



Al-Waris Restaurant v Young Women's Christian Association of Kenya (Tribunal Case E188 of 2024) [2024] KEBPRT 1740 (KLR) (19 December 2024) (Ruling)

Neutral citation: [2024] KEBPRT 1740 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E188 OF 2024
J OSODO, MEMBER
DECEMBER 19, 2024**

BETWEEN

AL-WARIS RESTAURANT TENANT

AND

YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF KENYA LANDLORD

RULING

A. Dispute Background

1. The tenaapplicant moved this Tribunal vide a reference dated 13th August 2024 pursuant to various provisions of the {aa1913 Landlord and Tenant (Shops, Hotels and Catering Establishments) Act}} Cap 301, Laws of Kenya seeking for an Order that the Landlord aor its agents or anyone acting on their instructions be restrained from interfering with the Tenant's quiet possession of the Premises or attaching, selling, auctioning or in any way removing the Tenant's Property from the Premises pending hearing and determination of the Application aor the Reference.
2. The tenant further seeks that this Tribunal does issue an Order setting aside the Proclamation of Distress of Movable Property dated 6th August 2024 together with an Order that the tenant is not indebted to the Landlord in respect of the Back space from the year 2020.
3. The tenant simultaneously filed a notice of motion of even date seeking for the same reliefs. We shall therefore consider the reference together with the motion in this ruling pursuant to the provisions of Section 12(4), Cap. 301, Laws of Kenya.
4. The reference and the application are predicated upon the grounds set out on the face of the application and the affidavit of MANUWAR YUSUF sworn on 13th August 2024. It is the tenant's case that the landlord is the registered owner of the buildings and all that parcel of land being Land Reference No. Mombasa Block XX48.



5. The tenant leased the building constructed thereon vide a lease agreement dated 28th February 2019 which expired on 31st July 2024 and the tenant continued trading therein.
6. The tenant has been conducting its Restaurant business on the said Premises from the year 2017 wherein the tenant traded as “Biryani Hut”.
7. The tenant pleads that it has over the years gained reputation as a Restaurant offering Swahili, Ethiopian and Indian dishes to persons within the County of Mombasa after having heavily invested in creating the brand “Al-Waris Restaurant”, marketing the same and gaining popularity.
8. The tenant has invested in repairing the Premises with the aim of making the same habitable and hygienic to enable it carry out its business.
9. On or about 30th April 2024, the landlord issued the tenant with a notice of intended termination of the tenancy. The tenant objected to the notice and has continued trading on the Premises post the expiry of the Notice on 30th July 2024.
10. The landlord and the tenant commenced negotiations in respect of the alleged accrued rent to which the tenant issued the landlord with a proposal in respect of payment of the rent.
11. Instead of the landlord responding to the tenant on the proposed terms, the landlord opted to instruct its Auctioneers to proclaim the tenant's goods of trade.
12. The lease agreement dated 28th February 2019 provided for payment of rent with respect to the Cafeteria, Offices and a back space in line with the provisions of Clause 2 of the said Lease.
13. The Tenant has been conducting its Restaurant business and fully utilizing the Cafeteria and the Office Space to the exclusion of the back space.
14. It is the tenant's plea that the provisions of the lease have broken down the rent payable in respect to the Cafeteria which is separate from the rent payable in respect of the back space. According to the tenant, the alleged accrued rent is on account of rent payable for the use of the back space but which the tenant has not been using since the year 2020.
15. The landlord has consistently been informed that the tenant does not intend to utilize the backspace and the same was surrendered back to the landlord. In light of the foregoing, the tenant pleads that it is not liable to effect payment of rent in respect of Premises it does not occupy.
16. The Tenant objects to the proclamation on the grounds that it is not indebted to the landlord and the negotiations and proposed payment plan was not an admission entitling the landlord to instruct its Auctioneers to levy distress.
17. The tenant contends that its position is further fortified by the fact that it has always effected payment of the rent in respect of the Premises occupied by it in line with the provisions of the lease dated 28th February 2019 (now expired). It is the tenant's case that the landlord has not established that it will suffer any prejudice, if it continues trading in the said Premises or that the landlord intends to use the Premises for any other purpose.
18. The tenant pleads that it is apprehensive that the proclamation is aimed at frustrating the tenancy in a bid to force the tenant to vacate the Premises and unless the Orders sought in the application are issued, the tenant stands to suffer loss as it will be evicted from the Premises or have its goods proclaimed.
19. It is further pleaded that the landlord does not stand to suffer any loss in the event of the Orders being granted and that it is in the interest of justice that the application be granted.



20. Among the documents relied upon by the tenant are: the certificate of incorporation of the tenant, lease agreement dated 28th February 2019, notice of intended termination of tenancy dated 30th April 2024, tenant's proposal to pay rent arrears dated 30th July 2024, proclamation by Auctioneers dated 6th August 2024 & tenant's statement of rent payments.
21. Interim orders of injunction were issued on 16th August 2024 pending hearing of the application inter-partes on 12th August 2024.
22. The application is opposed through the replying affidavit of Lilly Agoya sworn on 6th September 2024 wherein she deposes that the tenancy relationship between the parties commenced vide a lease agreement entered on 29th March 2017 when the tenant was trading under the name "Biryani Hut" and the said lease was for a period between 1st May 2017 to January 2019. The tenant has been running a restaurant in the premises.
23. The terms of the agreement were that the tenant was required to pay two months' deposit of Kshs 140,0=, one month's rent of Kshs 70,0= and the electricity bill for the premises.
24. According to the landlord, the tenant would default on rent payment from the onset but the landlord would accommodate it based on pleas that it was facing financial challenges. The parties entered into another lease agreement dated 28th February 2019 after the tenant requested for extension of the back kitchen, whose period was for 5 years and three months.
25. The tenant would continuously default on rent payment, which would result in the landlord issuing numerous letters demanding for payment of the arrears. Following the landlord's intimation of intention to terminate the tenancy relationship, the tenant filed an application dated 15th April 2021 vide Mombasa CMCC NO.557 OF 2021, Al-waris Restaurant -vs- Young Women's Christian Association Of Kenya, seeking for orders against attachment and eviction.
26. A ruling was delivered on 8th March 2023 dismissing the tenant's application upon a finding that the tenant was indeed in arrears. Following the ruling, the landlord issued a demand letter to the tenant seeking for payment of the rental arrears, which elicited no response from the tenant.
27. As at 24th September 2024, the outstanding rental arrears payable by the tenant stood at Kshs 4,102,2= which amount continues to increase monthly with every default. The landlord indulged the tenants through their Advocates with an intention to amicably settle the dispute between them but the same did not bear any fruits.
28. Following the failed negotiations, the landlord issued a notice of termination of the tenancy dated 30th April 2024. The said termination was to take effect in three months' time on 30th July 2024. One of the conditions in the notice was for the tenant to notify the landlord in writing within one month whether it agreed with the notice or not. The landlord did not receive any information from the tenant regarding the said notice within the stipulated one month.
29. It was not until the lapse of the notice period that the tenant issued the landlord with the letter dated 30th July 2024 indicating that it was interested in proceeding with the tenancy on condition that the rent owed be slashed by 50% and further that the balance be paid in installments of Kshs 100,0=.
30. According to the landlord, despite the tenant's allegation in its letter that it no longer used the additional space it leased, the same has never been communicated officially in writing in order for parties to vary the terms of the agreement entered into upon the request by the tenant to lease the



additional space. In any case, the Tenant has never remitted rent for the additional space since the request to lease it was allowed and an agreement signed reflecting the new additional terms.

31. Considering the large amount of rental arrears that has since accumulated and the last-minute action by the tenant, the landlord considered that the letter and the unreasonable offer was made in bad faith with the intention of derailing the termination of the tenancy relationship between the parties.
32. According to the landlord, the tenant's allegation that it issued a notice of objection, which has been exhibited is not a reflection of the truth and is only meant to mislead this Honourable Tribunal. The exhibited notice of objection is conspicuously missing the date, and there is also no indication of how the same was served upon the landlord considering that there is no mark on the face of the document showing the landlord's receipt or even a reference of how the same was served. The planting of the document with an intention to deceive the Honourable Tribunal further portrays the malicious character of the tenant.
33. Considering the notice for termination of the tenancy had lapsed, the landlord instructed the Auctioneers to proceed with distress for rent against the tenant and a proclamation was issued against the tenant's properties.
34. Whenever there is an attempt to recover the rental arrears, the tenant issues Cheques which end up bouncing or when the postdated cheques mature, it instructs the landlord not to bank the same, which further exhibits its deceptive character.
35. From the above analysis and history of the parties, it is the landlord's plea that it is only fair that it be allowed to distress for rent to recover the outstanding and accumulating rental arrears. It is in the interest of justice and fairness that the outstanding sums be paid to it as the Landlord is being prejudiced for being subjected to provision of rental services at a huge unsustainable loss which is aggravated by the harsh economic times.
36. The landlord therefore prays that the tenant's application be dismissed forthwith with costs to it and that the outstanding rental arrears be paid forthwith, failure to which the tenant be evicted and distress for rent be levied.
37. The landlord annexed the following documents to the replying affidavit: Lease agreements dated 29th March 2017 & 28th February 2019, Demand letter for rent arrears dated 8th June 2019, Demand letters dated 18th March 2020 & 9th April 2021, Ruling, in MOMBASA CMCC NO. 557 OF 2021, Demand letter dated 18th October 2022, Rent account statement dated 30th September 2024, Demand letter dated 15th April 2024, Tenant's advocates response letter dated 24th April 2024 & Landlord's notice to terminate tenancy dated 30th April 2024.
38. The parties were directed to file written submissions in respect of the application but only the tenant complied.

B. Issues for determination

39. The following issues arise for determination; -
 - a. Whether the tenancy notice issued on 30th April 2024 by the landlord ought to be approved or dismissed.
 - b. Whether the tenant is entitled to the reliefs sought in the application dated 13th August 2024.
 - c. Whether the landlord is entitled to distress for rent and to evict the tenant.



- d. Who shall bear the costs of the application and reference?
- Issue a) Whether the tenancy notice issued on 30th April 2024 by the landlord ought to be approved or dismissed.
40. It is not contested that the tenancy herein is controlled within the meaning and interpretation of Section 2(1) of Cap 301, Laws of Kenya. Section 4(1) & (2) of the said statute provides as follows;
- (1) 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.
 - (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.” (emphasis added).
41. Section 4(4) & (5) of the said statute provides that: -
- (4) No tenancy notice shall take effect until such date, not being less than two months after the receipt thereof by the receiving party, as shall be specified therein:
 - (5) A tenancy notice shall not be effective for any of the purposes of this Act unless it specifies the grounds upon which the requesting party seeks the termination, alteration or reassessment concerned and requires the receiving party to notify the requesting party in writing, within one month after the date of receipt of the notice, whether or not he agrees to comply with the notice.”
42. On 30th April 2024, the landlord issued the tenant with a notice to terminate tenancy on the ground that it was in rent arrears in the sum of Kshs 3,563,2= as at 5th April 2024. The notice was expressed to take effect on 30th July 2024. The notice was for three months.
43. We have looked at the said tenancy notice and confirmed that the same is in tandem with the foregoing legal provisions. We therefore find and hold that it is valid.
44. Section 6(1) of the same statute provides as follows;
- “6. Reference to Tribunal
1. A receiving party who wishes to oppose a tenancy notice, and who has notified the requesting party under section 4(5) of this Act that he does not agree to comply with the tenancy notice, may, before the date upon which such notice is to take effect, refer the matter to a Tribunal, whereupon such notice shall be of no effect until, and subject to, the determination of the reference by the Tribunal:
- Provided that a Tribunal may, for sufficient reason and on such conditions as it may think fit, permit such a reference notwithstanding that the receiving party has not complied with any of the requirements of this section.”
45. In compliance with the foregoing legal provision, the tenant was required to file a reference before the notice could take effect. No such reference has been demonstrated to be in existence.



46. Section 10 of the same statute provides as follows: -

10. Effect of notice where tenant fails to refer to Tribunal, etc.

Where a landlord has served a notice in accordance with the requirements of section 4 of this Act, on a tenant, and the tenant fails within the appropriate time to notify the landlord of his unwillingness to comply with such notice, or to refer the matter to a Tribunal then subject to section 6 of this Act, such notice shall have effect from the date therein specified to terminate the tenancy, or terminate or alter the terms and conditions, thereof or the rights or services enjoyed thereunder.”

47. In the case of *Saheb Vs Hassanally* (1981) eKLR, the Court of Appeal analyzed the foregoing legal provision and held as follows;

“In my opinion, it is clear that under the terms of section 10, if a valid notice is not referred, the landlord is entitled to possession without having to prove any of the statutory grounds relied upon in the notice.

To be valid a tenancy notice must comply with the provisions of section 4, including the requirements of the use of the prescribed form, of setting out the statutory grounds for relief and of due service. The learned judge was wrong in this case to investigate the grounds relied upon in the notice, but even then, he should have given judgment for the appellant on the ground that was conceded, namely that the landlord required the occupation of the premises for the purposes of his business (section 7 (1) (g)). The learned judge was in error in not awarding possession of the premises to the appellant in accordance with section 10, without making any inquiry into the validity of the grounds relied upon.” (emphasis added)

48. There being no reference filed by the tenant against the landlord’s termination notice, the tenancy automatically terminated on 30th July 2024 and we therefore need not

49. inquire into the validity of the ground proffered therein for purposes of determining its validity and enforceability. It does not matter, whether or not the tenant expressed a desire to object to the notice within Thirty (30) days thereof. The notice is therefore valid and is approved.

ISSUE b) Whether the tenant is entitled to the reliefs sought in the application and reference dated 13th August 2024.

50. The parties herein entered into written tenancy agreements on the spaces that were being leased out to the tenant by the landlord. The tenant claims that it surrendered the back space which was part of the lease agreements entered into with the landlord. There is no subsequent variation of lease agreement entered into between the two parties. The tenant has not exhibited any surrender of lease agreement entered into with the landlord for the said back space.

51. Section 97(1) of the {aa1946 Evidence Act}} provides as follows: -

(1) When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other



disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.”

52. In the case of *Dr Koisagat Tea Estate Ltd Vs Eritrea Orthodox Tewdo Church Ltd* [2015] eKLR, the High court cited the Court of Appeal decision in *National Bank Of Kenya Ltd Vs. Pipe Plastic Samkolit (k) Ltd* (2002) 2 E.A. 503, (2011) eKLR wherein the Court of Appeal at page 507 stated as follows: -

“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”

53. Guided by the foregoing legal provisions and cited Superior Courts’ decisions, we have no reason to depart from what the parties agreed upon and we therefore find that the tenant is not entitled to the injunction orders sought herein as granting the same will only assist it to escape the obligations set out in the agreements entered into with the landlord. No court of equity will assist a party to do that.

ISSUE (C) Whether the landlord is entitled to distress for rent and to evict the tenant.

54. The tenant admits that he has not been paying rent for part of the space contracted with the landlord. It is therefore clear that the tenant cannot escape from enforcement of payment of rent in accordance with the tenancy agreements entered into with the landlord in accordance with section 3(1) of the {aa191 Distress for Rent Act}}, Cap. 293, Laws of Kenya which provides as follows: -

(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.”

55. We shall therefore direct the tenant to settle the rent in arrears as demanded by the landlord and in default, the landlord shall be at liberty to distress in recovery thereof.

Issue (d) Who shall bear the costs of the reference?

56. As regards costs, the same are in the Tribunal’s discretion under Section 12(1)(k) of Cap. 301, but always follow the event unless for good reasons otherwise ordered. We shall award costs of the application and reference to the landlord being the successful party.

C. Orders

57. In view of the above analysis, the final orders which commend to us are:
- a. The tenant’s application and reference dated 13th August 2024 are hereby dismissed with costs and all the interim orders issued in the tenant’s favour are hereby discharged set aside.
 - b. The landlord’s notice of termination of tenancy dated 30th April 2024 is hereby approved and the tenant is ordered to vacate from the suit premises and in default shall be evicted therefrom by a Licensed Auctioneer who shall be accorded security by the Officer Commanding the Police Station within whose jurisdiction the premises are situate.



- c. The landlord is entitled to levy distress against the tenant for any rent in arrears in respect of the suit premises.
- d. The tenant shall pay costs of **Kshs 30,0=** to the Landlord which shall be defrayed against the rent account.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19TH DAY OF DECEMBER 2024

HON. GAKUHI CHEGE

(PANEL CHAIRPERSON)

HON. JOYCE AKINYI OSODO

(MEMBER)

In the presence of:

Miss Ogude for the landlord

Mrs Omondi holding brief for Gathu for the tenant

Further Orders: There shall be a stay of execution of this ruling for a period of 30 days from the date hereof.

