



Okuthe t/a La Place Restaurant v Kenya Railways Corporation & another (Tribunal Case E428 of 2021) [2023] KEBPRT 42 (KLR) (1 February 2023) (Judgment)

Neutral citation: [2023] KEBPRT 42 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E428 OF 2021
A MUMA, VICE CHAIR
FEBRUARY 1, 2023**

BETWEEN

RUTH FLORENCE OKUTHE T/A LA PLACE RESTAURANT TENANT

AND

KENYA RAILWAYS CORPORATION 1ST LANDLORD

**KENYA RAILWAYS STAFF RETIREMENT BENEFIT SCHEME 2ND
LANDLORD**

JUDGMENT

A. Parties and Representatives

1. The applicant Ruth Florence Okuthe is the tenant and rented space on the suit property Shed No N on LR No 2029/12 (hereinafter known as the 'tenant')
2. The firm of Sim Advocates LLP represent the applicant/tenant in this matter. a.simiyu@simiyuadvocatesllp.
3. The 1st and 2nd respondents are the landlord and rented out space to the tenant on the suit property Shed No N on LR No 2029/12 (hereinafter known as the 'landlord')
4. The firm of Nyaanga & Mugisha Company Advocates represent the Landlord/Respondent in this matter.

B. The Dispute Background

5. The landlord and the tenant entered into a tenancy agreement which expired. Upon expiry the tenant was served with a fresh lease whose terms were different and detrimental to the tenant.
6. The tenant alleges that the landlord served them with a new lease seeking to vary the original terms of the lease and has since filed a reference and notice of motion application dated August 17, 2021



under section 12(4) of the [Landlords and Tenants \(Shops, Hotels and Catering\) Establishments Act](#) cap 301. The tenant was seeking amongst other orders that pending the hearing and determination of this matter that the respondent be restrained from removing, evicting and harassing the tenant.

7. The tenant obtained restraining orders against the landlord on August 19, 2021. Interesting events unfolded after this orders were issued the landlords refused to reopen the premises and when counsel was asked he stated his hands were tied as he had already communicated to his client to obey the court orders. This led the tribunal to require the personal attendance of one Miss Milly Omido Acting GM to appear in person and explain why the business is still closed.
8. On 29th October when the said matter came up for hearing in the presence of all parties and Milly Omido present as well before my sister P May it was reported that indeed the premises were opened but another twist was added the goods of the tenant were all carted away to an undisclosed location. All the said Milly Could say was that she was away from the office and not in Nairobi and could not explain much unless investigated. The court ordered for compliance with previous orders and return of all the good carted away.
9. 11th of November 2021 the situation did not change in gross and blatant disregard of the tribunal orders it was reported the premises were still locked be as it may parties were asked to argue the application and a ruling delivered on 14 April 2022 which mentioned the acts of impunity by the landlords the tribunal made a finding that the tenants were entitled to damages and gave leave for assessment of damages each party to file documents.
10. The tenants filed for itemized damages totaling Kshs 1,574,800/- claiming she was not able to salvage anything when the landlords cared away the goods. Also carted away was all her records maintained at the premises and all were taken to a place unknown to the tenants.

C. Jurisdiction

11. The jurisdiction of this tribunal is in dispute. The landlord in brief response to the assessment of damages filed a notice of preliminary objection dated June 7, 2022 to the reference dated August 17, 2021 and witness statement dated June 2, 2022 claiming there is no competent suit before this tribunal and that the tribunal had no jurisdiction to hear and determine an assessment of damages as the same falls outside the tribunals jurisdiction under Sec 12 of cap 301 and relied on the cases of [Narshidas and Company Ltd vs Nyali Air Conditioning and Ref Services](#) 1996 eKLR and [Michael Gachie vs Peter Gichuru](#) 2016 eKLR, [Mundi vs Lolchoki](#) 1976 eKLR.
12. The tenant had earlier filed a reference and notice of motion application dated August 17, 2021 which pleadings form the basis of this claim. The Tribunal directed both the PO and assessment be heard together. Nothing has been filed in opposition to the assessment of damages by the landlords.
13. The tenant also filed a further affidavit dated October 25, 2021. Both parties filed submissions, which have been considered.

D. List of Issues for Determination

14. The issues raised for determination are as follows;
 - a. Whether the tribunal has jurisdiction to entertain the tenants claim for damages?
 - b. If the tribunal has jurisdiction, which type of damages & how much is awardable?



E. Analysis and findings

Whether the tribunal has jurisdiction to entertain a claim for damages?

15. The *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* chapter 301 laws of Kenya Act at section 12 (4) provides as follows;

"In addition to any other powers specifically conferred on it by or under this Act, a Tribunal may investigate any complaint relating to a controlled tenancy made to it by the landlord or the tenant, and may make such order thereon as it deems fit."
16. The above provision accords the tribunal additional powers to investigate any complaints relating to controlled tenancies and make orders as they deem fit. In the present case, despite the fact that the tenant is no longer in the premises, the suit matter originated at a time when a tenancy relationship still existed between the parties. Additionally, the means by which the relationship was terminated was not in accordance to the procedures stipulated under section 4 of cap 301.
17. The tenant has filed their claim and presented before this tribunal that despite there being orders issued by the tribunal on August 18, 2021 barring the landlords from interfering with the business operations of the Tenant, they proceeded and carted away their goods from the premises.
18. The landlord has in response to the tenant's claim for damages filed a preliminary objection dated June 7, 2022 opposing the jurisdiction of this tribunal on the grounds that the claim is unmerited and that it falls outside the mandate of the tribunal. The tribunal had previously established the existence of a controlled tenancy which then accords it the jurisdiction to determine the issue in question. Additionally, as per section 12(4) cited above, the tribunal does have the power to issue additional orders as it deems fit.
19. The tribunal reiterates its sentiments as presented in the ruling delivered on April 14, 2022 that the landlord has displayed acts of impunity by continuously disobeying this court's orders. The claim by the tenant for damages is therefore justified.
20. The *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* chapter 301 laws of Kenya Act at section 12 (1) (I) accords the tribunal as one of its powers the jurisdiction to;

"Award compensation for any loss incurred by a tenant on termination of a controlled tenancy in respect of goodwill, and improvements carried out by the tenant with the landlord's consent;"
21. In Tribunal Case No 8 of 2019 *Robert Ayieko Angoi v Lena Sarange* [2021] eKLR, where the matter was instituted by virtue of a notice of termination issued to the tenant by the landlord. The tenant did not file a reference opposing the said notice and as a result, the court gave orders allowing landlord to evict the tenant.
22. The tenant thereafter filed for stay of the above orders and averred that there was no tenancy relationship between themselves and the landlord. When the matter later came up for hearing the Tribunal proceeded to order that the premises be reopened and returned to the landlord.
23. The tenant aggrieved by the above decision proceeded to appeal through ELC Appeal No 12 of 2019. During the appeal several matters arose which the appellate court felt were not fully addressed by the tribunal. One such matter was the question on the tenancy relationship between the parties.



24. The appellate court established that the owner of the premises had leased the premises to both the tenant and the landlord without their knowledge. This as a result, created a scenario where the tenant was a sub-tenant of the alleged landlord despite there being no lease agreement between them. This then explained why the landlord had issued the tenant with a notice to terminate. The tribunal did not investigate this issue prior to issuing of the ruling and as such did not give an explanation as to why they returned the premises back to the landlord.
25. Based on the above the court was of the opinion that the only recourse available for the tenant was damages for loss of tenancy. The court stated that:
- “The appellant’s only recourse is in damages for loss of tenancy. The appellant is at liberty to sue the owners of the demised premises for a refund of the unutilized rent and general damages for breach of the agreement.”
- “In view of the foregoing, I find merit in the appeal and allow it. The matter is referred back to the Tribunal for assessment of the appellant’s damages for loss of tenancy.”
26. Based on the holding above, the court established the jurisdiction of the tribunal to assess and award damages in a matter relating to a controlled tenancy.
27. In the case of *Antique Auctions Ltd v Pan African Auctions Ltd* [1993] eKLR the Court of Appeal defined the term damages according to the McGregor book on *Damages* as follows:
- “Pecuniary compensation, obtainable by success, for a wrong which is either a tort or a breach of contract, the compensation in the form of a lump sum which is awarded unconditionally, and is generally, but now not necessarily, expressed in English currency.
28. The tribunal in Tribunal Case No 8 of 2019 *Robert Ayieko Angoi v Lena Sarange* [2021] eKLR stated in relation to the form of damages that;
- “Damages may be in the form of general damages or special damages..... Special damages have to be specifically pleaded and strictly proved by evidence. This would include the costs incurred by the Tenant as a result of the eviction or specific damage to property that was in the premises during the eviction.”
29. The Court of Appeal stated its position on specific damages in the case of *Richard Okuku Oloo vs South Nyanza Sugar Co Ltd* [2013] eKLR as follows:
- “We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.”
30. While differentiating between special and general damages the Court of Appeal in the case of *Antique Auctions Ltd v Pan African Auctions Ltd* [1993] eKLR stated that;
- “Compensation for a wrong committed could be claimed as general damages or special damages. In general damages compensation cannot be quantified but will be assessed by the court. In the case of special damage, such claim of the loss must be specifically pleaded



and strictly proved. Proof of damages is by evidence and the Court will decide each case on balance of probability”

31. In the case of *Rose Wangui Githioni v Nancy Nyambura Maina* [2017] EKLK the tenant had been prematurely evicted from the premises after the Landlord removed their goods and locked the premises.
32. The tenant filed a claim and was awarded general damages of Kshs 300,000 plus costs and interests by virtue of the fact that they had suffered loss of business. The Landlord filed an appeal and one of the grounds was in relation to the fact that the Trial Court had awarded the tenant general damages in a matter involving a breach of contract. The appellate court upheld the decision of the trial Court.
33. In arriving at this decision, the Court relied on an argument presented by the tenant where they relied on the case of *Marine Management Association & Another vs National Maritime Authority* (2012) 18NWLK 504 which stated as follows;

“Whereas the general principle is that courts do not normally award damages for breach of contract, there are exceptions such as when the conduct of the respondent is shown to be oppressive, high-handed, outrageous insolent or vindictive.
34. I wish to place reliance on the above case in my determination to award General Damages to the tenant in this present case. The Landlord acted in a manner that falls within the ambit of the exceptions stated above. The landlord did not heed to the orders of the Tribunal requiring them to unlock the premises, additionally, the director of the Landlord company was summoned to appear in Court to explain why they ignored the Court orders but they failed to do so. Finally, they proceeded to cart away the goods of the Tenant despite there being orders barring them from doing so.
35. The Tribunal is convinced that the above actions by the landlord can be deemed as “oppressive, high-handed, outrageous, insolent or vindictive”. This then allows this Tribunal to award the tenants General Damages for the breach of contract by the landlord.
36. In light of the foregoing and having assessed the claim by the Tenants the Tribunal awards them damages of Kshs 1,345,400.00

F. Orders

- a. The upshot is that the tenant’s reference dated August 17, 2021 is hereby upheld in the following terms:
- b. The landlord shall pay to the tenant damages of Kshs 1,345,400 plus interest from the date of filing this reference within 30 days.
- c. Tenants shall have costs.

HON A. MUMA

VICE CHAIR

BUSINESS PREMISES RENT TRIBUNAL

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY BY HON A. MUMA THIS 1ST DAY OF FEBRUARY 2023 IN THE PRESENCE OF SIMIYU FOR THE TENANT AND DACHI FOR THE LANDLORD.

HON A. MUMA



VICE CHAIR

BUSINESS PREMISES RENT TRIBUNAL

