



**Olenja v Omutsani (Tribunal Case E142 of 2023)  
[2023] KEBPRT 1271 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 1271 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E142 OF 2023  
CN MUGAMBI, MEMBER  
JULY 13, 2023**

**BETWEEN**

**SHARON OLENJA ..... TENANT**

**AND**

**DR. MARY OMUTSANI ..... LANDLORD**

**RULING**

**Introduction**

1. The landlord/Applicant's notice of motion dated February 22, 2023 seeks orders that the Tribunal be pleased to strike out the suit herein for want of jurisdiction and that the orders of the Tribunal issued on 9.2.2023 be set aside. The application also seeks a prayer that the tenant be ordered to compensate the Applicant for misrepresentation of facts.

**The Landlord's depositions**

2. The Applicant/Landlord has filed an affidavit sworn on February 22, 2023 wherein she has deposed that she is the owner of flat No. A 929 Madaraka Infill Section "E" Housing Scheme being a residential house and the use of the same has not been effected from residential to business.
3. The Applicant deposes in her said affidavit that from around March 2020, she let out the suit premises to one Zipporah Okello who ostensibly vacated the premises without notifying the Applicant but continued paying rent through her "cousin" the Respondent herein.
4. The Applicant has further deposed that the Respondent is a stranger to her and there does not exist a landlord/tenant relationship between the parties; and that the Respondent is therefore illegally in the suit premises.
5. The Applicant further deposes that the Respondent does not have a license or permit to carry out any business in the suit premises making the business of the Respondent illegal as it is not tax compliant.



6. The Applicant, in these circumstances, therefore, depones that the Tribunal has no jurisdiction to hear and determine this dispute.

### **The Tenant's Depositions**

7. The tenant has deponed in his replying affidavit sworn on March 13, 2023 that the landlady has not annexed to her affidavit any proof that the suit premises is residential and that at all material times, the landlady has been aware that the suit premises has been used for business purposes.
8. The Tenant further depones that; the landlady has not demonstrated that she ever received any rent from one Ziporah Okello, and that it is the tenant/Respondent who has always paid rent to the landlady/Applicant.
9. The tenant has also deponed that, the suit premises was rented out to her and her business partner, Ziporah Okello where they run the business of a hostel for students from Strathmore University.
10. It is also deponed that the tenant and the said Ziporah Okello parted ways and the said Ziporah Okello has been using the caretaker and the landlady to have the tenant illegally evicted from the suit premises.
11. The tenant has finally deponed that the application has not been brought in good faith and has been informed by malicious intentions on the part of the landlady/Applicant.

### **Issues for determination**

12. The issues that arise for determination in this application are in my view the following:-
- Whether there exists a landlord/tenant relationship between the Applicant and the Respondent in this suit.
  - Whether the suit premises is a residential premises or a business premises.
  - Whether the Tribunal has jurisdiction to hear and determine this dispute.

### **Issue A**

13. The position taken by the landlady is that she rented out the suit premises to one Ziporah Okello and that the Respondent herein is a cousin to the said Ziporah Okello and through whom Ziporah Okello paid rent. The tenant on her part has stated that she has been a tenant in the suit premises and that Ziporah Okello was her business partner, together they carried out the business of a students hostel in the suit premises. To be sure, both parties have not annexed to their respective affidavits any lease agreements and if there existed any tenancy between them, it can only at most be verbal.
14. The tenant has annexed an M-pesa statement which clearly shows that she was paying money to the landlady and as the landlady has not denied receiving the same as rent as suggested by the tenant, I have no reason to doubt that the payments were for rent.
15. The landlady, though suggesting that the only tenant she recognized as her tenant in the suit premises was one Ziporah Okello, she has not annexed any evidence of rent payments from the said Ziporah Okello neither is there any evidence that the money paid to the landlady by the tenant herein was paid or being paid on behalf of the said Ziporah Okello.
16. I have also seen the tenant's exhibit "0S3" and it makes reference to Zipshan Girls Hostel, Ustawi Court Block A79 House 929. This is the same premises the landlady admits to be her property and which



she allegedly rented out to one Ziporah Okello, it is the suit premises currently occupied by the tenant herein

17. In view of the foregoing, it is my finding on this issue that there exists a tenancy between the parties which has not been reduced into writing and is therefore a controlled tenancy within the meaning ascribed thereto by Section 2 of [Cap 301](#).

#### **Issue B**

18. The landlady has taken the view that the suit premises is a residential house and its use has never been changed to that of a business premises. The landlady has not produced any evidence in her affidavit or any other pleadings that indeed the suit premises is a residential premises, it being trite law that he who alleges proves. The tenant's assertion that the suit premises has been in use as a business premises is supported by the tenant's annexure "OS3", a list of hostels under Strathmore University in which the suit premises is described as Zipstan Girls Hostel. I do not think a hostel can be described as a residential premises in the context in which it is applied in this case. The tenant cannot have rented a whole hostel to reside therein, it could only have been for business purposes, and can only be described as a business unit; a hospitality business focusing on accommodation for profit.

On this issue, I therefore do find that the suit premises is a business premises.

#### **Issue C**

19. It follows from the findings in A and B above that; the tenancy herein being a controlled tenancy and the premises herein being a business premises, the tribunal has jurisdiction to hear and determine this dispute. In this regard, the landlady's application dated 22.2.2023 is dismissed with costs to the tenant.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 13<sup>TH</sup> DAY OF JULY 2023**

**HON. CYPRIAN MUGAMBI**

**CHAIRPERSON**

7.2023

