



**Nyongesa v Maina & another (Tribunal Case E531 of 2023)
[2023] KEBPRT 1128 (KLR) (Civ) (9 October 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 1128 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
CIVIL
TRIBUNAL CASE E531 OF 2023
P KITUR, MEMBER
OCTOBER 9, 2023**

BETWEEN

STEPHEN NYONGESA TENANT

AND

JOHN MAINA 1ST RESPONDENT

IRENE NYAWIRA 2ND RESPONDENT

RULING

1. The application before me is the tenant's notice of motion brought by way of certificate dated 26th April, 2023. The tenant sought for the following orders:
 - a. Spent
 - b. That the respondent be ordered to allow the applicant/tenant access to the business premises and all his items of trade
 - c. That an injunction be issued against the Respondent, to be restrained from interfering with the quiet possession and enjoyment by the tenant of the said premises until final determination of this matter.
 - d. An order as to costs of this suit
 - e. Any other order that the court deems fit.
2. The application was placed before the Tribunal on 29th May, 2023 whereby the Tribunal directed that the same be served upon the respondents and a date for inter-partes hearing set for 8th June, 2023.



3. The application was opposed by the respondents who each filed a replying affidavit in response to the application. The parties elected to canvass the application by way of written submissions. I have considered the application, the responses thereto and the submissions on record and would proceed as follows:

Tenant's case

4. The tenant's application is premised on the averments set forth in the sworn on 26th April, 2023. The tenant stated that they had been in actual occupation of the demised premises paying a monthly rent of Kshs. 4,000/-. He averred that the landlord through his agent, sometimes in September, 2022 locked the premises asking him to clear rent since he had delayed in making payments by 2 weeks. The tenant states that he later learnt that the landlord's actions were meant to dispossess him of the demised premises and lease the same to another tenant.
5. The tenant averred that in January, 2023 the 2nd Respondent locked his shop stating that he had uncleared electricity bill which he proceeded to clear despite the fact that he was sharing a meter with another tenant. He followed up with utility service provider KPLC but he realized that the same was not remitted. He states that his shop remained close until the time of filing the application thus necessitating the present proceedings.

Landlord's case

6. The landlord and their agent in their respective responses took a multi- pronged approach in attacking the application. The landlord stated that the tenant was a habitual rent defaulter and had accumulated arrears for a period of 14 months. The landlord therefore accused the tenant of lying under oath. The landlord further stated that the tenant was hiding behind the process of the Honourable Tribunal so that he could allowed to use the premises without paying the agreed rent.
7. The landlord maintained that it has a right to levy distress and the process of closing down the shop was done in accordance with the law.

Tenant's rejoinder

8. The tenant filed a further affidavit in response to the grounds raised by the landlord in their response. The tenant stated that the rent arrears alluded to by the landlord were for residential house which did not fall within the purview of the law.

Analysis

9. I am required to determine the following issues: -
 - a. Whether there exists controlled tenancy between the parties herein?
 - b. Whether the process of locking the tenant's premises was done in accordance with the law?
 - c. Who is liable to pay costs?

Issue No. 1

10. It is clear from the record and the averments of the Tenant herein that the lease between the parties was never reduced into writing. The Landlords/Respondents have also not challenged the Tenant's position that this tenancy between the parties is a controlled tenancy.



11. Section 2(1) (a) of Cap 301 describes a controlled tenancy as “A tenancy which has not been reduced into writing or...
12. I am therefore satisfied that the tenancy herein is a controlled tenancy and therefore subject to the provisions of Cap 301 of the Laws of Kenya. The Tenant herein is a protected Tenant.

Issue No. 2

13. Was the locking of the demised premises by the Landlord illegal and in contravention of the provisions of Cap 301 of the Laws of Kenya?
14. Section 4(1) of Cap 301 is in the following terms “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.”
15. Section 4(2) of the same Act 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.”

16. The Landlord’s invasion of the Tenant’s business premises on 23rd January, 2023 amounted to a constructive termination of the tenancy. It was not sanctioned by law. It did not follow the laid down procedure under section 4(2) as quoted here above. The locking of the Tenant’s goods was not proper and legal exercise of levying distress for owed/outstanding/accrued rent.
17. It was an act of impunity flying on the face of the law. The admission by the Respondents that it undertook the said actions as part of levying distress cannot hold as even the process of levying distress has a clearly stipulated process under the law.
18. The act of locking the premises with the tenant’s goods obviously meant that the tenant could not engage in any meaningful business without the goods locked in by the Landlord illegally. The Landlord cannot be a beneficiary of his own acts of illegality, he had no excuse for failing to follow the laid down and clear provisions of the law as explained in the foregoing paragraphs.
19. In emphasizing the need to strictly adhere to the provisions of Cap 301, the High Court in the case of; *Lall Vs Jeypee Investments Ltd* [1972] EA 512 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 offering them the protection specified by its provisions against ravages of predatory Landlords. Such protection can only be fully enjoyed if the provisions of the 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..... The Landlord and the Tenant Act laid down a code which Parliament intended to be followed if a Landlord does not give notice of termination as prescribed, the notice will be ineffectual. This may seem a technical and unmeritorious defence, but there is no doubt that the court has no power to dispense with these time limits if the Defendant chooses to object at the proper time. This is an act which requires, in so far as the giving



of notice is concerned, absolute and complete not merely substantive compliance with itsprovisions.”

20. I am satisfied that the Landlord effectively “closed down” the Tenant’s business and made it impossible to operate by the Landlord’s illegal action of locking the premises on 23rd January, 2023. I have also perused the documents filed. The tenant might be in rent arrears for the houses which the landlord has described as single rooms and which the tenant could sneak to at night. This clearly shows that the said single rooms were residential and while we may sympathize with the landlord, the same does not fall within the jurisdiction of this Honourable Tribunal. The landlord can pursue the appropriate remedies at the right forum.
21. The landlord is yet to be reopen the demised premises for the tenant to undertake any operations. I suspend the payment of rent to the Landlord from 23rd January, 2023 until such a time that the Landlord will reopen the premises. Owing to the period of time that has since lapsed, it is clear that the tenancy would be untenable. The same has been severed especially by the overzealous acts of the 2nd Respondent who acted at the whims of the landlord.
22. Flowing from the findings I have arrived at, I am satisfied that the Tenant is entitled to the following orders and which I hereby grant;
1. That the Landlord should forthwith reopen the demised premises and allow the tenant to carry away their goods.
 2. This ruling settles the application dated 26th April, 2023 and the reference dated 17th May, 2023.
 3. The tenant is awarded the costs of the application and reference assessed at Kshs. 40,000/-
 4. The OCS of the nearest police station shall ensure compliance with order 1.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9TH DAY OF OCTOBER 2023

HON. P. KITUR

MEMBER

09.10.2023

In the presence of; Mr. Stephen Nyongesa – tenant

No appearance for the 1st and 2nd* Respondents

