



**Kimilu v Huria Management Company Limited & another; Mofa  
Security Services Limited (Interested Party) (Tribunal Case E735 of 2022)  
[2023] KEBPRT 76 (KLR) (Civ) (24 February 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 76 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
CIVIL  
TRIBUNAL CASE E735 OF 2022  
A MUMA, VICE CHAIR  
FEBRUARY 24, 2023**

**BETWEEN**

**GIDEON KYALO KIMILU ..... APPLICANT**

**AND**

**HURIA MANAGEMENT COMPANY LIMITED ..... 1<sup>ST</sup> LANDLORD**

**HF DEVELOPMENT & INVESTMENT LIMITED ..... 2<sup>ND</sup> LANDLORD**

**AND**

**MOFA SECURITY SERVICES LIMITED ..... INTERESTED PARTY**

**RULING**

**A. Parties and Representatives**

1. The applicant Gideon Kyalo Kimilu is the tenant and rented space on the suit property Apartment No. LD-4, Block L erected on L.R No. Dagoretti/Rirutta/6809 situated in Dagoretti. (hereinafter known as the ‘tenant’)
2. The firm of FM Muteti & Co. Advocates represent the applicant/tenant in this matter. info@fmlawadvocates.co.ke
3. The 1<sup>st</sup> respondent is the landlord and the owner of the suit property and rented out space to the tenant on the suit property to the tenant. (hereinafter known as the ‘landlord’)
4. The firm of Bonbegi & Co. Advocates represent the 2<sup>nd</sup> Landlord/Respondent in this matter.



5. The 2<sup>nd</sup> respondent is the management company and is in charge of managing the affairs of the suit property. (hereinafter known as the ‘management company’)
6. The firm of Muriu Mungai & Company Advocates represent the 2<sup>nd</sup> Landlord/Respondent in this matter.

### **B. The Dispute Background**

7. The Landlord and the tenant entered into a tenancy agreement with the 1<sup>st</sup> Landlord on 1<sup>st</sup> July 2022 for a period of five years and a monthly rent of Kshs.50,000.00.
8. The tenant alleges that on 17<sup>th</sup> August 2022 the 1<sup>st</sup> and the 2<sup>nd</sup> respondents barricaded the main gate to the premises and denied him and his employees access to the business.
9. As a result, the Tenant has filed a Reference and a Notice of Motion Application under dated 18<sup>th</sup> August 2022 under section 12 (4) of the [Landlords and Tenants \(Shops, Hotels and Catering\) Establishments Act](#) Cap 301. The Tenant is seeking that this Honourable Tribunal grants orders restraining the Landlord from barricading, obstructing or in any way refusing or denying the Tenant/Applicant and his employees access to the Suit Property pending the hearing and determination of this matter.
10. The 2<sup>nd</sup> Respondent thereafter filed an application dated 5<sup>th</sup> September 2022 seeking to strike out the Tenant’s Application for the reason that it did not disclose a reasonable cause of action against them.

### **C. The Tenant’s Claim**

11. The has filed a Reference and a Notice of Motion Application dated 18<sup>th</sup> August 2022.
12. They have also filed a replying affidavit dated 25<sup>th</sup> October 2022 in response to the 2<sup>nd</sup> respondent’s application.
13. The Tenant has filed submissions in opposition to the 2<sup>nd</sup> respondent’s application.

### **D. The 1<sup>st</sup> Respondent’s Claim**

14. The 1<sup>st</sup> Respondent has filed a replying affidavit dated 21<sup>st</sup> October 2022 in response to the 2<sup>nd</sup> respondent’s application.
15. They have also filed their submissions in opposition to the above application.

### **E. The 2<sup>nd</sup> Respondent’s Claim**

16. The 2<sup>nd</sup> respondent has filed an application dated 5<sup>th</sup> September 2022 seeking to strike out the Tenant’s reference and application.
17. The 2<sup>nd</sup> respondent has also filed a supplementary affidavit dated 3<sup>rd</sup> January 2023.

### **F. List of Issues for Determination**

18. The issues raised for determination are as follows;
  - a. Whether the Tenant’s Suit establishes a reasonable cause of action against the 2<sup>nd</sup> respondent?

### **G. Analysis and Findings**

Whether the Tenant’s Suit establishes a reasonable cause of action against the 2<sup>nd</sup> respondent?



19. The tenant approached this tribunal seeking orders that the 1<sup>st</sup> and 2<sup>nd</sup> respondents be restrained from denying them access to the premises. The tenant claims that they barricaded the premises and as a result the tenant and his employees could not access the premises.
20. In response the 2<sup>nd</sup> respondent filed an application seeking to have the tenant's suit struck out for reason that it does not disclose a reasonable cause of action against them which is then the main question for determination before this Tribunal.
21. The tenant in response to this application has stated in their replying affidavit that the 1<sup>st</sup> landlord purchased the property pursuant to an agreement for sale dated 31<sup>st</sup> December 2021. Clause 8.6 of the Agreement provides as follows;

“the parties hereby agree that the Management Company shall retain the services of HF Development and Investment (HFDI) with respect to management of the estate upon exit of the Vendor. The purchaser shall pay service charge to the Management Company”

22. Additionally, the tenant has annexed proof in form of email correspondence showing that the 2<sup>nd</sup> respondent gave approval for the premises to be converted as well as email correspondence showing that the 2<sup>nd</sup> Respondent gave orders that personnel working for the tenant be denied access from the premises.
23. The 1<sup>st</sup> Landlord has also filed a replying affidavit responding to the 2<sup>nd</sup> respondent where he also cites the aforementioned clause of the agreement for sale and further presents that it is the 2<sup>nd</sup> respondent that has been interfering with the possession of the tenant. They make reference to the same email correspondence that the tenant has annexed as proof before this Tribunal.
24. I take note that the aforementioned email was however retracted by a representative from the 2<sup>nd</sup> respondent company. They stated that the approval to convert the premises was given erroneously and as such the tenant should not convert the premises.
25. In determining whether the tenant has demonstrated a reasonable cause of action, I wish to rely on the case of *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* [1980] eKLR where the Court stated as follows;

The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that 'is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way".

Additionally, the Court stated that;

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.



26. I have perused the Agreement for Sale entered into between the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents. Paragraph B of the agreement provides as follows;

The vendor is currently in the process of erecting and completing a development project on a portion of the land consisting of residential apartments together with pathways, driveway shops, parking areas, gardens, playgrounds and other usual amenities.....

27. In light of this it is evident that the premises were meant for residential purposes. As a result of this in order to convert the same to a commercial premises, there should have been an amendment or an addendum to the mother agreement for sale. There is no proof that the same was done by the 1<sup>st</sup> and 2<sup>nd</sup> respondents and as such the Tribunal deems that the suit property remains for residential purposes.
28. Additionally, as stated above, the approval given by the 2<sup>nd</sup> respondent to convert the premises was subsequently retracted for being erroneously granted and hence the tenant cannot rightfully claim that the 2<sup>nd</sup> respondent gave their approval.
29. Based on the above the Tribunal finds that the tenant has not sufficiently disclosed a reasonable cause of action against the respondents. They ought to have done their due diligence prior to establishing their business in the suit property. The 2<sup>nd</sup> respondent was acting pursuant to the provisions of the agreement for sale.
30. The tenant claims that they made investments worth Kshs. 1,200,000.00 in establishing the business. I find that they are not entitled to a refund of the same since they failed to conduct their due diligence as to the nature of the suit property prior to making any investments.
31. Despite the above the Tribunal acknowledges that the tenant had made some pre-payments for rent to the 1<sup>st</sup> respondent up to the month of October 2023. The same should be refunded to the tenant since they were not in operation. They shall however not be refunded for the months of July and August 2022 since they did operate their business.
32. In light of the foregoing, I find that the tenant has failed to disclose a reasonable cause of action and as such the application by the 2<sup>nd</sup> respondent is merited.

## **H. Orders**

### **a.**

The upshot is that the 2<sup>nd</sup> Respondent's Application dated September 5, 2022 is hereby upheld in the following terms:

### **b.**

The Tenant's Reference and Application dated August 18, 2022 are hereby struck out.

### **c.**

The tenant shall pick their property, if any from the premises and thereafter hand over vacant possession to the owner 1st respondent within 7 days.

### **d.**

The 1<sup>st</sup> Respondent shall refund the tenant the amounts paid for rent from the month of October 2022 to October 2023.



**e.**

Each party shall bear their own Costs.

**HON A. MUMA**

**VICE CHAIR**

**BUSINESS PREMISES RENT TRIBUNAL**

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY BY HON A. MUMA THIS 24<sup>TH</sup> OF FEBRUARY 2023 THE PRESENCE OF MUTETI FOR THE TENANT AND ODUNDO FOR THE 2<sup>ND</sup> LANDLORD AND NO APPEARANCE FOR THE 1<sup>ST</sup> LANDLORD.**

**HON A. MUMA**

**VICE CHAIR**

**BUSINESS PREMISES RENT TRIBUNAL**

