



Patel & another v Enzi Healthcare Limited & 2 others (Tribunal Case E160 of 2023) [2023] KEBPRT 668 (KLR) (24 November 2023) (Ruling)

Neutral citation: [2023] KEBPRT 668 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E160 OF 2023
J OSODO, CHAIR & GAKUHI CHEGE, MEMBER
NOVEMBER 24, 2023**

BETWEEN

HARISH BECHARBHAI PATEL 1ST APPLICANT

NIMISHA HARISH BECHARBHAI PATEL 2ND APPLICANT

AND

ENZI HEALTHCARE LIMITED 1ST RESPONDENT

VICTOR MUKHWANA MUKASA 2ND RESPONDENT

FADHILI CHACHA MARWA 3RD RESPONDENT

RULING

A. The Dispute Background

1. The Landlords/applicants moved this tribunal vide a reference under section 12 (4) of the [*Landlord and Tenant \(Shops, Hotels and catering establishment\) Act*](#) Cap 301 dated 22nd June, 2023 complaining that the tenants herein are still in occupation of the suit premises and are not paying rent to the landlords.
2. The applicants/landlords filed a Notice of Motion of even date seeking the following orders; -
 - i. That the application be certified as urgent
 - ii. That this honorable tribunal be pleased to issue an eviction order against the respondents/tenants in favor of the 1st and 2nd applicants in respect of commercial premises/shop No. 12 ground floor erected on plot No. L.R Kwale/Diani Complex/716 and 717 situated at Diani where they operate a business known as Enzi Health Limited on the said plots.
 - iii. That the Tenant/respondents be ordered to pay arrears of rent amounting to Ksh. 334,000 with respect to commercial premises/shop No. 12 ground floor erected on plot No. L.R



Kwale/Diani Complex/716 and 717 situated at Diani, as at 5th June, 2023 and accruing all at a monthly rent of Ksh. 66,800 per month and in default, the landlord/applicant be at liberty to levy distress.

- iv. That the O.C.S Diani Police Station to supervise the said eviction.
 - v. That the cost of incidental to this application be provided for.
3. The application was supported by an affidavit dated 22nd June, 2023 wherein the applicants deposed as follows;
- i. That they are indeed the registered proprietors of the parcels of land known as L.R Kwale/Diani Complex/716 and 717 situated at Diani together with the building/developments standing thereon.
 - ii. That the lease agreement for the suit property indicates a monthly rent of Ksh. 66,800 and is annexed as HBP-1.
 - iii. That the tenants last paid a sum of Ksh. 66,800 on January 2023 and for the last about 5 months, the tenants have not paid rent which is currently in arrears in the sum of Ksh. 334,000 and continues to accrue, despite operating the said premises for gain.
 - iv. That following the persistent default of payment of the rent, the applicants opted to issue the tenant/respondents with a demand notice dated 20th April, 2023 and 12th May, 2023 to remind them on the need to pay the rent arrears. Copies of the notices are annexed as HBP-2(a) and (b) respectively.
 - v. That the said notice was served upon the tenants herein and received by their staff one Christine Kerera and that she acknowledged receipt after receiving instructions from the 2nd respondent.
 - vi. That the tenants have not heeded to the said notice nor yield or delivered the possession of the premise to the applicants/landlord and therefore remain in the premise against the applicants will.
 - vii. That the tenants are yet to pay the outstanding rent of Ksh. 334,000, vacate and/or hand over the possession of the suit premises.
4. The application is opposed through a replying affidavit dated 11th August, 2023 in which the respondents/tenants deposed as follows;
- i. That the allegations that the tenants have not paid rent since January, 2023 and that the tenants have rent arrears of Ksh. 334,000 are not true. The tenants have always paid rent on time save for the month of June and July 2023 when the business experienced difficulties and therefore the arrears are Ksh. 133,600 and not as alleged by the applicant.
 - ii. That the applicants have failed to provide any statements of account and/or receipts to ascertain the alleged rent arrears and that in any event, the applicants are holding security and/or deposit of Ksh.133,600 which deposit is sufficient to cover the arrears.
 - iii. That the orders sought by the applicants to evict the tenants/respondents is illegal and arbitrarily with the possible consequence of crippling the tenants' business which they have greatly invested in and further stand to suffer loss as a result of the renovations carried out in the premises should they be evicted.
 - iv. That they have engaged the applicants/landlords in good faith with the view to settle the arrears



5. At a court hearing on 15th August, 2023 the court ordered that the application be disposed of by way of written submissions and both parties complied with the applicants/landlords filing on 30th August, 2023 and the tenants/respondents filing on 13th September, 2023. We shall consider the submissions while dealing with the issues for determination.

B. List of Issues for Determination

6. The following are the issues for determination;
- Whether the landlord is entitled to the orders sought in the application dated 22nd June, 2023.
 - Who shall bear the costs of the application?

Issue (a) Whether The Landlord Is Entitled To The Orders Sought In The Application Dated 22Nd June, 2023

7. In the case of *Manaver N Alibhai t/a Diani Boutique v South Coast Fitness & Sports Centre Limited* Civil Appeal No. 203 of 1994 it was held as follows: -

“The Act lays down clearly 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*. These provisions include the giving of a notice in the prescribed form. The notice shall not take effect earlier than 2 months from the date of receipt thereof by the tenant. The notice must also specify the ground upon which termination is sought. The prescribed notice in form A also requires the landlord to ask the tenant to notify him in writing whether or not the tenant agrees to comply with the notice.”

8. In the instant case, the landlords submit that they served the tenants with Notice to terminate tenancy in the form of letters dated 20th April, 2023 and 12th May, 2023 which were duly received by their employee, one Christine Kerera. Upon perusal of the said letters, it is evident that the letters herein are written to demand rent arrears as evidenced in paragraph 5 of the letter dated 20th April, 2023 which stated as follows;

“Take notice that unless you remit the outstanding amount of Ksh. 220,400/= to our client within seven days (7) from the date hereof we shall be left with no option but to seek further action at your own peril as to costs with no further warning towards you.”

The other demand letter dated 12th May, 2023 states as follows in paragraph 4;

“Take notice that this letter serves as a reminder for you to remit the outstanding amount of Ksh. 220,400/= to our client within seven days (7) from the date hereof failure to which we shall be left with no option but to seek further action at your own peril as to costs with no further warning towards you.”

9. The letters herein are therefore rent demand letters and not notices to terminate tenancy as submitted by the landlords herein. A termination of tenancy notice ought to comply with the dictates of Section 4(2) of *Cap 301* and it is in this regard that we find the letters herein Null and Void with regard to termination of tenancy.



10. In the tenants' replying affidavit dated 11th August, 2023, the tenants admit that they are in rent arrears of Ksh. 133,600 for the months of June and July 2023 as opposed to the alleged rent arrears of Ksh. 334,000. Both parties have failed to submit statements of account to ascertain the alleged rent arrears, therefore this tribunal is unable to determine the exact amount owing.
11. We however note that the tenants have admitted to owing rent and that the landlord has a right to rental income in accordance with [Cap. 301](#), Laws of Kenya.
12. In the case of [*Samuel Kipkori Ngeno and Another v Local Authorities Pension Trust \(Registered Trustees\) & Another*](#) (2013) eKLR at paragraphs 9 and 12, the court held as follows:-
 - “9. A tenant's first and main obligation is to pay rent as and when it becomes due for the landlord has the right to an income from his investment. Why would a tenant allow himself to fall into such huge arrears of rent”
 12. “The temporary injunction sought in the present application is an equitable remedy at the court's discretion. He who comes to equity must come with clean hands. A tenant who is in huge arrears of rent is underserving of the court's discretion. The court cannot be refuge of a tenant who fails to meet his principal obligation of paying rent as and when it becomes due”.
13. We therefore find that the landlords/applicants are entitled to recover any rent in arrears in respect of the suit premises by the tenants and in default to use lawful means to recover the same.

Issue (b) Who Shall Bear The Costs Of The Application?

14. 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 order that both parties bear their own costs.

C. Orders

15. In conclusion, the following final orders commend to us;
 - a. The application dated 22nd June, 2023 is hereby dismissed.
 - b. The landlord is granted leave to issue a proper notice of termination of tenancy upon the tenant in the prescribed form under section 4(2) of [Cap. 301](#), Laws of Kenya.
 - c. The tenant is liable to pay rent arrears owing and in default of payment thereof, the landlord shall be at liberty to use legal means to recover the same including and not limited to levying distress.
 - d. Both parties shall meet their own costs.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24TH DAY OF NOVEMBER 2023.

HON. JOYCE AKINYI OSODO

PANEL CHAIRPERSON

BUSINESS PREMISES RENT TRIBUNAL



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HON GAKUHI CHEGE

MEMBER

In the presence of:

Miss Moraa for Landlord/applicant

