



**Lenana Archade Limited v Aballa & 2others t/a Spiced Rocks Liquor Store  
(Tribunal Case E202 of 2023) [2023] KEBPRT 1203 (KLR) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 1203 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E202 OF 2023  
CN MUGAMBI, CHAIR  
JULY 25, 2023**

**BETWEEN**

**LENANA ARCADE LIMITED ..... LANDLORD**

**AND**

**JOSEPH SUNDAY ABALLA, PATRICIA AKUMU MALILI & GEORGE  
STEPHEN OMONDI OGADA T/A SPICED ROCKS LIQUOR STORE TENANT**

**RULING**

**Introduction**

1. The Tenant's application dated 22.2.2023 seeks orders that pending the hearing and determination of this reference, the tenant be restrained from carrying on the business of a bar and/or lounge on the suit premises (Shop Numbers 13 & 14 (Spice Liquor Store)- Lenana Archade Mall- L.R. No. 1/358 (Original No. 1/347/6) situate along Lenana Road in Nairobi (hereinafter referred to as the suit property). The Applicant has also sought for orders of eviction against the tenant and police assistance in the enforcement of the said orders.

**The Landlord's Depositions**

2. The landlord's affidavit in support of its application may be summarized as follows;-
  - a. That the landlord is the head tenant on the suit premises wherein is constructed a mall christened LENANA ARCADE MALL.
  - b. That the landlord and the tenants entered into a sub-lease vide a lease agreement dated 24.10.2022 for the strict purposes of operating a liquor store and no other business.
  - c. That the tenants are operating a bar and a lounge on shop No. 13 in flagrant breach of clause 4j and 5k of the under lease



- d. That the tenants are aware that clause 7(i) of the under lease states that the under lease is subordinate and subject to all general and underlying leases.
- e. That the landlord is entitled to exercise its rights under clause 7(e) of the underlease due to the tenants' breaches of the said lease.
- f. That due to the tenants' breaches, the head leaser has issued the landlord herein with a notice of breach of the head lessor and has threatened to take action prejudicial to the landlord.

### **The Tenants' Depositions**

3. The tenants' replying affidavit has been sworn by M/S PATRICIA AKUMU MALILI and may be summarized as follows;-
  - a. That the Respondents are the tenants of the landlord/Applicant on the suit premises.
  - b. That the tenants took up the suit premises on the prompting of one Mr. David Kinyua, a representative of the landlord and he was aware that the tenants were taking up the premises to set up a liquor shop and an exclusive private lounge.
  - c. That Mr. David Kinyua and one Mr. Watere representing the landlord were present when the renovations to the suit premises were carried out.
  - d. That it was always clear that the suit premises would be used for the business of a liquor shop and an exclusive private lounge, and this is evident from the design of the suit premises.
  - e. That the landlord's representatives have not opposed the operations of the business in the suit premises.
  - f. That on 24.10.2022, Mr. Kinyua pressurized the tenants to sign a lease agreement.
  - g. That in November 2022, the tenants learnt that the landlord's directors had differences over the existence of the lounge within the suit property.
  - h. That the landlord's representative Mr. Waitere, at a meeting held on 8.12.2022 denied that the landlord had allowed the tenant to operate a lounge and accused the tenants of being in breach of the under lease.
  - i. That the lease over the premises was signed in late October, being after the tenant had started their operations.
  - j. That the tenants are not privy to the head lease annexed to the landlord's affidavit and only came to learn about it in December 2022.
  - k. That Joseph Njoki Murithi who purports to have witnessed and certified the lease agreement, landlord's exhibit "AMW2" was not present on 24.10.2022 when the tenants executed the agreement.
  - l. That the tenants are not privy to any notices issued to the landlord/Applicant.
  - m. That the landlord has approached the Tribunal with unclean hands to seek equitable relief.
  - n. That the tenants stand to suffer irreparable loss if the prayers sought by the landlord are granted.



## Analysis and Determination

4. On 9.3.2023, the tenants filed a notice of preliminary objection stating that the Tribunal had no jurisdiction to hear and determine this dispute for the reason that the under lease dated 24.10.2022 does not create a controlled tenancy.
5. The Tribunal in its ruling at paragraph 12 and 13 stated as follows:-
  12. Clearly, the interpretation by the parties is at variance and does not give a common position on the status of the tenancy created by the under lease. It remains for example to be determined whether clause 7 contains or does not contain covenants.

It is also a matter for determination whether the parties by executing the under lease ousted and excluded clauses 7(b)(iii) and 7(b)(vii) from being covenants in the lease agreement.
  13. These determinations require the consideration of evidence and a perusal of the under lease. A determination of whether or not this tenancy is controlled will therefore require the consideration of the evidence and cannot therefore proceed by way of a preliminary objection whose limits are well known.
6. In this ruling, I now have the advantage and opportunity of considering the available evidence presented through the parties affidavits to determine whether indeed the Tribunal has jurisdiction.
7. Under the said lease, the term of the lease has been defined as the period beginning on 1<sup>st</sup> January 2022 and expiring on 31<sup>st</sup> March 2027. This translates to a period of five years and three months. Section 2(i) of the landlord and Tenant/shops, hotels and catering establishment Act Cap 301 provides as follows:-

“A 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 date thereof or
    - (iii) relates to premises of a class of specified under sub-section (2) of this section.
8. Having already established that the lease agreement between the parties herein is for a period of five years and three months and that it is also in writing, does the agreement contain a provision for termination otherwise than for breach of covenant within five years of its commencement?

I have perused the lease document and I have not seen any provision therein for a termination of the lease agreement otherwise than for breach of covenant. The instances under which the landlord may terminate the lease have been set out under clause 7 of the lease agreement. The lease agreement forming the AGREEMENT between the parties cannot therefore at the same time be deemed to oust its own provisions. The landlord's argument that clause 6 of the lease agreement is to be read as the only clause containing the AGREEMENTS/COVENANTS between the parties to the exclusion of clause 7 thereof is not tenable.



9. In my view, all the clauses in the lease agreement contain the covenants between the parties or else they would not have been included therein if they were not meant to be binding upon the parties.

An exclusion of clause 7 from the binding nature of the agreement and a finding that clause 7 of the lease agreement does not form part of the covenant between the parties would be to import jurisdiction in this matter though judicial craft where otherwise, no jurisdiction exists.

10. The Tribunal at this juncture ought to satisfy itself that it has the requisite jurisdiction to hear and determine this matter and as I had directed myself in the ruling on the notice of preliminary objection herein raised earlier, consideration of evidence was necessary. I have considered the lease subject matter of these proceedings and I am satisfied that the tenancy created by the said lease agreement does not amount to a controlled tenancy and consequently, the Tribunal has no jurisdiction to hear and determine this matter.

### **Final Disposition**

11. In light of the finding at paragraph 10 above, it will not be necessary to consider the landlord's reference and application dated 22.2.2023 and both are dismissed for want of jurisdiction.

**RULING DATED, SIGNED & DELIVERED VIRTUALLY THIS 25<sup>TH</sup> DAY OF JULY, 2023**

**CYPRIAN MUGAMBI**

**CHAIR PERSON**

**25.7.2023**

In the presence of;

Mr. Wendoh holding brief for Mr. Lubulellah for the landlord

In the absence of the tenants and Counsel

