



**Onsomu v Gatati (Tribunal Case E096 of 2024)
[2024] KEBPRT 531 (KLR) (3 May 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 531 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E096 OF 2024
P KITUR, MEMBER
MAY 3, 2024**

BETWEEN

TONGI NORBERT ONSOMU TENANT

AND

SAMMY KAMENJU GATATI LANDLORD

RULING

A. Parties And Representatives

1. The Applicant Tongi Norbert Onsomu is the Tenant having rented out premises from the Landlord herein (hereinafter known as the 'Tenant')
2. The Firm of Julia Mukundi Advocates represents the Tenant.
3. The Respondent Sammy Kamenju Gatati has leased out to the Tenant a business stall space at Makongeni in Thika. (hereinafter known as the 'Landlord')
4. The firm of Onyango Oyieko & Associates Advocates represents the Landlord.

B. The Dispute Background

5. The Tenant avers that on 9th January 2024, the Landlord, unlawfully sent some people to the suit premises who broke in and carried away some of his tools of trade.
6. The tenant further alleges that the Landlord failed to and/or neglected to comply with the provisions of the Landlords and Tenant (Shops, Hotels, Catering Establishments) Act, Cap 301 in levying the distress for rent if any was outstanding.
7. The Tenant also discloses that he had offered to pay the Landlord the demanded sum of Kshs. 12,000/= demanded by the Landlord as unpaid rent.



8. As a result of the above, the Tenant filed a Complaint and a Notice of Motion Application both dated 26th January 2024.
9. The Tenant was seeking the for orders Inter alia;
 - i. This matter be certified as urgent and service be dispensed with in the first instance.
 - ii. The landlord/respondent be temporarily be prohibited and restrained from unlawfully evicting the tenant pending the hearing and determination of this application.
 - iii. The landlord/respondent be compelled restore equipment belonging to the tenant seized from the suit premises.
 - iv. In the alternative the landlord/respondent be ordered to compensate the tenant for the loss for the value of the equipment seized of Kshs. 124,000 and for the loss arising from the unlawful attachment of the tenant's equipment.
 - v. The costs of this application be borne by the landlord/respondent.
10. The Landlord in response to the Tenant's Reference and Application filed a Replying Affidavit dated 29th February 2024 in which it averred that the Tenant had admitted that he was in arrears form June 2023, which arrears stood at Kshs. 12,000/= as at the date of filing.
11. The Landlord further denied breaking into the premises and seizing any equipment belonging to the Tenant.
12. The Landlord additionally challenged the jurisdiction of this Tribunal, which we first have to consider before delving into the other issues.

C. List Of Issues For Determination

13. The issues raised for determination are as follows;
 - a. Whether the Tribunal has jurisdiction to determine this matter.
 - b. Whether the Tenant has been unlawfully rid of the business premise and therefore entitled to the reliefs sought.

D. Analysis And Findings

a. Whether the Tribunal has jurisdiction to determine this matter

14. Jurisdiction is everything and once challenged, a determination should be made before the Tribunal can proceed with further disposal of any matter thereto. The Tribunal has no option but to down its tools where want of jurisdiction is deemed or assumed not to exist. In the case of Owners of the Motor Vessel 'Lillian' (s) versus Caltex Oil (Kenya) Ltd [1989] KLR1, the Court stated as follows:

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court had no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

15. The question therefore arising is whether there exists a tenancy relationship between the Tenant and the Landlord subject to the [Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#) (Cap 301).



16. The principles established by the time-honored, *Mukisa Biscuit Manufacturing Co Ltd v. West End Distributors* (1969) EA 696, are settled that;
- “a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”
17. From the foregoing, it is clear that a preliminary objection is meant to only raise a pure point of law on the assumption all facts pleaded by the other side are correct.
18. The Landlord alleges that the Tenant is no longer in the premises, which fact appears not to have been disputed by the Tenant. The Landlord equally alludes to there having been a tenancy without any written agreement, which position, as at the time of the persistence of the Tenancy, would fall within the ambit of a controlled tenancy and therefore within the jurisdiction of this Tribunal as provided by section 2 of Cap 301 which defines a controlled tenancy as 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 date thereof OR
 - iii. Relates to premises of class specified under subsection (2) of this section.
19. In *Republic v Chairperson - Business Premises Rent Tribunal at Nairobi & another Ex-Parte Suraj Housing & Properties Limited & 2 others* [2016] eKLR, the Judge cited with approval the case of *Pritam vs. Ratilal and Another Nairobi HCCC No. 1499 of 1970* [1972] EA 560 where it was stated as follows:
- “Therefore the existence of the relationship of landlord and tenant is a pre-requisite to the application of the Act and where such relationship does not exist or it has come to or been brought to an end, the provisions of the Act will not apply. The applicability of the Act is a condition precedent to the exercise of jurisdiction by a Tribunal; otherwise the Tribunal will have no jurisdiction. There must be a controlled tenancy as defined in section 2 to which the provisions of the Act can be made to apply. Outside it, the Tribunal has no jurisdiction.”
20. The position in the above cited authority applies, without doubt, in circumstances where a Tenancy has come to an end within the confines and in a manner provided under Cap 301 but can respectfully be distinguished from the present circumstances of this case.



21. In making the distinction, I am minded to look at the definition of a Tenant under Cap 301 which provides:

“tenant” in relation to a tenancy means the person for the time being entitled to the tenancy whether or not he is in occupation of the holding, and includes a sub-tenant;

22. The Tenant herein contests the manner in which the Tenancy purportedly came to an end. With that, a challenge to jurisdiction cannot be sustained outside an inquiry into the manner in which the tenancy came to an end.

Whether the Tenant has been unlawfully rid of the business premise and therefore entitled to reliefs sought

23. A Landlord is entitled to the remedy of distress for rent under the [Distress for Rent Act](#), Cap 293. Section 3 provides as follows:-

Right of distress

- (1) Subject to the provisions of this Act and any other written law, any person having any rent or rent service in arrear and due upon a grant, lease, demise or contract shall have the same remedy by distress for the recovery of that rent or rent service as is given by the common law of England in a similar case.
- (2) No distress shall be levied between sunset and sunrise or on any Sunday.

24. Additionally, Section 4 of the [Distress for Rent Act](#) provides:-

Distraigned goods may be sold under certain circumstances

- (1) Where any goods or chattels are distrained for rent reserved and due upon a grant, demise, lease or contract, and the tenant or owner of the goods or chattels so distrained does not, within fourteen days after distress has been made, and notice thereof (stating the cause of the making of the distress) left on the premises charged with the rent distrained for, pay the rent together with the costs of the distress, or replevy them, with sufficient security to be given to the licensed auctioneer according to law, the person distraining may lawfully sell on the premises or remove and sell the goods and chattels so distrained for the best price which can be obtained for them, towards satisfaction of the rent for which they are distrained, and of the charges of the distress, removal and sale, handing over the surplus (if any) to the owner.

25. The Landlord was therefore entitled to commence the process of distress for rent as enumerated above. From the evidence before this Tribunal, this path was not taken by the Landlord who opted to cart away the Tenant's tools of trade.
26. That act in itself, is tantamount to ridding the Tenant of the premises. Question then arises as to whether such action enjoys the protection of law. We shall interrogate the action against the background of the relevant provisions of Cap 301 to answer the question, having noted the existence of a Landlord-Tenant relationship.
27. The Act requires a landlord who wishes to terminate or alter the terms of a controlled tenancy to issue a notice in the prescribed form. Section 4(2) of the Act provides as follows;



4. Termination of, and alteration of terms and conditions in, controlled tenancy
- (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.
28. In *Manaver N. Alibhai T/A Diani Boutique vs. South Coast Fitness & Sports Centre Limited*, Civil Appeal No. 203 of 1994 the Court of Appeal held as follows;
- “The Act lays down clearly and in detail, the procedure for the termination of a controlled tenancy. Section 4(1) of the Act states in very clear language that a controlled tenancy shall not 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 specified provisions of the Act.
29. In the present matter before this Honourable Tribunal, it is clear that the Landlord did not issue a Notice to Terminate Tenancy as provided under the schedule to the Landlord and Tenant (Shops, Hotels and Catering Establishments) (Tribunal) (Forms and Procedure) Regulations, 1966.
30. The Tenant may have defaulted in paying the rent, but the procedure binding the Landlord in a controlled tenancy to be followed upon that occurrence was not complied with. Instead, the Landlord went ahead, in a manner most crude, to kick out the Tenant from the premises. A break-in order was not sought as is customarily required of any law-abiding Landlord before lawfully gaining entry to a Tenant’s business premise. The Landlord herein went ahead, broke into the premises and carted away goods effectively ridding the Tenant of access and use of the premises.
31. In light of the foregoing, I therefore proceed to order as follows;

ORDERS

- a. The upshot is that the Tenant’s Application dated 26th January 2024 hereby succeeds in the following terms;
- b. The Landlord shall immediately re-open the Tenant’s Business Premises at Makongeni in Thika Town and allow the Tenant back in.
- c. The Landlord, his agents, servants or persons acting under its mandate shall immediately return the following items; 1 deep frier heavy duty, chips heavy duty display warmer, and signature juice dispenser within 7 days.
- d. The Landlord his agents, servants or persons acting under its mandate are hereby restrained from selling by public auction or any other available means of sale the Tenant’s goods, tools of trade and any other items removed from the Tenant’s premises on 9th January 2024.
- e. The Tenant shall additionally be exempted from paying rent from 9th January 2024 and shall only resume payment of rent from the date of re-admission into the premises.
- f. This Ruling settles the Complaint dated 26th January 2024.
- g. Costs are awarded to the Tenant assessed at Kshs. 10,000/= to be deducted from rent payable upon resumption of rent payment under Order (e) above.
- h. The Landlord shall not issue any Tenancy Notice for termination or otherwise until after the lapse of eight calendar months from the date of this Ruling.



- i. The OCS Makongeni Police Station to ensure compliance.

HON P. KITUR

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

Ruling dated, signed and delivered virtually by Hon P. Kitur this 3rd day of May 2024 in the presence of Ms. Mokundi for the Tenant and in the absence of the Landlord.

HON P. KITUR

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

