



**Wahome & another v Mbugua & another (Tribunal Case E320 of 2023)
[2023] KEBPRT 620 (KLR) (15 September 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 620 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E320 OF 2023
A MUMA, AG. CHAIR
SEPTEMBER 15, 2023**

BETWEEN

EDWIN THAGANA WAHOME 1ST APPLICANT

FLORENCE NJAMBI 2ND APPLICANT

AND

DENIS MBUGUA 1ST DEFENDANT

GIFTED HANDS FURNISHING AND FABRICS 2ND DEFENDANT

RULING

A. Parties and Representatives

1. The applicants, Edwin Thagana Wahome and Florence Njambi are tenants who rented space at Booth 7 situated at Kimathi House, Upper Ground Floor on LR NO. 209/9326 for business (hereinafter known as the 'Tenant').
2. The firm of Muthoni Miruka and Ocholla Advocates represents the Tenants in this matter.
3. The 1st Defendant is a vendor whom the Applicants entered into a Sale Agreement for purchase of the business and goodwill of Shop No. 7, Ravenite Liquor Shoppe Located on the Ground Floor of Kimathi House, Nairobi.
4. The 2nd Defendant is the owner and landlord of Upper Ground Floor on LR NO. 209/9326 (hereinafter known as the 'suit premises') in which Booth 7 is situated.
5. The firm of Peter Maina & Co. Advocates represents the 2nd Defendant in this matter.



B. The Dispute Background

6. On 26th March 2018, the Landlord and the Tenants entered into a sublease agreement in respect of the suit premises. The terms of the agreement were that the Tenant would occupy the suit premises for a period of 5 years at a monthly rent of KShs. 30,000 payable on or before the 5th day of each consecutive month for the 1st year, KShs. 35,000 for the 2nd year and thereafter the monthly rent would be subject to an increase of 10% per annum.
7. The Dispute in this matter arose when the Landlord issued the Tenant with a Notice dated 2nd March 2023 stating that the Tenant's 5-year lease had expired and was therefore expected to vacate and hand over the shop. In the said Notice, the Landlord alleged that the Tenant had an outstanding balance of KShs.36,898 which would be deducted from their 2-month deposit of KShs. 60,000 that was held by the Landlord and that any further extended stay would attract further deductions from the deposit money.
8. Through a Reference dated 24th March 2023 and a Notice of Motion of even date, the Tenant moved this Honourable Tribunal seeking among other orders that pending the hearing and determination of the reference that the Tribunal order the Respondent in person, their servants and/or persons acting on their behalf from locking and/or denying the Tenants/Applicants entry to their business premises or issuing eviction notices against the Tenant/ Applicant until this application is heard and determined. Further, that the Respondent be ordered to renew the sublease agreement for another five (5) years.
9. Vide an Order issued on 5th April 2023, the Tribunal certified the matter as urgent, issued an Order for injunction restraining the Respondents from interfering with the Tenants/Applicants quiet possession and enjoyment of their premises pending inter-partes hearing as well as in the interim, the Tenants to pay rent for March, April and May.

C. Tenant's Case

10. The Tenants stated that on 26th March 2018, they entered into a Sale Agreement with the 1st Defendant for sale of Shop No. 7, Ravenite Liquor Shoppe Located on the Ground Floor of Kimathi House, Nairobi for purchase of business and goodwill at a consideration of KShs. 1,300,000.
11. They subsequently entered into a sublease agreement with the 2nd Defendant which would run for a period of 5 years.
12. Further, they deponed that they were received a Notice of the Sub-lease expiry dated 20th December 2023, to which they reverted via a letter dated 18th January 2023 indicating their interest in renewing the lease.
13. The Tenants aver that they were Landlords refused to renew their lease and issued them with and eviction notice dated 2nd March 2023 indicating that their sub-lease had expired and they were supposed to vacate and hand over the shop.
14. Further, they allege that they have been faithfully paying rent as per the agreed rent in the sub-lease agreement.

D. Respondents' Case

15. The 2nd Respondent reiterates that they entered into a sub- lease agreement with the Tenants on 26th March 2018 for a period 5 years which was to expire on 1st March 2023 but renewable on the Plaintiff's interest.



16. The 2nd Respondent avers that despite the expiry of the sub-lease on 1st March 2023, the Tenants/Applicants refused to surrender the premises and never actualized their interest in renewing the lease.
17. Further, the Respondent claims that the Tenants defaulted in rent payment and fell into arrears of Kshs. 159,000 being the rent for the month of February, March and April. They noted that they had increased the rent for April to Kshs. 45,000 due to the prevailing economic circumstances.

E. Jurisdiction

18. The 2nd Defendant in its submissions contested the jurisdiction of this Honourable Court on the basis that there exists no Landlord-Tenancy Relationship between the parties herein and as such this Honourable Tribunal has no jurisdiction to hear the dispute herein.
19. It is the 2nd Defendant's contention that the expiry of the lease on 1st March 2023 brought an end to the Landlord- Tenancy Relationship that existed between the Tenants/Applicants and the 2nd Defendant.
20. They allege that the nature of engagement between the Tenants/Applicants and the 1st Defendant was a commercial transaction which ought to be determined by a commercial court. Furthermore, the 2nd Defendant avers that the 1st Defendant is not a party to the sub-lease agreement and is therefore wrongly joined to the suit.

F. Issues for Determination

21. I have carefully perused all the pleadings and evidence presented before this Honourable Tribunal by the parties. It is therefore my respectful finding that the following issues are ripe for determination;
 - a. Whether this Honourable Tribunal has jurisdiction to determine this Reference?
 - b. Whether the tenant was in rent arrears?
 - c. Whether the Court should grant the orders sought?

G. Analysis and Findings

a. Whether this Honourable Tribunal has jurisdiction to determine this Reference?

22. This Honourable Tribunal has the duty to interrogate the question of jurisdiction and satisfy itself before making any further step in line with the celebrated case of Owners of the Motor Vessel 'Lillian S' Vs Caltex Oil (Kenya) Limited [1989] eKLR where the Court of Appeal held as follows:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

23. As was stated by the Supreme Court in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR:

“A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written



law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. ...”

24. The jurisdiction of this Honourable Tribunal is limited to controlled tenancies as provided for under the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Cap 301 Laws of Kenya (hereinafter the Act).

25. Section 2 of 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; or
 - (iii) relates to premises of a class specified under subsection (2) of this section.”

26. It is not in contention that the Tenants/Applicants had entered into a sub-lease agreement with 2nd Defendant which was to run for a period of 5 years. It therefore goes without saying that there existed a landlord-tenancy relationship between the Tenants/Applicant and the 2nd Defendant which qualified as a controlled tenancy and therefore subject to the jurisdiction of this Honourable Tribunal.

27. It is not in contention that the sub-lease agreement was to expire on 1st March 2023. Both parties agree that the Landlord to the Tenants a notice of sub-lease expiry dated 20th December 2022, which notice indicated that the sub-lease was to expire on 1st March 2023. Further, the notice stated that the Tenant was to communicate to the Landlord of any interests to renew the lease.

28. Section 4 of the Act stipulates the procedure for termination of controlled tenancy in the following terms;

2) A landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the tenant, any term or condition in, or right or service enjoyed by the tenant under, such a tenancy, shall give notice in that behalf to the tenant in the prescribed form.

(4) No tenancy notice shall take effect until such date, not being less than two months after the receipt thereof by the receiving party, as shall be specified therein:

Provided that-

- (i) where notice is given of the termination of a controlled tenancy, the date of termination shall not be earlier than the earliest date on which, but for the provisions of this Act, the tenancy would have, or could have been, terminated;
- (ii) where the terms and conditions of a controlled tenancy provide for a period of notice exceeding two months, that period shall be substituted for the said period of two months after the receipt of the tenancy notice;
- (iii) the parties to the tenancy may agree in writing to any lesser period of notice.



29. The Landlord/ 2nd Defendant herein issued the Notice on 20th December 2022 expressed to take effect on 1st March 2023, which is more than 2 months thus, in compliance with the Section 4 of the Act.
30. From the foregoing, I am in agreement with the Landlord that the lease expired on 1st March 2023 and the Landlord- Tenancy Relationship would therefore cease to exist. Therefore, the issue that arises for determination what is the nature of the relationship between the parties after the sub-lease agreement expired.
31. The Tenants noted that the Landlord collected rent from the Tenants even after the purported coming effect of the termination notice. The Tenants/Applicants in their Reply to Grounds of Opposition dated 24th May 2023 stated in paragraph 2 as follows;

“That the Plaintiffs/Tenants have fully complied with the orders of the court issued on the 4th April 2023 by paying the amount in the sum of Kshs.105,000/= only being the rent of March, April and May respectively.”

32. Subsequently, the Tenants/Applicants provided evidence of payment of the mentioned amount in form of Mpesa Statements, which statements have not been challenged by the Landlord. This Tribunal therefore considers the said payment to have been made duly and received by the Landlord as the rent.
33. This Honourable Tribunal in the case of Nancy Njeri Gitau & another v James Muchone Njuga & another [2021] eKLR held that the receipt of rent by the Landlord after expiry of a lease created a controlled periodic tenancy of month to month:
43. The effect of continued collection of rent by the Landlords from the Tenants after the termination notice and the lease expiry was to create a controlled periodic tenancy of month to month in line with section 60 (2) of the Land Act, 2012 which stipulates as follows: -
- “A lessor who accepts rent in respect of any period after the lease has been terminated or the term of the lease has expired shall not, by reason of that fact, be deemed to have consented to the lessee remaining in possession of the land or as having given up on the rights or remedies of the lessor against the lessee for breach of a covenant or condition of the lease and if the lessor continues to accept rent from a tenant who remains in possession for two months after the termination of the lease, a periodic lease from month to month shall be deemed to have come into force” (emphasis added)
45. Equally in the present case, the continued acceptance of rent by the Landlords created a periodic tenancy of month to month and superceded the termination notice as well as the lease.
46. In the premises, I find that the notice of termination of tenancy despite the fact that it took effect for failure to file a Reference as required was superceded by subsequent events of acceptance of rent and continued occupation of the suit premises by the tenants.
34. From the foregoing, it is my finding that a Landlord- Tenancy Relationship exists between the Tenants/Applicants and the 2nd Defendant/Landlord and the said relationship qualifies as a controlled relationship despite the expiry of the lease agreement. This relationship also falls within the purview of Section 2 of the Act which defines controlled tenancy as one which has not been reduced into writing.

“controlled tenancy” means a tenancy of a shop, hotel or catering establishment—

- (a) which has not been reduced into writing; or



35. Having established that a controlled tenancy exists between the parties, I find that this Honourable Tribunal is clothed with jurisdiction to determine this matter before it.

b. Whether The Tenant Was In Rent Arrears?

36. The Tribunal draws its power to determine or vary rent from the provisions of section 12 (1) (b) which states:

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

37. The Landlord contends that the Tenants are in rent arrears of Kshs. 159,000 as at May 2023 being the Kshs. 69,990 for the month of February and March and Kshs.45,000 each for the Month of April and May.
38. The Landlord avers that it increased the rent for the month of April from Kshs. 35,000 to Kshs. 45,000 due to the prevailing economic circumstances. It further avers that the Kshs. 45,000 is a fair consideration since the stated amount is less than the market value of the property.
39. In support of this, the Landlord submitted a Rent Assessment Report dated 27th June 2023 prepared by Fahari Valuers Limited which provided that the current market value of the property was Kshs. 54,000. The 2nd Defendant further contends that the premises are easily accessible and the access road is tarmacked.
40. The Tenants on the other hand contend that there are not in any rent arrears as they have since paid all the rent arrears that were due as per the Tribunal’s Order dated 5th April 2023.
41. They contend that they have been faithfully paying their rent at the rate of KShs.35,000 per month as per the Lease Agreement. In total, the Tenants/Applications noted that they paid Kshs. 105,000 being the rent for the month of March, April and May at a rate of Kshs. 35,000 per month.
42. They further state that the amount of Kshs. 45,000 quoted by the Landlord is unjustifiable and they are not bound by it. The Tribunal notes that the Tenants did not produce any Rent Assessment Report as directed by the Tribunal.
43. Section 4 of the Act provides for termination of, and alteration of terms and conditions in controlled tenancy as follows:

“ 4.

- (1) Notwithstanding the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be terminated, and no term or condition in, or right or service enjoyed by the tenant of, any such tenancy shall be altered, otherwise than in accordance with the following provisions of this act.
- (2) A landlord who wishes to terminate a controlled tenancy, or to alter to the detriment of the tenant, any term or condition in, or right or service enjoyed by the tenant under, such a tenancy, shall give notice in that behalf to the tenant in the prescribed form.”



44. The Tribunal notes that the Landlord did not provide any notice of the alleged increase in rent, which is a term of a controlled tenancy, as stipulated in section 4 of the Act. The Act prescribes a standard form for such notices.
45. From the foregoing, we find that the rent payable for the period of March to May 2023 was KShs.35,000 being the rent payable before the alleged increment.
46. In the premise therefore, I find that the Tenant had no rent arrears.

c. Whether The Court Should Grant The Orders Sought?

47. The Tenants/Applicants sought the Tribunal's intervention in restricting the Landlords from interfering with their quiet possession and enjoyment of the property. The Tribunal also notes that they had expressed the intention to renew their lease and willingness to pay the rent due. The only contention was the increment in rent by the Landlord from KShs. 35,000 to KShs.45,000.
48. The Tribunal is cognizant of the rising rate of inflation which subsequently affects the cost of living and ultimately the rent payable for the premises is equally affected. This Tribunal also has in mind that the Landlord agreed to charge a monthly rent of KShs.45,000, which is KShs.9,000 lower than the market value reported by the Valuers.
49. The Tribunal is also cognizant of the notice of sub-lease expiry that was sent by the Landlord on the Tenants on 20th December 2022, which notice indicated that the Lease was to expire on 1st March 2023. Further, it stated that the Tenants had the option of renewing the lease upon communication to the Landlord.
50. Subsequently, vide a letter dated 18th January 2023, the Tenants expressed interest in renewing the sub-lease. However, I note that there were no further communications between the parties on the renewal of the lease. The Landlord neither responded to the letter from the Tenants on their interest to renew the lease nor did they present to the Tenants a new lease with the new terms for consideration and agreement.
51. The only communication on record from the Landlord was the Notice dated 2nd March 2023 which stated that the sub-lease had expired and directed the Tenants to vacate and hand over the shop.
52. I find this conduct by the Landlord not fair. It cannot communicate one thing and fail to act on the very thing it said. The notice dated 20th December 2022 was very clear that the Tenant had the option of renewing the lease upon communicating the interest to the Landlord. The Landlord cannot then go back on its word and terminate the lease without granting the Tenant the opportunity to renew the lease.
53. Having made the findings, I now turn to the prayers made by each party in these proceedings and make the following orders in the upshot.

Orders

- a. The Tenant's Notice of Application dated 24th March 2023 is partially allowed in the following terms:
- b. The Tenant shall remain in the premises and keep paying rent at the rate of KShs. 45,000.00 from the month of October 2023 on or before the 5th of every month pending the hearing and determination of the reference on the new term of the lease.
- c. The landlord shall provide new terms of the lease in 14 days. The tenant shall respond in 14 days as well.



d. The reference shall be fixed for hearing of the new terms of the lease on 30th October 2023.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY BY HON. MUMA THIS 15TH DAY OF SEPTEMBER 2023 IN THE ABSENCE OF THE APPLICANT/TENANT AND IN THE PRESENCE OF MAINA FOR THE RESPONDENTS.

HON. A MUMA

Ag. Chair/Member

BUSINESS PREMISES RENT TRIBUNAL

