



**Spin City Africa Limited v Ontulili Investments Limited & another (Tribunal
Case E907 of 2022) [2023] KEBPRT 236 (KLR) (25 April 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 236 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E907 OF 2022
A MUMA, VICE CHAIR
APRIL 25, 2023**

BETWEEN

SPIN CITY AFRICA LIMITED TENANT

AND

ONTULILI INVESTMENTS LIMITED 1ST RESPONDENT

VILLA CARE MANAGEMENT LIMITED 2ND RESPONDENT

RULING

A. Parties and Their Representatives

1. The Tenant, spin City Africa Limited, is a limited liability company whose Managing Director is Francis Munyurwa who rented a shop on LR No 1/786 Mezzanine Floor Titan Plaza.
2. The Firm of Ogolla Okello & Co. LLP Advocates represents the Tenant in this matter.
3. The 1st Respondent, Ontulili Investments Limited, is the Landlord and the owner of the suit Premises.
4. The 2nd Respondent, Villa Care Management Limited, is a limited liability company and the property managers of the 1st Respondent.
5. The Firm of Gerivia Advocates LLP represents both the 1st & 2nd Respondents in this matter.

B. Background of The Dispute

6. The Tenant and the Landlord entered into a lease agreement dated 29th August 2009 for a period of 5 years 3 months for the premises in Mezzanine Floor, 530 sq. ft Titan Complex.
7. The Management Company however issued a notice to vacate dated 23rd February 2022 notifying the Tenant that they would be cleared to vacate the premises on 28th February 2022 and demanding clearance of rent arrears for the space 530 sq. ft.



8. The Tenant then filed a reference and a Notice of Motion Application dated 7th October 2022 seeking a plethora of orders to restrain the Landlord and the Management Company and its agents Pyramid Auctioneers from selling any and or all the goods distrained, restrained from evicting, harassing or interfering with the Tenant's peaceful occupation of the premises, to release unconditionally the goods distrained held at the auctioneer's premises, and to allow the Tenant continue paying rent as usual.
9. On 12th October 2022, the Honorable Tribunal granted prayers number 1, 2, and 5 of the Notice of motion application. Further, the Tribunal ordered that the Application be served for virtual hearing on 14th November 2022 and that the Tenant files an affidavit of service.
10. Subsequently, the Landlord and the Management Company filed a replying affidavit dated 25th November 2022 as directed by the Tribunal on 14th November 2022.
11. On 24th January 2023 the matter came up for hearing. The Court directed that parties file their submissions. The Tenant's submissions are dated 20th February 2023 while the Landlord and the Management Company's submissions are dated 7th March 2023.

C. Claim and Defence

12. The Tenant claims that its relationship with the Landlord dates back to fourteen years ago when the Tenant took possession of the suit premises LR No 1/786 Mezzanine Floor, space measuring 530 sq. ft. Titan Complex for a period of 5 years and 3 months.
13. That after the expiry of the lease period, it continued to occupy the suit premises. However, the Landlord and the Management Company have continually interfered with her quiet enjoyment of the premises by issuing many notices to vacate and that the Tenant's effort to bring the relationship to an end has been frustrated by the Landlord and the Management Company.
14. The Tenant claims that on 23rd February 2023, the Landlord and the Management Company issued it with a notice to vacate by 28th February 2023 and to pay rent arrears for the suit premises.
15. Further, the Tenant avers that the Landlord and the Management Company have removed laundry machines for business, placed the said machines in another room, and locked the premises.
16. In response to the claims of the Tenant, the Landlord and the Management Company claim that in addition to the suit premises, the Tenant has been occupying another space measuring 719 sq. ft. on the same Mezzanine floor.
17. It is the Landlord and the Management Company's case that the Tenant has intentionally withheld a material fact which is that the last time it paid rent and service charge was November 2021.
18. The Landlord and the Management Company further claim that as at November 2022, the Tenant owed them Kshs 1,310,829.03 on account of rent arrears and penalties accrued and Kshs 45,420.
19. Further, the Landlord and the Management Company claim that the Tenant failed to inform them that it had abandoned the demised premises but remained in possession, locked it, leaving its equipment, fittings and fixtures therein.
20. Additionally, the Tenant failed to surrender the premises to the Landlord and the Management Company and failed to pay rent and service charge for over a year and therefore the eviction is not malicious and without good reason.



D. Issues for Determination

21. The following issues fall for determination;
- i. Whether there exists a tenancy relationship between the Tenant and the Landlord.
 - ii. Whether proper notice to vacate was issued to the Tenant?
 - iii. Whether the distress for rent was exercised lawfully?

E. Analysis and The Law

a. Whether there exists a tenancy relationship between the Tenant and the Landlord.

22. Pursuant to Section 2 of the *Landlord and Tenant (Shops, Hotels and Catering Establishment) Act* Cap 301, there exists two forms of tenancy agreement: Written and oral or by implication.
23. The parties herein entered into a lease agreement for a period of 5 years and 3 months. However, once the period lapsed, the Tenant continued to be in possession of the suit premises and paid rent. This established an unwritten controlled tenancy, and therefore is subject to the jurisdiction of this Honorable Tribunal.

b. Whether proper notice was issued

24. Section 4 of the *Landlord and Tenant (Shops, Hotels and Catering Establishment) Act* Cap 301 provides that where a Landlord wishes to terminate a controlled tenancy, they must issue a two-months' notice to the tenant in the prescribed form, indicating the grounds of the said termination.
25. On 3rd January 2020, The Tenant issued the Landlord with a notice to vacate laundry shop measuring 530sq. by end of March 2020, citing the economic situation that was prevailing then which made it difficult for the Tenant to pay rent for the space.
26. On 26th March 2020, the Tenant informed the Landlord of their intention to retain the space measuring 530 sq. ft. and to handover by the end of March the space measuring 719 sq. ft. which was empty and had no equipment.
27. In response to the Tenant's email, the Landlord informed the Tenant that another party was interested in the space measuring 530 sq. ft. and requested that the Tenant sticks to the initial arrangement.
28. It is noteworthy that despite the notice, the Tenant still remained in the premises and did not adhere to conditions set out by the Landlord on the 28th March 2020. In the statement of accounts provided by the Management Company, the Landlord continued to receive rent for the suit premises, space measuring 530 sq. Ft.,
29. On 23rd February 2022, the Management Company issued a notice requiring the Tenant to vacate the suit premises by 28th February 2022. This does not amount to proper notice. It is my finding, therefore, that the eviction of the Tenant from the suit premises was unlawful and illegal.

c. Whether Distress for rent was exercised lawfully

30. A landlord has a right at common law and a statutory right to levy distress for rent.
31. However, this right must be exercised within the confines of the law. The Landlord is obligated to seek leave of the Tribunal before distraining and attaching a tenant's goods pursuant to Section 12 (h) of the *Landlord and Tenant (Shops, Hotels, and catering Establishment) Act* (Cap 301).



32. It is the Landlord and the Management Company' case that at the time the Tenant was vacating on 1st April 2020, it was in rent arrears for both spaces measuring 719sq.ft. and 530 sq. ft. In seeking to recover the said arrears, the Landlord and the Management Company attached the Tenant's goods and equipment and proceeded to cart them away on 1st October 2022.
33. I find that there is a dispute as to the arrears owing. It is clear from the Landlord's statement of accounts that the Tenant has rent arrears in the sum of Kshs 1,310,829.03 from the period between 1st September 2020 and 16th November 2022. The Tenant has disputed this but has not adduced any evidence to prove payment of rent in full as claimed.
34. In a letter dated 26th November 2020, the Landlord and the Management Company demanded payment of the arrears and copied the said letter to Pyramid Auctioneers with instructions to take the requisite action if the arrears were not paid within 3 days of the date of the letter.
35. In this case, it is evident that the management Company did not seek leave of this Honorable Tribunal to distrain the Tenant's goods and equipment. In fact, they carted away the goods without even a proclamation notice.
36. I therefore find that the actions of the Landlord to exercise their right to levy distress for rent was not done procedurally and is therefore unlawful.
37. In light of the above, it is clear that the Tenant is no longer in the premises as the same is locked and their goods and equipment carted away. The Tenant's only recourse, therefore, is to file a claim for damages for illegal distress and eviction.

F. Orders

38. The upshot is that the Notice of Motion Application dated 7th October 2022 is hereby allowed in the following terms;
 - a. The Tenant shall have 14 days to file for assessment of damages and submissions after which the Landlord shall have 14 days to respond to the same.
 - b. The reference shall be fixed for hearing on 12th June 2022 for hearing on assessment of damages.
 - c. Landlord shall release any Tenants good in his possession of agents possession immediately.
 - d. Costs shall be in the cause.

RULING DATED, SIGNED AND DELIVERED BY HON. MUMA THIS 25TH DAY OF APRIL 2023 IN THE ABSENCE OF PARTIES.

HON. A. MUMA

VICE CHAIR

BUSINESS PREMISES RENT TRIBUNAL

