



X-Press Systems and Services Limited v Kifaru Enterprises Limited (Tribunal Case E167 of 2023) [2023] KEBPRT 715 (KLR) (6 December 2023) (Ruling)

Neutral citation: [2023] KEBPRT 715 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E167 OF 2023
A MUMA, MEMBER
DECEMBER 6, 2023**

BETWEEN

X-PRESS SYSTEMS AND SERVICES LIMITED APPLICANT

AND

KIFARU ENTERPRISES LIMITED RESPONDENT

RULING

A. Parties and Representatives

1. The applicant X-press Systems and Services Limited is the tenant and rented the suit property known as Godown No.2 Spectrum Business Park, Baba Dogo Road (hereinafter known as the ‘Tenant’).
2. The Firm of Waithaka & Associates Advocates represents the Tenant in this matter.
3. The Respondent Kifaru Enterprises 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 Kipkoech Tanui and Co. Advocates represents the Landlord in this matter.

B. The Dispute Background

5. The tenant moved this tribunal by way of an amended reference dated 8th September 2023 and a Notice of Motion application of even date. The tenant sought among others, leave to amend the Reference dated 13th February, 2023 on the grounds that;
 - i. The Applicant filed a reference on 13th February 2023 and a Notice of Motion seeking *Inter-alia* a joint measurement of Go-down number 2 Spectrum Business Park, Baba Dogo Road, Nairobi to establish the square feet per lettable area.
 - ii. On 2nd August the Tribunal issued a ruling that a joint measurement be conducted on the premises to ascertain the lettable area.



- iii. The same was conducted on 22nd August 2023 and the same determined that the true lettable area of the premises to be 575.49 square metres (6194 square feet).
6. The Tenant contended that the Landlord had been alleging that lettable area of the premises was 6800 square feet and has therefore been overcharging and inflating rent payable by the Applicant.
7. The Tenant therefore moved the Tribunal to access and make a determination on the amount of compensation due to the Applicant as a result of the inflated rent he was coerced into paying.
8. Subsequently, the Landlord filed a Replying Affidavit dated 13th September 2023 in response to the Tenant's Amended Application and Reference stating that the relationship between the parties is founded on contract and that the Tenant has deliberately refused to pay rent as and when it falls due.
9. The Landlord contends that it proposed an amicable settlement of the matter and where it proposed to adopt the measurements arrived at by the joint survey in a way that the Tenant would be able to vacate the premises on or before 17th August 2023 without paying anything but the Tenant declined the proposal.
10. The Landlord further avers that the Tenant is in violation of the orders issued by the Tribunal to pay rent and prays that it be allowed to proceed and levy distress to recover the rent for July, August and September.

C. Tenant's Case

11. The Tenant herein avers that it entered into a lease agreement dated 29th July 2019 with the Landlord for the lease of the suit property who deceptively misrepresented the lettable area of the premises as 6800 square metres.
12. The Tenant states that it consistently contested the lettable area of the premises but the Landlord ignored and refused to take into account the Tenant's reservations.
13. It is the Tenant's case that its incontrovertible that the Landlord had been unscrupulously overcharging rent for space that does not constitute part of the premises rented by the Tenant. In addition, the Tenant avers that the Landlord relied on exaggerated rental arrears in its attempt to attach and sell off the Tenant's goods and belongings. The Tenant terms the Landlord's actions as exploitative, predatory and coercive in nature.

D. The Landlord's Case

14. The Landlord deponed the relationship between the Tenant and the Landlord is governed by the Lease Agreement dated 29th July 2019 and since the same has not been nullified or declared invalid as between the parties, the terms of the Lease Agreement apply in full force between the parties herein.

E. Jurisdiction

15. There is no dispute as to the jurisdiction of this Court.

F. Issues for Determination

16. I have carefully perused all the pleadings and evidence presented before this honorable Court by the parties. It is therefore my respectful finding the two issues that fall for determination by this Tribunal are:
 - i. Whether the tenant is entitled to refund of overcharged rent?



- ii. Whether the tenant is entitled to compensation for forceful detention into the rental premises from January 2019-September 2023?

G. Analysis And Findings

Whether the tenant is entitled to refund of overcharged rent?

17. The tenancy relationship between the tenant and the Landlord herein was created vide a tenancy agreement dated 29th July 2019 and executed by both parties.
18. As a general rule, parties are bound by their contract. Thus, the law requires that parties entering into a contract understand both express and implied terms. For the purpose of this agreement, the tenant and the landlord are required to be free agents or have a free state of mind to create a mutual tenancy relationship. The doctrine of freedom of contract is however not absolute and the same may be interfered with by this Tribunal due to various factors including misrepresentation.
19. That said, the Tenant herein avers that the Landlord has been unscrupulously overcharging rent for space that does not constitute part of the premises rented by the Tenant. The Tenant also states that the Landlord relied on exaggerated rental arrears in its attempt levy distress upon the Tenant's goods.
20. In the case before me, I proceed to analyse and determine whether the Tenant is entitled to a refund by the Landlord.
21. This Tribunal is guided by Section 12 of the [Landlord and Tenant\(Shops, Hotels and Catering Establishments\) Act](#) which provides that;

“ A Tribunal shall, in relation to its area of jurisdiction have power to do all things which it is required or empowered to do by or under the provisions of this [Act](#), and in addition to and without prejudice to the generality of the foregoing shall have power-

(B) to determine or vary the rent to be payable in respect of any controlled tenancy, having regard to all the circumstances thereof,”

22. It is well within this Tribunal's mind that the Landlord sought to levy distress upon the Tenant who has been defaulting rent payment. The Landlord submits that the Tenant/Applicant has been defaulting on rent payment and it was until he was served with a demand letter asking him to settle the outstanding rent arrears that he raised a new issue challenging the measurement of the lettable space of the suit premises.
23. The relationship between the parties herein is governed by the Lease Agreement dated 29th July 2019 wherein the Landlord agreed to lease the Applicant/Tenant the suit premises measuring 6800 square feet for a monthly fee of Kshs.204,000/=.
24. It is also well within the mind of this Tribunal that pursuant to a ruling issued on 2nd August, 2023 a joint inspection of the lettable area was conducted and the same was determined to be 575.49 square metres or 6194.52 square feet as opposed to 6800 square feet indicate by the Landlord while renting the property to the Tenant.
25. I note that this however being the case, the rent payable for the premises as per the Lease Agreement dated 29th July 2019 was Ksh. 204,000 per month, with a rent escalation of 5% every year. The rent payable was for the suit premises as a whole and not charged per square foot. I therefore find that misrepresentation of the lettable area would only be detrimental to the Tenant if the Landlord had billed per square foot which is not the case in the present matter. In this present case, the lettable area



is immaterial as the rent agreed upon is not based on the lettable space, in other words, it is not billed per square foot.

26. The Tenant/Applicant was well aware of the terms of the Lease Agreement including the rent payable when entering into the lease agreement with the Landlord. This Tribunal is guided by the decision in *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* (2017) eKLR where the Court of Appeal stated that: -

We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, they are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.

Whether the tenant is entitled to compensation for forceful detention into the rental premises from January 2019 to September 2023?

27. The Landlord was well within its right to levy distress pursuant to an order issued by this Tribunal that the Landlord would proceed to levy distress should the Tenant continue to default on rent payments.
28. It is the landlord's submission that even after this Tribunal directed that the Tenant was at liberty to vacate the suit, the Tenant elected to stay and has continued to delay in remitting its rent payments. The Tenant has however not sufficiently proved the forceful detention into the rental premises from January to September to warrant orders of compensation.
29. In the upshot, I now turn to the prayers made by each party in these proceedings and make the following orders.

H. Orders

30. The Tenant's Reference and Application dated 8th September 2023 is hereby dismissed.
31. The Tenant shall pay all rent arrears and will continue to pay rent as per the lease agreement dated 29th July 2019 when and at the same falls due failure to which the Landlord is at liberty to levy distress.
32. The Landlord is at liberty to issue a valid notice to terminate the relationship between the parties.
33. Each party shall bear their own costs.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY BY HON. MUMA THIS 6TH DAY OF DECEMBER 2023 IN PRESENCE OF MWENDA HOLDING BRIEF FOR WAITHAKA FOR THE TENANT/APPLICANT NO APPEARANCE FOR THE RESPONDENT/LANDLORD.

HON. A MUMA

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

