



**Sax and Violin Limited v Cross Roads Limited (Tribunal Case
E238 of 2023) [2023] KEBPRT 644 (KLR) (27 October 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 644 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E238 OF 2023
A MUMA, AG. CHAIR
OCTOBER 27, 2023**

BETWEEN

SAX AND VIOLIN LIMITED TENANT

AND

CROSS ROADS LIMITED LANDLORD

RULING

1. The tenant/applicant (hereinafter referred to as “the tenant”) has rented out the business premises known as Unit 201/P1.1.02 on LR No 20xxx (IR No 64062) (hereinafter referred to as “the premises”) situate at Karen/Langata Road Nairobi where he has been operating a bar and restaurant business.
2. The Firm of Muthomi & Karanja Advocates appears for the tenant.
3. The landlord/1st respondent (hereinafter referred to as “the landlord”) has let out the premises to the tenant.
4. The auctioneer/2nd respondent (hereinafter referred to as “the Auctioneer”) is firm of auctioneers under the [Auctioneers Act, 1996](#).
5. The Firm of MNM Advocates LLP appears for the Landlord.

Dispute Background

6. The tenant approached this Tribunal *vide* a Reference and an Application both dated February 28, 2023 after allegedly receiving a Proclamation Notice from the 2nd respondent.
7. The main point of concern for the tenant is that the landlord intends to sell their tools of trade pursuant to the alleged Proclamation Notice and this would complicate the Tenant’s effort to clear arrears that they owe the Landlord.



8. On the other hand, the landlord and the Auctioneer filed a joint Replying Affidavit dated March 31, 2023 wherein he states that this Tribunal is devoid of jurisdiction to handle the matter as the Lease between the landlord and the tenant was for a period of six (6) years.
9. The landlord was also concerned since the tenant has been accumulating rent arrears since to date and that they cannot blame the Covid-19 pandemic for their default since the applicant have been in full scale operations.
10. The tenant filed Written Submissions and a List and Bundle of Authorities dated August 4, 2023.
11. The respondents filed undated Written Submissions.

The tenant's case

12. The tenant alleges their default of their rent obligations was caused by the forced closure of the premises during the onset of the Covid-19 pandemic.
13. They further claim that they only defaulted on their obligations during the period of the said pandemic.
14. The Tenant also challenges the validity and legality of the alleged Proclamation Notice issued by the Auctioneer and state that it fails to meet the requirements of section 12 1 (h) of [cap 301](#).

The landlord's case

15. The Landlord challenges the jurisdiction of this Tribunal to hear and determine this matter based on the duration of the Lease agreement between the landlord and the tenant which is allegedly six years.
16. The landlord further claims that the tenant has failed to meet his rent obligations as agreed by the parties and also directed by this Tribunal during the pendency of this matter.
17. The landlord has also demonstrated that there have been various unsuccessful attempts by the parties to offset the outstanding the rent arrears.
18. Accordingly, the landlord implores this honorable court to allow them to distress for rent as the Tenant has failed to demonstrate commitment and seriousness to honor various agreements by the parties on payment of the outstanding arrears.

Issues for determination

19. From the background and the parties' respective cases provided hereinabove, this Tribunal finds the following issues for determination:
 - i. Whether this Tribunal possesses the requisite jurisdiction to hear and determine this matter?
 - ii. Whether the Proclamation Notice by the 2nd respondent is legal?

Analysis and determination

Whether this Tribunal possesses the requisite jurisdiction to hear and determine this matter?

20. I have given full consideration to the Application, the Replying Affidavit in response thereto and the parties respective Submissions.



21. I will first deal with the question of jurisdiction as this lies at the heart of any matter before this Tribunal. Section 2 of the [Landlord and Tenants \(Hotels, Shops and Catering Establishments\) Act](#) cap 301 (“the Act”) defines a controlled tenancy as follows;

“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...
22. From the pleadings provided in this matter, I have noted with concern that the tenant relied on a Lease agreement in their application and denounced the agreement later on after the respondents raised the question of jurisdiction.
23. As improper as it looks, I am unable to consider the lease agreement as it is not properly executed and witnessed as stated by the Tenant. It is therefore not a valid and enforceable contract as per the [Law of Contract Act](#) Cap 23.
24. I therefore find that there was no written lease agreement between the landlord and the tenant and there exists a periodic tenancy agreement between the landlord and the tenant.
25. It is my considered view that this Tribunal is clothed with the requisite jurisdiction to hear and determine this matter.

Whether the Proclamation Notice by the 2nd Respondent is legal?

26. The tenant has come out strongly to oppose the legality of a Proclamation Notice that was allegedly issued by the landlord due to the rent arrears that the tenant owed them.
27. It is trite law under Section 12 1 (h) of the Act that this Tribunal has the power to permit levy for distress of rent.
28. That notwithstanding, I am also convinced that where a Tenant is in default of their rent obligations, the Landlord is at liberty to distress. Section 3(1) of the [Distress for Rent Act](#), cap. 293 provides as follows:

“Subject to the provisions of this Act and any other written law, any person having any rent or rent service in arrear and due upon a grant, lease, demise or contract shall have the same remedy by distress for the recovery of that rent or rent service as is given by the common Law of England in a similar case”.



29. Accordingly, in the case of *John Nthumbi Kamwitbi v Asba Akumu Juma* (2018) eKLR the court cited with approval the decision in *Peter Nthenge v Daniel Itumo & another* HCCC No. 1242 of 1974, the Court held thus:

“The right of landlord to distrain for arrears or 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. Formerly, the right to distress was a right of some importance to the landlord and often exercised, but it has now fallen into disuse...I find that the applicant 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. If the tenant chooses, he/she could file a reference to the tribunal for orders in objection of the distress”

30. It has been demonstrated that the tenant has outstanding arrears of Kenya shillings thirteen million three hundred and eighty-two hundred and twenty-three and forty-two (Kshs. 13,380,223.42/=) as of December 22, 2022.
31. I therefore find that the Landlord did not act illegally. The landlord has a right to distress and the right crystalized when there are accrued arrears. However, the tenant has demonstrated willingness to pay the rent and arrears. I am therefore inclined to allow the tenant’s an opportunity to offset the arrears.
32. On the prayer to be allowed to pay in installments, I shall give them a final opportunity to honor their commitment to offset the rent arrears.

Determination

33. In the upshot, the tenants Reference and Application both dated February 28, 2023 are hereby partially allowed in the following terms:
- a. Tenant to pay the rent and arrears in the sum of KShs. 1,500,000.00 per month on or before the 5th day of every month. In default of which the Landlord is at liberty to distress to recover the outstanding arrears and take vacant possession with assistance from Police at Karen;
 - b. Costs of this Reference assessed at KShs. 50,000/= awarded to the Landlord.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY BY HON A. MUMA THIS 27TH DAY OF OCTOBER 2023.

HON A. MUMA

AG CHAIR/MEMBER

