



**Liberatta N. Kamaru t/a St. Anne Lifred Academy v Estate of Mathew Ndungu Kimani & another (Tribunal Case E128 of 2023) [2024] KEBPRT 872 (KLR) (4 July 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 872 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E128 OF 2023  
A MUMA, MEMBER  
JULY 4, 2024**

**BETWEEN**

**LIBERATTA N. KAMARU T/A ST. ANNE LIFRED ACADEMY ..... APPLICANT**

**AND**

**THE ESTATE OF LATE MATHEW NDUNGU KIMANI ..... 1<sup>ST</sup> RESPONDENT**

**GLADSOM AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**A. Parties And Representatives**

1. The Applicant, Liberatta N. Kamaru, trading as St. Anne Lifred Academy is the tenant and had rented space for business in the suit property erected on Land Reference Number 57/643 (hereinafter the “Tenant”).
2. The firm of Kabuthia Kamau and Associates Advocates represents the Tenant in this matter.
3. The 1<sup>st</sup> Respondent is the Estate of the Late Mathew Ndungu Kimani and the owner of the suit property who had rented out the space on the suit premises to the tenant (hereinafter the “Landlord”).
4. The firm of C.N. Karanja & Associates Advocates represents the Landlord in this matter.
5. The 2<sup>nd</sup> Respondent is an auctioneer, having been enlisted by the 1<sup>st</sup> Respondent to distress for rent arrears accumulated by the Tenant.

**B. Background Of The Dispute**

6. The Applicant/Tenant entered into a lease agreement with the deceased Landlord, Martin Ndungu Kimathi on 15<sup>th</sup> November 2017. The Lease was to run for a period of eight (8) years with the monthly



rent being Kenya Shillings Two Hundred Thousand (Ksh. 200,000). The tenant has been running a school business on the suit premises since the year 2016.

7. The Tenant moved this Tribunal vide a Reference and a Notice of Motion Application filed under a Certificate of Urgency both dated 3<sup>rd</sup> February, 2023 on a complaint that the Landlord through Gladsom Auctioneers unlawfully proclaimed her goods of trade on disputed rent arrears.
8. On 4<sup>th</sup> April, 2023, this Honourable Tribunal issued orders that;
  - i. The Application be certified as urgent;
  - ii. The Respondents/ Landlords and their agent Gladsom Auctioneers be and are hereby restrained from levying distress and/or removing the proclaimed goods from Tenant's business premises pending the hearing of the Application inter-partes;
  - iii. The OCS Kasarani Police Station to assist in compliance; and
  - iv. The Application be served for hearing on 6<sup>th</sup> March, 2023.
9. Subsequently, on 3<sup>rd</sup> April 2023, the Landlords filed a Notice of Preliminary Objection contending that the Tribunal lacked jurisdiction to hear and determine this reference as the same offends Section 2 of the Landlords and Tenant (Shops, Hotels and Catering Establishments) Act, Cap. 301. This Honourable Tribunal, vide a ruling issued on 19<sup>th</sup> July 2023, established that the matter falls within the ambit of the jurisdiction of the Tribunal thus dismissing the Landlord's Preliminary Objection.
10. Thereafter, the Tenant filed an amended Notice of Motion Application dated 17<sup>th</sup> September 2023 seeking a supplementary order inter alia: that the Landlord and/or their servants and/or employees, agents, Gladsom Auctioneers, be prohibited forthwith by this Court from unlawfully intercepting/ harassing, intimidating and/or evicting, closing, attaching or threatening/interfering/tampering, disposing by hand or in any manner whatsoever and/or howsoever with the Applicant's quiet occupation and lawful enjoyment of suit premises pending the hearing and determination of the Application.
11. Correspondingly, the 1<sup>st</sup> Respondent filed a Replying Affidavit dated 15<sup>th</sup> May 2024 and the Tenant filed a Further Affidavit dated 24<sup>th</sup> May 2024.
12. The Tribunal directed that the Application will be canvassed by way of written submissions and accordingly, the Tenant filed submissions dated 24<sup>th</sup> May 2024 while the Landlord filed submissions dated 29<sup>th</sup> May 2024.

### **C. The Landlord's Claim**

13. The Landlord filed submissions dated 29<sup>th</sup> May 2024. The Landlord submitted that the tenancy between herself and the Tenant had been terminated vide a Notice to Terminate dated 18<sup>th</sup> October 2022 which was meant to take effect after six months thereof.
14. The Landlord submits that the Tenant and the deceased Landlord executed a Lease Agreement dated 15<sup>th</sup> November 2017 and the same was to run for a period of 8 Years.
15. It was pursuant to this Lease Agreement that the Landlord issued the aforementioned Termination Notice in accordance to Clause 8 of the Lease which states as follows;  
  
Notice to terminate Lease



“It is hereby agreed that if either party shall desire to terminate this Tenancy Agreement, the party shall give the other a Notice in writing of Six (6) months and the Lessee shall yield up the said premises in good and Tenable repair and condition in accordance with the covenants hereinbefore contained.’

16. They argued that they followed due procedure as provided for in the lease thus the tenancy was lawfully terminated and the Landlord continues to suffer prejudice due to the continued failure of the Tenant to perform its contractual duty in paying rent and settlement of the outstanding arrears.
17. With regard to the disputed rent arrears accumulated by the Tenant. The Landlord avers that the Lease Agreement signed between the deceased Landlord and the Tenant dated 15<sup>th</sup> November 2017 expressly provides for interest to be incurred in case of late rent payment by the Tenant. Similarly, the Lease also provides for the rate of escalation of rent to be 10% every two years.
18. In view thereof, and in addition to the fact that the tenancy began on 1<sup>st</sup> June 2016, the Landlord avers that the total amount payable by the Tenant is Kshs. 5,696,000.00. A breakdown of this figure is the outstanding rent arrears, escalated rent and interest for late payment.
19. Ultimately, the Landlords urged the Tribunal to dismiss the Tenant’s Reference and Notice of Motion Application with costs to the Landlord.

#### **D. The Tenant’s Claim**

20. The Tenant also filed written submissions in support of the Amended Notice of Motion Application dated 17<sup>th</sup> September 2023. The Tenant stated that Landlord had unlawfully issued the Notice to Terminate as prescribed by the provisions of the Landlord and Tenant (Shops, Hotel and Catering Establishments) Act.
21. The Tenant submitted that the tenancy was a controlled tenancy. The Tenant submitted that Section 2 (b ) (ii) of the Landlord and Tenant Act provided that a “controlled tenancy” means a tenancy of a shop, hotel or catering establishment that  

“contains provision for termination otherwise than for breach of covenant, within five years from the commencement thereof...”
22. It is the Tenant’s case that the provision for termination contained in the Lease Agreement executed between the deceased Landlord and the Tenant did not provide for termination in cases of breach.
23. It is therefore the Tenant’s case that a plain reading of clause 8 of the Agreement therefore means that section 2(1) (b) (ii) falls in this case as the Agreement provides for a termination clause other than for breach of covenant thus making it a controlled tenancy. The Tenant relied on the cases of Mohamed Nur Abdullahi v Al-sawaw Mohammed Abdulgader & Another {2021}ekLR and Al- Riaz International Limited v Ganjoni Properties Ltd [2015]eKLR to support their case.
24. Pursuant to this, the Tenant submitted that the Landlord was required to terminate the tenancy in accordance with the provisions of the Act as espoused in Section 4.
25. Similarly, the Tenant submits that the Lease provides for termination other than breach of contract which the Landlord cites as the reason for termination.



## F. List Of Issues For Determination

26. Having given full consideration to the Landlord's Notice of Preliminary Objection, submissions filed by Counsels, the issue for determination is;
- a. Whether the Notice to Terminate dated 18<sup>th</sup> October 2022 is valid and as such, whether the Tenant should hand over vacant possession to the Landlord?

## F. Analysis & Determination

27. The Submissions filed by the parties raises fundamental issues discussed herein below:
- a) Whether the Notice to Terminate dated 18<sup>th</sup> October 2022 is valid and as such, whether the Tenant should hand over vacant possession to the Landlord?
28. It is not in dispute that the Tenant has outstanding rent arrears owed to the Landlord. However, the parties are in dispute of the total amount of rent arrears due to the Landlord.
29. This Court notes that the Lease Agreement signed between the deceased Landlord and the Tenant dated 15<sup>th</sup> November 2017 expressly provides for interest to be incurred in case of late rent payment by the Tenant. Similarly, the Lease also provides for the rate of escalation of rent to be 10% every two years.
30. It is also not in dispute that the Tenant occupied the premises on 1<sup>st</sup> June 2016 prior to signing the Lease Agreement. In view thereof, this Tribunal marks the tenancy commencement date as well as the date of commencement of the computation of the escalated rent to be 1<sup>st</sup> June 2016.
31. Therefore, this Tribunal is inclined to agree with the computation of arrears as done by the Landlord thus the total outstanding amount being Kshs. 5,696,000.00.
32. A quick perusal of the Lease Agreement tendered before this Honourable Tribunal reveals that there indeed exists a clause on termination under clause 8 of the Agreement. Where each party shall give the other a six month notice in writing to yield up the premises.
33. This Court vide the Ruling dated 19<sup>th</sup> July 2023, established that the nature of the tenancy of the parties herein is a controlled tenancy. Accordingly, this Tribunal is guided by the provisions of the law encapsulated in the Landlord and Tenant Act.
34. Notably, the Act provides for termination of controlled tenancies and Section 4(2) of the Landlord and Tenant Act is in the following terms;
- “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 on service enjoyed by the Tenant under such tenancy shall give notice in that behalf to the Tenant in the prescribed form”
35. However, the dispute lies in the matter is whether the provision of termination as contained in the lease, overrides the aforementioned provision of the Act. This court is not oblivious to the fact to the laws of contract that bind parties to their agreement.
36. Additionally, the termination provision in the Lease seemingly aligns the tenancy with Section 2(1)(b) (ii) of Cap. 301, as the termination clause does not hinge on any breach of covenant by either party.
37. In light of this, this Honourable Tribunal is inclined to respect the binding nature of the lease signed between the Tenant and the deceased Landlord as dictated by the Law of Contract Act, Cap 23 of the laws of Kenya.



38. The termination of the tenancy by the Landlord herein can therefore be safely held to be legal and having been done according to the provisions of the Lease Agreement being guided by the Laws of Contract.

**F. Orders**

39. The upshot is that the Tenant's Reference dated 3<sup>rd</sup> February 2023 alongside the amended Notice of Motion Application dated 17<sup>th</sup> September 2023 are hereby dismissed with costs to the Landlord.
40. The Tenant is hereby ordered to hand over vacant possession to the Landlord and settle the outstanding rent arrears amounting to Kshs. 5,696,000.00 by the 5<sup>th</sup> day of August 2024 and upon failure to comply, the Landlord is at liberty to levy for distress for rent.

**HON A. MUMA**

**MEMBER**

**BUSINESS PREMISES RENT TRIBUNAL**

Ruling dated, signed and delivered virtually by Hon A. Muma this 4<sup>th</sup> Day of July 2024 in the presence of Kamau for the Tenant and no appearance for the Landlord.

**HON A. MUMA**

**MEMBER**

**BUSINESS PREMISES RENT TRIBUNAL**

