



**Dal Lounge & Grill Ltd v Wass Enterprises Limited (Tribunal Case
E1180 of 2021) [2024] KEBPRT 1003 (KLR) (10 July 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 1003 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E1180 OF 2021
N WAHOME, CHAIR & JOYCE MURIGI, MEMBER
JULY 10, 2024**

BETWEEN

DAL LOUNGE & GRILL LTD APPLICANT

AND

WASS ENTERPRISES LIMITED RESPONDENT

RULING

1. The Tenant/Applicant filed the present suit vide the reference dated 28th November 2023. The Tenant simply requested this court to:-

“Investigate the matter and determine the issues involved”.
2. The Tenant for inexplicable reasons also filed the further reference dated the 29th November 2023 in which he lodged the following complaint:-

“The Landlord be restrained from evicting, harassing, intimidating or interfering with the Tenant’s possession of premises known as L.R NO. 209/14250, NAIROBI”
3. The first reference dated 28th November 2023 is anchored on Section 6 of the [Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#) hereinafter “the Act”. The 2nd reference dated 29th November 2023 is said to be anchored on Section 12(4) of the Act.
4. The references were supported by the notice of motion application dated 28th November 2023. The motion principally sought for orders to ensure that the Tenant is allowed quiet possession of the demised premises known as L.R NO. 209/14520- Nairobi.
5. In response, the landlord filed the Notice of preliminary objection dated 11th December 2023 which was determined by a Ruling dated 1st March 2024 and dismissed as lacking in any merit. This court



judged that it had the wherewithal to oversee this matter to conclusion as the same was a controlled Tenancy.

6. The landlord further filed the Replying Affidavit sworn by a director thereof one Mathew Njoroge Kabetu on the 3rd April 2024. Thereafter directions were taken to the effect that the application dated 28th November 2023 be canvassed by way of written submissions.
7. The Tenant filed the submissions and supplementary submissions dated 9th May 2024 and 4th June 2024 respectively. The landlord's submissions are dated 28th May 2024.
8. We have perused all the pleadings and the parties respective submissions and are of the view that a determination on the application dated 28th November 2023 will also have settled all the issues raised in the references dated the 28th November 2023 and the 29th November 2023. In our view the suit herein turns on the issue of validity of the notices of termination dated the 12th January 2022, 2nd December 2022 and 23rd November, 2023. The issues for determination in this matter in our opinion are the following:-

A. Whether the notices of termination of Tenancy dated 12th January 2022, 2nd December 2022 and 23rd November 2023 are lawful.

B. Whether the landlord is entitled to levy distress on the alleged rent arrears.

C. Who should bear the costs of this suit.

ISSUE NO. A- Whether the notices of Termination of Tenancy dated 12th January 2022, 2/12/2022 and 23/11/2023 are lawful.

9. From the evidence on record, the landlord seems not to have persued the notices of termination dated 12th January 2022 and 2nd December 2022. It is not clear why nothing happened on their effective dates of maturity to make the landlord issue the further notice dated 23rd November 2023. Amazingly, it seems that despite the 1st notice of 12th January 2022 and even the 2nd Notice dated 2nd December 2022, the landlord continued to happily receive rent paid to him by the Tenant.
10. Section 10 of the Act provides that:-

“Where a landlord has served a notice in accordance with the requirements of Section 4 of his Act, on a tenant, and the tenant fails within the appropriate time to notify the landlord of his unwillingness to comply with such notice or to refer the matter to a tribunal then subject to Section 6 of this Act, such notice shall have effect from the date therein specified to terminate the tenancy, or terminate or alter the terms and conditions, thereof or the rights or services enjoyed thereunder”.

11. Though the termination notice dated 12th January 2022 had taken effect on the 1st April 2022 and the 2nd one dated 2nd December 2023 on the 1st March 2023, nothing seems to have happened towards such objective. The parties continued in a landlord and Tenant relationship albeit with some challenges. That is exactly the reason why the landlord issued the purported notice dated 23rd November 2023.
12. We note that though the Tenant never addressed the two notices of termination dated 12th January 2022 and 2nd December 2022, the landlord never offered any evidence to the effect that he had brought the same to the notice of the Tenant. It also never offered any explanation as to why it had to issue three different termination notices in regard to the same subject matter.



13. It is our view from the above that the notices of termination dated 12th January 2023 and 2nd December 2022 if at all they were ever brought to the attention of the Tenant, and which we doubt, that they were defeated by the conduct of the parties. That is by the Tenant paying rent and the landlord receiving the same and therefore the Tenant/Landlord relationship as per the lease agreement dated 17th August 2021 was restored and continued to be governed by the same.
14. On the notice of termination dated 23rd November 2023, it is our view at the outset that the same is not compliant with the law and thus a nullity and of no legal effect. The same is in conflict with Sections 4(2), 4 (4) and 7 of the Act and also Regulation 4(1) of the Regulations to the Act.
15. In short, the purported notice is not in the prescribed form, it never gave the Tenant at least two months notice failed to ask the Tenant to within 1 month notify it whether it agreed to comply with the notice and also did not state the grounds for termination as recognized by Section 7 of the Act.
16. The provisions of the Act are mandatory in nature and require strict and compulsory compliance with the same. The landlord did not in our view in anyway comply with the same and the purported notice dated 23rd November 2023 must also fail. We find reliance on the Locus Classicus case of Fredrick Mutua Mulinge T/A Kitui Uniform – vs- Kitui Teachers Housing Sacco Ltd (2017) eKLR where the High Court held that:-

“It is clear from the foregoing authorities that the tenancy notice dated 18th June 2014 was null and void for failing to give the appellant two months notice as required under the Act and as such was of no legal effect. Life could not be breathed into the defective notice by the letter dated 1st July 2014 through which the respondent purported to amend the effective date of the notice. The letter was not a notice in the prescribed form provided for under the Act”.

17. The court of appeal has also addressed the question of the pre-requisites for a valid notice of termination of tenancy in the case of Manaver N. Alibhai – vs- South Coast Fitness and Sports Centre (1995) eKLR where it held that:-

“The Act lays down clearly and 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, 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 grounds on 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”.

All these the landlord did not do.

ISSUE NO. B- Whether the landlord is entitled to levy distress on the alleged rent arrears.

18. The Landlord through the letters dated 23rd November 2023, one to the Tenant and the other to M/S Muga auctioneers and General Merchants faulted the Tenant for being in breach of the lease agreement dated 17th August 2021 for among others non-payment of rent and sub-letting the premises without its consent.



19. The landlord in the Replying Affidavit dated 3rd April 2024 further claimed Kshs.650,000/- in rent arrears as per annexure MNK-11. All these evidence was not in anyway rebutted by the Tenant either in its submissions or most ideally by filing a supplementary affidavit to counter the same. Indeed the Tenant was suspiciously very quiet in all its pleadings and other filings on the question of rent payment and the claimed arrears in rent.
20. We therefore do not have any reason whatsoever to doubt the assertion by the Landlord that he is owed Kshs.650,000/- by the Tenant in rent arrears. Indeed annexure Nos, 9 10 and 11 speak to that fact. Section 107(1) of the [Evidence Act](#) provides that:-
- “Whoever desires any court to give Judgement as to any legal right or liability dependent or the existence of facts which he asserts must prove that those facts exist”.
21. Without any rebuttal to the documented facts on the rent arrears by the landlord, we find that the landlord has been able to demonstrate on a balance of probability that the Tenant owes it Kshs.650,000/- in rent arrears.
22. It then follows that the landlord was at liberty to levy distress in recovery of the rent in arrears. It is a right inherent to all landlords that does not require permission or license from either this tribunal or any other court. The High Court sitting at Embu in the case of John Nthumbi Kamwithi – vs- Asha Akumu Juma (2018) eKLR held that:-
- “I have perused the Act but I find no provision to the effect that such permission be sought. I find that the Appellant had no obligation to seek permission from the Tribunal to levy distress. The fact that the Tenancy is controlled does not mean that the landlord applies to the Tribunal to levy distress. Distress is a right the landlord is entitled to for recovery of rent”.
23. In the case of Peter Nthenge vs Daniel Itumu & Another HCCC No. 1247 of 1974 at Nairobi, the court held that:-
- “The right of a landlord to distrain for rent arrears arises at common law and need not be expressly reserved. It enables the landlord to secure the payment of rent by seizing goods and chattels found upon the premises in respect of which the rent or obligations are due”.
24. This position is further fortified by Section 3(1) of the [Distress for Rent Act](#) which provides that:-
- “Subject to the provisions of this Act and any other written law, any person having any rent or rent service in arrears and due upon a demise, grant, lease or contract shall have the same remedy by distress for recovery of that rent or rent service as is given by the common law of England in a similar case”.
25. We therefore find that the landlord had the entitlement to levy distress in recovery of the rent in arrears. In this, it did not require any licence nor permission from this Tribunal.

ISSUE NO. C Who should bear the costs of this suit.

26. The Tenant has succeeded in having the notices of termination dated 12th January 2022, 2nd December 2022 and 23rd November 2023 nullified for being unlawful. On the other hand the landlord has been able to assert its rights to levy distress in recovery of the rents in arrears. We therefore direct that each party will bear own costs of this matter.



27. In the final analysis, we make the following orders:-

- i. The references and application herein are allowed to the extent that the Tenant shall be allowed quiet possession of the premises known as L.R No.209/14520- Nairobi unless the same is disturbed in strict compliance with the law.
- ii. That the Tenant shall settle all the rents in arrears within 30 days of the date hereof and in default the landlord shall be at liberty to levy distress in recovery of the same at the Tenants costs.
- iii. That each party shall bear own costs of this suit.

Those are the orders of the court.

RULING DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY ON THE 10TH DAY OF JULY 2024.

HON. NDEGWA WAHOME, MBS HON. JOYCE MURIGI

PANEL CHAIRPERSON MEMBER

RULING DELIVERED IN THE PRESENCE OF MR. AMUGA FOR THE TENANT AND MR. MURIITHI FOR THE LANDLORD/RESPONDENT.

HON. NDEGWA WAHOME, MBS HON. JOYCE MURIGI

PANEL CHAIRPERSON MEMBER

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