



**Njira v Omollo & another (Tribunal Case E794 of 2021)
[2023] KEBPRT 343 (KLR) (Civ) (19 May 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 343 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
CIVIL
TRIBUNAL CASE E794 OF 2021
A MUMA, VICE CHAIR
MAY 19, 2023**

BETWEEN

MICHEAL NJIRA TENANT

AND

RISPER OMOLLO LANDLORD

AND

DOLLAR AUCTIONEERS AUCTIONEER

RULING

1. The Tenant/Applicant (hereinafter referred to as the “Tenant”) has rented the premises known as stall number 495 Kariobangi North Market (hereinafter referred to as the “suit premises”).
2. The Landlord/1st Respondent (hereinafter referred to as the “1st Respondent”) of the suit premises has let the suit premises to the Tenant since 1997 under a verbal agreement on the terms of the tenancy.
3. The Auctioneer/2nd Respondent (hereinafter referred to as the “2nd Respondent”) is a firm of Auctioneers.
4. The firm of Mengich & Company Advocates appears for the Landlord and the 2nd Respondent.
5. The Tenant appears in person.

Dispute Background

6. The 1st Respondent through her advocates instructed the 2nd Respondent to distress for rent on the grounds that the Tenant owed her rent arrears to the sum of Kenya Shillings Ninety-Four Thousand Only (Ksh 94,000/=).



7. It is on this basis that the Tenant filed a reference before this Tribunal complaining that the Respondents had attached his tools of trade.
8. Pursuant to the reference, the Tenant further filed an application dated December 20, 2021 seeking injunctive orders against the attachment of his tools of trade by the Respondents, which orders were granted on December 22, 2021.
9. The Respondent responded vide a Replying Affidavit sworn by Akinyi Omollo and dated January 10, 2022 wherein she deposed inter alia that the Tenant has been defaulting on her rent obligations of Kenya Shillings Four Thousand Only per month (Kes 4,000/= p m) since 2015 hence her move to instruct the 2nd Respondent to levy for distress.
10. Thereafter, the Tenant filed a Further Supporting Affidavit dated February 4, 2022 wherein she raised various concerns including that the above mentioned Akinyi Amollo has no locus and that she had been paying rent at the rate of Kenya Shillings Three Thousand Only per month (Kes 3,000/= p m) to the 1st Respondent as agreed.

THE TENANT'S CASE

11. The Tenant's contention is that he has been paying rent as agreed with the 1st Respondent and has further been making payments to Nairobi City County. He further disputed the 1st Respondent's ownership of the suit premises.
12. The Tenant also informed this Tribunal that he had made some adjustments and improvements on the suit premises and this had been pre-approved by the 1st Respondent.
13. Additionally, the Tenant claimed that the repairs and improvements costed more than one year's rent which had been waived by the 1st Respondent as a result of the costs incurred by the Tenant on the repairs and improvements.

The 1st respondent's case

14. The 1st Respondent's main argument is that the rent payable was agreed to be the sum of Kenya Shillings Four Thousand Only per month (Kes 4,000/= p.m.) but she allowed the Tenant to pay Kenya Shillings Three Thousand Only per month (Kes 3,000/= p.m.) until his business picks up.
15. Further, the Respondent issued a demand notice and alleged that the Tenant visited her advocates offices and indicated that he would reorganize his finances and clear the outstanding balance.

ISSUES FOR DETERMINATION

16. I have given full consideration to the Application and the Replying Affidavit in response thereto and it is my considered view that the following issues are for determination:
 - i. Whether the Respondent issued a notice to increase rent to the Tenant?
 - ii. Whether the distress for rent was lawfully conducted?



ANALYSIS AND DETERMINATION

i. Whether the Respondent issued a notice to increase rent to the Tenant?

17. I must first note that as per section 2 of the *Landlord and Tenants (Hotels, Shops and Catering Establishments) Act* Cap 301 (“the Act”), the tenancy that is the subject matter of this dispute is a controlled tenancy since it was had not been reduced into writing.
18. The 1st Respondent did not provide any evidence to support her claims and as such, I have found it difficult to substantiate any of the allegations in her Replying Affidavit.
19. Further, on February 7, 2022 this Tribunal ordered the Tenant and the 1st Respondent to file their respective submissions and neither of the parties complied with those directions. That being the case, this Tribunal is left with no option but to rely on the pleadings as filed.
20. Now In turn to the first issue for determination as mentioned above. I refer to section 4 (2) of the Act which provides as follows;

“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.”

21. In the case of *Fredrick Mutua Mulinge t/a Kitui Uniform v Kitui Teachers Housing Cooperative Society Limited* [2017] eKLR the Environment and Land Court cited with approval the case of *Lall vs Jeypee Investments Ltd* Nairobi HCCA No 120 of 1971 (1972) EA 512 where the Court stated as follows;

“The *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* is an especially enacted piece of legislation which creates a privileged class of tenants for the purpose of affording them the protection specified by its provisions against ravages of predatory landlords. Such protection can only be fully enjoyed if the provisions of Act are observed to the letter otherwise the clearly indicated intention of the legislature would be defeated. In order to be effective in this fashion the Act must be construed strictly no matter how harsh the result...This is an Act which requires, insofar as the giving of the notice is concerned, absolute and complete not merely substantive compliance with its peremptory provisions.” (Emphasis added)

22. I need not say more in this regard. The 1st Respondent having failed to issue a notice as required under section 4 (2) of the Act, can not purport to have increased the rent payable in 2015 from Kes 3,000/= to Kes 4,000/=.
23. Furthermore, the 1st Respondent has failed in her duty to adduce evidence to prove that there are any rent arrears owed to her by the Tenant.
24. Therefore, I am not convinced that the 1st Respondent adhered to the provisions of the Act with respect to issuing a notice to increase the rent payable from Kes 3,000/= to Kes 4,000/=.

ii. Whether the distress for rent was lawfully conducted?

25. Having failed to satisfy the requirement to issue a notice to alter the terms of the tenancy as required by the Act, the Respondents needed to seek leave of this Honorable Tribunal to attach the Tenant’s tools of trade.



26. In order to conclusively determine this issue, I find it prudent to state that this Tribunal has the discretion to exercise the powers conferred to it under section 12 of the Landlord and Tenants (Hotels, Shops and Catering Establishments) Act Cap 301 (“the Act”). Accordingly, I turn your attention to sub section 1 (h) of the said section which provides as follows;

“ A Tribunal shall, in relation to its area of jurisdiction have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in addition to and without prejudice to the generality of the foregoing shall have power to –

h to permit the levy of distress for rent”

27. In my considered view, having failed to issue the Tenant with a notice to alter the terms of the tenancy, the 1st Respondent was in addition required to approach this Tribunal and seek leave so as to be permitted to levy of distress for rent.

28. That being the case, I find that the distress for rent that was levied by the Respondents was irregular and unlawful.

29. In the upshot the Tenant’s application dated December 20, 2021 is allowed in the following terms;

- a. The Respondents are hereby ordered to return the Tenant’s tools within five (5) days of the date of this ruling;
- b. The 1st Respondent be and is hereby ordered to file and serve statement of accounts since 2015 and using the rent of Kenya Shillings Three Thousand Only per month (Kes 3,000/= p m) within 14 days from the date of this ruling and the Tenant to 1st Respondent to respond to the statement of accounts within 14 days of service;
- c. The Tenant shall continue paying rent of Kenya Shillings Three Thousand Only per month (Kes 3,000/= p m) as and when it falls due failure to which the 1st Respondent shall be at liberty to distress;
- d. The 1st Respondent is at liberty to issue a Notice to Terminate or Alter Terms of Tenancy in accordance with the Landlord and Tenants (Hotels, Shops and Catering Establishments) Act Cap 301;
- e. The reference shall be fixed for Hearing June 29, 2023.
- f. Costs shall be in the cause.

HON A MUMA

VICE CHAIR

BUSINESS PREMISES RENT TRIBUNAL

RULING DATED, SIGNED AND DELIVERED VIRTUALLY BY HON A. MUMA THIS 19TH DAY OF MAY 2023 IN THE PRESENCE OF MS KIRUI FOR THE LANDLORD AND MICHAEL NJIRA THE TENANT IN PERSON.

HON A MUMA

VICE CHAIR

BUSINESS PREMISES RENT TRIBUNAL

