



**East Coast Horizons Limited v Mago Investment Limited (Tribunal Case  
E1023 of 2022) [2023] KEBPRT 458 (KLR) (2 August 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 458 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E1023 OF 2022  
A MUMA, AG. CHAIR  
AUGUST 2, 2023**

**BETWEEN**

**EAST COAST HORIZONS LIMITED ..... APPLICANT**

**AND**

**MAGO INVESTMENT LIMITED ..... RESPONDENT**

**RULING**

**A. Parties & their Representatives**

1. The applicant East Coast Horizons Limited is the tenant who rented space on parcel of land known as LR No 209/178/79 (IR 85343) for the business (hereinafter known as the 'tenant').
2. The firm of Mwenda Njagi & Co. Advocates represents the Tenant in this matter. info@mwendanjagi.co.ke
3. The 1<sup>st</sup> respondent Turitu Service Station Limited is the is the Landlord and rented out space to the tenant for the business in the suit property (hereinafter known as the 'landlord')
4. The firm of Gichuki King'ara and Company Advocates represents the landlord in this matter. pkingara@gmail.com.

**B. The Dispute Background**

5. The tenant moved this tribunal by way of reference dated November 3, 2022 and a notice of motion application of even date. The tenant sought among others, orders to direct the landlord to open and allow the tenant free access to the business premises and an order to restrain the landlord from unlawfully harassing, intimidating, closing, evicting, attaching or levying distress and an order to stay attachment of the tenant's property.



6. Vide an order of this tribunal issued on November 4, 2022, this tribunal directed the landlord to open and allow the tenant free access to the business premises immediately to continue with his business and failure to open the tenant break and gain access with the assistance of the OCS Central Police Station.
7. The landlord filed a replying affidavit dated March 3, 2023.

### **C. Tenant's Case**

8. The tenant deponed that the respondent's action of demanding non-existing rent arrears, closing the premises, denying access, and at the same time threatening the tenant with eviction is occasioning hardship to them.
9. They further deposed that he is a protected tenant and thus must be protected by this honourable tribunal from illegal activities of the landlord.
10. It is their case that by the time the landlord was closing the shop, they no rent arrears and that they had made an excess rent payment in the tune of Kshs 82,000.00.

### **D. Respondents' Case**

11. The Landlord deponed that tenant has and continue to be in occupation of the suit premises without a lease agreement.
12. They deposed that despite their verbal requests to the tenant requiring them to execute the lease agreement, tenant remain reluctant to execute the same.
13. It is their case that the closure of the suit premises was not premised on malice, that the actions were geared towards ensuring the tenant execute the lease agreement in order for them to be governed by the same.
14. They further stated that the tenant has been avoiding to execute the lease agreement with an intention to evade payment of rent at the market value.

### **E. Issues for Determination**

15. I have carefully perused all the pleadings and evidence presented before this honourable court by the parties. It is therefore my respectful finding that four issues which fall for determination by this tribunal are: whether there exists a tenancy relationship between the applicant and the respondent; whether the applicant is a protected tenant; whether the rent increment proposal by the respondent is valid and whether the closure of the suit premises by the respondent is lawful.

### **F. Analysis And Findings**

#### **a. Whether there exists a tenancy relationship between the Applicant and the Respondent**

16. Through their replying affidavit dated March 3, 2023 and sworn by John Machua Waithaka, the respondent claims that they do not have a tenancy agreement between themselves and the applicant and that their relationship is not regulated by any tenancy agreement.
17. The respondent also admit in the said response at paragraph 5, that the tenant has been and continue to be in occupation of the suit premises.
18. The respondent further acknowledges at paragraph 8 of their response to be in receipt of the rent payment by the applicant.



19. On the other hand, the applicant in their case stated that they have been in occupation of the suit premises, and that have been constantly paying rent. At this stage, I shall not dispense with the issue of whether they have paid full rent.
20. Various courts which to which this honourable tribunal is bound by stare decisis have pronounced themselves on the issue of determining whether or not there exists a tenancy relationship between parties.
21. In view of the foregoing, factors that determine whether there exists a tenancy relationship between the applicant and the respondent herein are among others: payment of rent; receipt of the rent paid; grant of premises and occupation of the premise.
22. It is also important to note that, an agreement can exist in two forms, either in writing or oral, in which case, both are held valid and serve the same purpose for purpose of tenancy.
23. Section 4 of the *Landlord and Tenant (Shops, Hotel and Catering Establishment) Act* recognizes that the tenancy can exist both orally or be reduced in written.
24. In view of the foregoing therefore, it is the finding of this tribunal that there exists a tenancy relationship between the applicant and the respondent. The absence of an unexecuted lease agreement between the applicant and the respondent as claimed by the latter, does not amount to lack of a tenancy relationship between the parties. All the factors needed to prove for the existence of a tenancy relationship have been demonstrated through the evidence of the parties which are well in the record of this tribunal.

**b. Whether the Applicant is a protected tenant**

25. The applicant herein claims that they are protected tenant. The law governing controlled tenancy is cap 301. Section 4 provides:
  - (2) Interpretation

For the purposes of this Act, unless the context otherwise requires—

“controlled tenancy” means a tenancy of a shop, hotel or catering establishment—

    - (a) which has not been reduced into writing; or
    - (b) which has been reduced into writing and which—
      - (i) is for a period not exceeding five years; or
      - (ii) contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or
26. It is clear and as admitted by both parties that the relationship between the applicant and the tenant, which relationship I have succinctly established in the first issue to be a tenancy relationship, was never reduced to writing. It is in this respect therefore, that this tribunal agrees that the relationship between the parties herein fall well in the ambit and the meaning of a controlled tenancy pursuant to section 2 of Cap 301.



**c. Whether the rent increment proposal by the Respondent is valid**

27. The applicant producing various evidence including letters from the respondent, stated that, the respondent, being the owner of the suit premises intended to increase the rent payable in the suit premises.
28. Cap 301 section 9 on the decision of tribunal and effect thereof provides under subsection (1) that upon a reference a tribunal may, after such inquiry as may be required by or under this Act, or as it deems necessary— (a) approve the terms of the tenancy notice concerned, either in its entirety or subject to such amendment or alteration as the tribunal thinks just having regard to all the circumstances of the case.
29. Regulations 9 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) (Tribunal) (Forms and Procedure) Regulations, 1966* provides for the factors to be considered when assessing rent increment. These are the factors that this tribunal shall base in determining the impugned rent increment.
30. It has been earlier determined and held severally by this tribunal that the proprietary owners of any premises are usually at liberty to vary by increasing the rent payable. However, the same must comply with all the provisions of law allowing the same.
31. This tribunal in the case of BPRT cause No E209 of 2022 Francis Babu v Southern Haulage while determining the issue of rent increment by the landlord stated:

“It is trite law that the owners of premises are in law allowed to propose and impose rent increment by the approval of this tribunal. However, the increment must always be within the rates of the market value for it to be valid and enforceable.”
32. Section 12 of cap 301 however, empowers this tribunal to effect the rent increment by the landlord. While landlords are usually at liberty to increase rent payable to reflect the market value and dynamics such as inflation, the same can only be regularized and approved by this tribunal.
33. Pursuant to the finding of the second issue in this ruling, that the applicant is a controlled tenant, this tribunal takes a judicial notice that section 4 of Cap 301 is applicable to the extent that the respondent was required to issue a property notice to vary any terms of the tenancy relationship.
34. In view of the foregoing therefore, it is my respectful finding that the attempt by the landlord to increase rent payable in the suit premises cannot be underscored.
35. In the same vein therefore, whether the tenant is in arrears can only be based on the initial amount of rent required to be paid and not the new proposed rent value.

**d. Whether the closure of the suit premises by the Respondent is lawful**

36. The respondent admitted in their replying affidavit that they in deed closed and denied tenant free access to the suit premises. They however stated that the same was geared towards ensuring the tenant signs the tenancy agreement.
37. I will restrain myself from assessing the said situation in which the respondent was putting the applicant in to execute the agreement. If the same was among the issues before me, then I would find with a lot of ease that the tenant's free-agent mind was being compromised, put differently, it would appear that the respondent was putting the applicant under conditional duress. I will however not belabor myself on the same.



38. I have already established that the applicant herein is a protected tenant. Cap 301 clearly provides for the procedure under which the impugned actions by the respondent herein can be lawfully undertaken.
39. Section 4 of cap 301 provides:
4. Termination of, and alteration of terms and conditions in, controlled tenancy
    - (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.
    - (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.
40. None of the parties has produced before this tribunal any form of notice to another. In lieu of that said notice as prescribed by the foregoing provision, this tribunal finds that the actions of the respondent of closing the premises of the tenant are unprocedural and unlawful thus, they are of no consequence.
41. Having made the above four-pronged findings, I now turn to the prayers made by each party in these proceedings and make the following orders in the upshot.

#### **G . Orders**

42. The tenant's application dated November 3, 2022 is allowed in the following terms:
- a. The landlord be and is hereby restrained from closing, threatening, interfering and /or evicting the tenant from the suit premises.
  - b. Both parties to file rent valuation report within 21 days from the date hereof.
  - c. The reference shall be fixed for hearing September 19, 2023.
  - d. Costs shall be in cause.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY BY HON. MUMA THIS 2<sup>ND</sup> DAY OF AUGUST 2023 IN THE ABSENCE OF PARTIES**

**HON A. MUMA**

**AG CHAIR/ MEMBER**

**BUSINESS PREMISES RENT TRIBUNAL**

