously with the notice of motion dated 26th September 2018. The Application in principal sought that the demised premises known as Godown No. 1 located on L.R No. 209/136/212 along Ngariama road, that the landlord allow the Tenant quiet possession thereof pending the hearing and determination of both the complaint and the application.

3. In response to the application, one Shadrack Thuo Kuria a director of the landlord swore a replying affidavit sworn on the 15th October, 2018. On his part, the 2nd Applicant/Tenant M/S Arvees Fashions Ltd filed its reference dated 29th May 2019 in Tribunal case No. 502 of 2019. Its complaint was that:

   a. The Landlord had locked the premises thereby denied the Tenant access.

   b. The landlord had refused to repair and or restore the premises into a tenantable state after a fire incident, and

   c. The Landlord had threatened to evict the Tenant.

4. The same was accompanied by a Notice of Motion application of the even date. It in principal sought that the landlord be ordered to reopen the demised premises located on L.R No.209/136/212

along Ngariama Road and to allow the Tenant quiet possession thereof pending the hearing and determination of both the Application and the Reference.

5. The landlord responded to both the reference and Replying Affidavit sworn on the 15th July 2019 by one Shadrack Thuku Kuria said to be a director of the landlord. The reference and Application aforesaid were triggered by the landlord's termination notice dated 17th April 2019.

6. The grounds for the termination notice were that:-

   i. The Tenant has defaulted in paying rent for a period of 12 months from April 2018,

   ii. The Tenant has committed substantial breaches by causing fire hazards upon the building,

   iii. The building has been condemned as unsafe after a fire hazard caused by the Tenant.

   iv. The landlord requires to take possession of the premises so as to materially reconstruct and repair it after fire damage caused by the Tenant.

7. It is important at this point to note that the 1st Tenant was given access to its demised space and allowed quiet possession by an order this court issued on the 28th September 2018. Similarly the 2nd Tenant was issued with orders to the same effect on the 30th May 2019.

8. By an order of this court made on the 23rd August 2019, both BPRT case No. 787 of 2018 and 502 of 2019 were consolidated and ordered heard together. However the court did not give directions on which of the two files would be the lead file. Importantly however is that the parties were heard together as anticipated by the court and the parties themselves.

9. After all the preliminaries were accomplished, the consolidated references were fixed for hearing on the 14th October 2021. The Tenants never appeared for the hearing on that date and their respective suits were dismissed with costs and the landlord allowed unfetered access to the demised premises. As indicated by the court, this was to allow for the landlord undertake extensive repairs on the premises.

10. However there was little comfort and short lived celebrations by the landlord as the Tenants were back to court by the notice of motion application dated 26th October 2021. They sought that the landlord be restrained from interfering with their respective demised premises and the setting aside of the orders made on the 4th October 2021 dismissing their reference.

11. The Application was responded to by the landlord through the Replying Affidavit sworn by one Edward Atiang Rombo on the 18th November 2021. The dependent is an advocate of the High Court and the counsel for the Landlord. The application was heard by way of oral submissions which were rendered on the 22nd January 2021 and the matter fixed for Ruling on the 16th December 2021.

12. The Ruling on the application dated 26th October 2021 was delivered by Hon. Patricia May on the 4th February 2022. The Tenants references were reinstated as were the orders of quiet possession.

13. The Landlord further filed the notice of motion application dated 7th December 2022 which among others sought for the following prayers,-

   i. Spent

   ii. That upon hearing this application, this Honourable Tribunal be pleased to set aside/vary the interim orders granted on 9th November 2021 by vacating the same.

   iii. That pending hearing and determination of this application, this Honourable Tribunal be and is hereby pleased to issue the earliest possible date for inspection of the suit premises herein.

iv. That pending hearing and determination of this application, this Honourable Tribunal be and is hereby pleased to allow the Applicant/Landlord herein seal the back entrance as an interim measure for any theft of the premises.

v. That the Tenant herein be barred from operating any grinders or machinery causing vibrations on the building.

vi. That this Honourable Tribunal be pleased to issue an order barring any entry of any personnel save for professionals into the suit premises pending hearing and determination of the complaint dated 27th July 2018.

vii. That the officer commanding station Central Police Station do ensure compliance.

14. The landlord was to further file the notice of motion application dated 13th March 2024. In it, it sought for the following reliefs:-

i. Spent

ii. That Honourable Patricia May be pleased to recuse herself from further presiding over the instant matter.

iii. That the file be placed before the Chairman for directions and/or appointing another judicial officer to take over the matter to the exclusion of Hon. Patricia May.

iv. That this file be and is hereby stored under lock and key for safe custody.

v. That this court be and is hereby pleased to issue directions that all outstanding rent to the tune of Kshs.4,0008,960 be paid pending hearing and determination of the reference.

vi. That the Tenants be denied audience by the Tribunal until prayer 5 hereinabove is complied with.

15. Earlier on and by the notice of motion application dated 22nd June 2022, the landlord had sued the 2nd Tenant and sought for the following reliefs:-

i. Spent

ii. That the Tenant be prohibited from occupying the premises known as L.R NO. 209/136/212 pending hearing and determination of this application interpartes.

iii. That the Tenant be prohibited from occupying the premises known as L.R NO. 209/136/212 pending hearing and determination of suit inter-partes.

iv. That the Tenant be directed to clear its rent obligations to the landlord amounting to Kshs.2,338,560/- being rent arrears of occupation of the suit premises since March 2018.

v. That this Honourable Tribunal be pleased to visit and physically inspect the state of the premises.

vi. That OCS Central Police Station ensures compliance of the orders hereinabove.

16. The Tenants responded to the said Application jointly through the grounds of opposition dated 16th August 2022. They asserted that the application was defective, was in conflict with Cap. 301 and that it intended to circumvent the Tenants complaints.

17. Due to the non attendance of the landlord to urge the application dated 22/6/2022. The same was on the 29/9/2022 dismissed with costs to the Tenants, it seems, as can be informed from the record that

the landlord's applications dated 7th December 2022 and 13th March 2024 were also never prosecuted. The same were only mentioned in passing by the landlord's counsel in her submissions. She seemed to intimitate that the same had not been opposed and that they should be allowed. We respectively decline that invitation for the obvious reasons that the same were never prosecuted.

18. This matter was eventually set down for hearing on the 27th March 2023. The landlord on this day had two witnesses namely Peter Kuria and Shadrack Thuku Kuria both directors of the landlord and who testified as LW1 and LW2 respectively. The landlords 3rd witness namely Engineer Ronald Kingangi testified on the 13th May 2024 and the Landlord closed its case.

19. On the same date, both Tenants testified through one Joseph Kiarie Kiriko who testified as TW1. He introduced himself as a manager of the 1st Tenant. Thereafter the Tenant closed its case. By consent of the parties, it was directed to have he parties file their respective written submissions.

20. The landlords submissions are dated 27/5/2024 whereas those for the Tenants are dated the 1/7/2024. We shall now proceed to briefly state the cases for both parties.

A. Case For The Landlord

21. The Landlord through its 3 witnesses and all the pleadings on record asserted that:-

    i. Its premises known as L.R No. 209/136/212 was gutted down by fire on the 1st April 2018 and where the 2nd Tenant was to blame.

    ii. The Tenants had denied it access and vacant possession to enable it carry out extensive repairs as required.

    iii. The court, the Tenants own report on the fire, the reports by the Nairobi city government and landlords own report on the state of the demised premises showed that same required extensive repairs and massive resources.

    iv. According to the landlord, Kshs.10,381,000/- was required to restore the premises.

    v. Though in occupation of the premises and while the 1st Tenant was still proceeding with its work, the Tenants had refused to pay the rent which had rose to Kshs.4,008,960.

    vi. The landlord therefore sought that the Tenancy be terminated and that the Tenant's be allowed to deliver vacant possession of the respective, spaces occupied by the Tenants within the building.

22. On their part, the Tenants denied having had anything to do with the fire that gutted the demised premises. Their evidence was that:-

    i. The 1st Tenant after the fire incident of 1st April 2018, it was required to pay increased rent from Kshs.56,000/- to Kshs.200,000/-. It rejected the same by filing the complaint herein.

    ii. On its part the 2nd Tenant was issued with a termination notice dated 17th April 2018 which was to take effect on the 1/7/2019. That provoked the filing of the reference dated the 29th May 2024.

    iii. By a report prepared by M/S Amazon Consultants Ltd, there was required at least Kshs.13,076,423.52 to rehabilitate the demised premises.

    iv. The landlord had refused to repair the premises and had also rejected their offer to repair the same.

v. The landlord had attempted to evict them from the premises and had infact advertised the premises to new tenants.

vi. They were not liable to pay any rent when their businesses were not operational.

vii. Demanded that the landlord be ordered to repair the premises or to in the alternative they be allowed to repair the same.

viii. Both the verbal notice to increase rent for the 1st Tenant and the termination notice by the landlord were both illegal and of no consequence in law.

ix. The Tenants therefore asked this court to allow their respective references and dismiss the landlord's notices to them.

23. We have perused all the extensive pleadings, the documents filed and the submissions by the respective parties and are of the view that the issues for determination in this matter are the following:-

A. Whether the notice to terminate the tenancy against the 2nd Tenant and the verbal notice to increase rent against the first Tenant are lawful.

B. Whether the Tenants are liable to pay rent for the duration of between 1st April 2018 and todate.

C. What are the just orders to make in the circumstances of this matter.

D. Who should bear the costs of this matter.

Issue No. A- Whether the notice to terminate the tenancy against the 2nd Tenant and the verbal notice to increase rent against the first 1st Tenant are lawful.

24. From the evidence on record, all the parties were in convergence of thought and from their respective reports that the building known as L.R NO. 209/136/212 needed very extensive repairs. This in particular on the spaces occupied by the Tenants. The report by the landlord was produced as exhibit 1(a), the covering letter thereof as Exhibit No. 1(b). letter dated 4th July 2018 by the city's fire department produced as exhibit No. 3. Also produced to confirm the damage was a letter dated 28/7/2019 by the City's department of public works which was produced as exhibits No.5 . The Landlord's 3rd witness is namely Engineer Ronald Kingangi also produced his report dated 2nd Augustt 2023 which had evaluated theeaerlier report prepared by the Landlord's consultant dated 4th July 2018. The same was marked as Exhibit No. 6.

25. The Tenants with the consent of the landlord produced the report by M/S Keviki General Builders dated 11th May 2018 and the one dated 2nd October 2018 by Engineer C.M. Shanyuma as Tenants exhibit No. 1.

26. Over and above the reports by the respective parties consultants and by the City Government Authorities, there is a report by the then chairman of this Tribunal which is seen from the proceedings herein and dated 23/8/2019 as well as the report by this court's inspector dated 1/2/2024. All these lead to the conclusion that the demised premises were incapable of providing tenancy between he 1st April 2018 upto date.

27. In those circumstances, we are unable to comprehend how the landlord would wish to increase rent in an inhabitable and untenable premises or even want to terminate such a tenancy which by intervention of fire was not effective.

28. In view of the reports by the Tenants, the landlord, the county Government authorities and even the court on the untenantable state of the premises, we are unable to understand how the Tenants could be issued with orders to be allowed unfettered access to obviously dangerous spaces within the Building known as L.R NO. 209/136/212. This orders were issued to the 1st and 2nd Tenants on the 28/9/2018 and 30th May, 2019.

29. Despite the orders having been issued as aforesaid, it was clear from the Tenants that they were never able to exploit the said orders. However, the landlord claimed that the 1st Tenant was operating from its premises albeit in a cladestine manner. It therefore sought to be paid rents in arrears by not only the 1st tenant but also the 2nd Tenant.

30. In our view, whether the notice to increase the rent or that in regard to the 2nd Tenant is within the conventional parameters as provided by the Act may not be relevant. In our view this is a controlled tenancy subsisting in abnormal circumstances. Where the landlord has not been paid rent for over 6 years and the Tenants have not been in operation for a similar period.

31. We shall revisit that question as we determine the issue on the most deserving orders to make in the circumstances of this matter.

32. The complaints by the Tenants are appreciated on the plain recognition of the provisions of the Act and in particular Sections 4(2), 4(4) and 7 of the Act and Regulations 4(1) of the Regulations to the Act but we doubt that the same can have exclusive application in the absence of a running tenancy for a period exceeding 6 years.

33. Though in deep appreciation of the mandatory provisions of the Act and as expounded in the Locus Classicus case of Fredrick Mutua Mulinge – vs- Kitui Teachers Housing Co-operative Society Ltd (2017) eKLR and the case of Manaver N. Alibhai T/A Diani Boutique – vs- South coast Fitness and Sports Centre Ltd (1995) eKLR the same may not apply perse in the obtaining circumstances of this matter and are distinguishable.

34. From the overall evidence on record, this is a contract that has constructively terminated by the effluxion of time. It would be illogical and not make any business sense to assume the continued landlord and Tenant relationship when the same is not productive in any manner to the parties for a prolonged or inordinately long period of time.

35. In our view, clause (ii) of the schedule to the Act was not expected to remain in force without limit. It was obviously meant to operate within logical timelines that also made business sense.

    it provides as follows:-

    "That where the premises are destroyed by fire, civil commotion, or accident, through no negligence on the part of the lessee, any liability to pay rent shall be suspended until the premises are again made fit and habitable".

36. We reiterate our view that the law must have envisioned reasonable periods of such suspension of payment of rent and also rehabilitation of such destroyed premises.

37. Section 53 (E) of the *land registration Act* offers a glimpse on how a lease disturbed by five should determine.

    It provides that:-

    "if at any time the leased premises or any part thereof are destroyed or damaged by fire, civil commotion or accident not attributable to the negligence of the lessee, his servants

or his licensees, so as to render the leased premises or any part thereof wholly or partially unfit for occupation or se, the rent or a just proportion thereof according to the nature and effect of the damage sustained shall be suspended and cease to be payable until the leased premises have again been rendered fit for occupation and use within six (6) months of their destruction or damage as aforesaid, the lessee may at his option, and on giving one month's written notice of his intention so as to do determine the lease".

38. The Tenants in this matter have not been in business for over 6 years, there is no end in sight as to when the demised premises will be availed for their use. To want to cling to the same is incomprehensible unless they are accruing some benefit thereof without any cost as alleged by the landlord.

39. We are also persuaded by the leading case on the question of frustration of a tenancy as a result of a fire incident. The case Taylor – vs- Cadwell (1863) E.R 309 where the court held that where a tenancy and/or contract was frustrated by fire the parties were allowed to disengage.

40. The general jurisprudence on the issue in England is that a tenancy or contract frustrated by fire enabled the parties to disengage from the same and if such frustrations proceeded for a period of three months or more the same was considered terminated. This is in regard to short term tenancies like the present one whereas in long term Tenancies or leases it depended on the length or such lease or tenancy.

41. We therefore respectfully determine that the present tenancy has lost meaning, is not productive and there would be no basis to sustain the same as no progressive objective would be achieved from such action. We would therefore separate the parties as their landlord/Tenant relationship has long been constructively terminated and we give effect to that reality.

Issue No. B- Whether the Tenants are liable to pay rent for the period between 1/4/2018 and todate.

42. We reiterate that clause II of the schedule to the Act provides that rent is effectively suspended in case of fire where the lessee is not to blame. Though the landlord in its pleadings purported to place liability on the occurrence of the fire to the 2nd Tenant no evidence was offered to that effect.

43. Indeed there was no evidence to show that the 2nd Tenant was ever reported as a suspect to any authorities. Also, all the reports by the consultants including Exhibit No. 1(a) by the landlord's own consultant absolved all the players in this matter from any responsibility on the fire. We therefore are not persuaded to depart from this conventional wisdom of the law which premises the innocence of the Tenant unless otherwise proved.

44. However, we feel that this court should have intervened and expedited on the question of having the premises restored at the shortest time possible for continued economic activities thereof. The parties should also have appropriately moved this court under Section 12(1) (g) to help address the persistent quagmire and the economic loss of unmitigated proportions. The section provides that:-

45. "12(i)g(i)- where the landlord fails to carryout any repairs for which he is liable. "to have the required repairs carried out at the cost of the landlord and, if the landlord fails to pay the cost of such repairs, to recover the cost thereof by requiring the tenant to pay rent to the Tribunal for such period as may be required to defray the cost of such repairs, and so that the receipt of the Tribunal shall be a good discharge for any rent so paid".

46. Part (ii) of the Section provides that:-

> " To authorize the Tenant to carry out the required repairs, and to deduct the cost of such repairs from the rent payable to the Landlord".

47. That is now water under the bridge and a sad reality to all the parties herein. We also note that the landlord's premises on the other floors which were not affected could not be allowed to continue operations due to the inherent dangers as recognized by the reports of all consults and or experts. This is a state of affairs that this court cannot allow to continue. This is a business Premises Rent Tribunal. If there is no Business running, no premises that are habitable and without rent being paid, then the functioning of this tribunal is deflated.

48. From the totality of the evaluation of this issue, it is our view that the Tenants cannot be made liable for payment of rent for their respective spaces when no evidence is shown of any profits accrued from any economic activities on the said spaces.

Issue No. C- What are the just orders to make in the circumstances of this matter.

49. Section 9(2) (b) of the Act provides that without prejudice to the generality of this Section, a Tribunal may, upon any reference-

> " Terminate or vary any of the terms or conditions of the controlled tenancy, or any of the rights or services enjoyed by the Tenant, upon such conditions, if any as it deems appropriate".

50. Further Section 12(4) of the Act provides that:-

> " In addition to any other powers specifically conferred on it by or under this Act, a Tribunal may investigate any complaint to a controlled tenancy made to it by the landlord or the tenant and may make such order thereon as it deems fit".

51. With the above in mind, we reiterate our dispositions on the two prior issues to the effect that the Landlord and Tenant relationship herein is constructively terminated and that there should be no rent payable by the Tenants to the Landlord during the period that the Tenancy was interrupted.

52. We would further and in determination of the fourth issue on costs direct that each party bears own costs. this is from the overall evaluation of the record. It is the just decision to make in the circumstances of this matter. A Landlord without benefit from its investment for 6 years and Tenants out of business for the same period.

53. In the final analysis, the orders that commend to us are the following:-

    i. That the Landlord and Tenant relationship herein is constructively terminated and effect is given of such termination.

    ii. That the Landlord is allowed unfettered access and vacant possession of land Reference No. 209/136/212 situate at Nairobi City.

    iii. That no rent is payable on the demised premises by the 1st and 2nd Tenants effective the 1st April 2018 todate.

    iv. That each party shall bear own costs of this suit.

Those are the orders of the court.

JUDGEMENT SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF JULY, 2024.

HON. NDEGWA WAHOME, MBS HON. JOYCE MURIGI

PENEL CHAIRPERSON MEMBER

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Judgement delivered in the presence of Mr. Kisaka present for the Tenants and M/S Mathia for the Landlord.

HON. NDEGWA WAHOME, MBS HON. JOYCE MURIGI

PENEL CHAIRPERSON MEMBER

BUSINESS PREMISES RENT TRIBUNAL BPRT