



Orchards Communications Ltd v Suitable Hotesl Ltd (Tribunal Case E247 of 2023) [2023] KEBPRT 1150 (KLR) (13 July 2023) (Ruling)

Neutral citation: [2023] KEBPRT 1150 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E247 OF 2023
CN MUGAMBI, CHAIR
JULY 13, 2023**

BETWEEN

ORCHARDS COMMUNICATIONS LTD TENANT

AND

SUITABLE HOTESL LTD LANDLORD

RULING

Introduction

1. The tenant's application dated 3.3.2023 seeks orders of injunction restraining the landlord from enforcing the "illegal" rent increment or in any other way interfering with the quiet use of the Applicant's rental premises pending the hearing of the suit and further seeks orders restraining the landlord from closing the premises or closing the premises or disconnecting any amenity pending the hearing of the suit. Police assistance has also been sought in ensuring compliance with the court orders sought.

The Tenant's depositions

2. The tenant's affidavit in support of its application sworn by Ms. Esther Wairimu Kamau may be summarized as follows:-
 - a. That the deponent is a director of the Applicant and has its authority to swear the affidavit.
 - b. That the Applicant occupies a shop on the Respondent's premises known as L.R. No. 4953/4/23 Thika Town.
 - c. That on 2.3.2023, the tenant was issued with two letters demanding unpaid electricity bills and rent increment arrears, which the tenant states to be malicious and absurd.



- d. That the actions of the landlord are a sure way of chasing the tenant from the suit premises and the landlord's demands do not comply with the statutory requirements and procedure.
- e. That the tenant is a diligent tenant who is not in any rent arrears and has therefore approached the court with clean hands.

The Landlord's depositions

3. The landlord's replying affidavit sworn by Ms. Titus Thuo Macharia on 29.3.2023 may be summarized as follows:-
 - a. That on 15.1.2018, the parties herein entered into a lease agreement for five years and three months effective 15.2.2018, the agreement was terminable by each party giving the other a six months notice.
 - b. That as per the lease, the rent was to be renewed upwards every twelve months at the rate of 5% and at renewal, the increase would be 10%.
 - c. That the tenant has refused to pay rent as provided for in the lease agreement and has also failed to pay electricity bills for the premises it occupies amounting to Kshs. 215,311/= as at 21.2.2023.
 - d. That the tenant has been erratic in the payment of rent.
 - e. That the tenant has not carried out any improvements on the suit premises.
 - f. That the deposit on rent paid does not cover rent arrears as it is meant to repair the premises at the end of the term of the lease.
4. Both parties have filed their respective submissions, I have read the same and I will consider them in writing this ruling.

Issues for determination

- a. Whether the tenancy between the parties herein is a controlled tenancy?
- b. Whether the tenant is in rent arrears.
- c. Whether the tenant has an unpaid electricity bill?
- d. Whether the tenant is entitled to the prayers sought in the application.
- e. What orders ought to be made in disposing of this matter.

Issue A

5. The tenant in its affidavit in support of its application has deponed that it has been occupying one of the Respondent's shops on L.R. No. 4953/4/23, Thika Town. At paragraph 8 of the affidavit, the tenant declares itself a diligent tenant who is never in any rent arrears. The tenant has not disclosed in its affidavit the rent payable, the duration of the lease or whether the lease was oral or in writing. The Respondent on its part has relied on agreement between the parties entered into on or about 15.8.2018.

The lease agreement was for a period of five (5) years and three months effective 15.2.2018. It was determinable by each party giving the other a six months notice. The tenant has in its submissions denied the lease agreement exhibited by the landlord. It is the tenant's position that it is a stranger to the lease agreement and further submits if any agreement existed, the same is unenforceable for the lack



of a company seal and proof that the executor of the document is a director of the landlord. I think the tenant is blowing hot and cold at the same time. It is either it executed the agreement or it did not. The tenant has actually not denied executing its part of the agreement but is only concerned that the lease agreement does not have the seal of the landlord and proof that the executor is a director of the landlord.

6. The tenant's challenge to the lease agreement exhibited by the landlord has been presented through the submissions of the tenant. I do not take this challenge seriously as it has been settled that submissions do not constitute evidence unless expressly adopted as such.

In the case of; *Nancy Wambui Gacheru vs Peter W. Wanjere Ngugi*, Nairobi HCCC No. 36 of 1993, the court in this regard stated as follows:-

“Indeed and strictly speaking, submissions are not part of the evidence in a case. Submissions to this court's view are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim, charge or dispose it. Once a case is closed, a court may well proceed to give its judgment. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submission are not necessarily the case.”

It would have been expected in this case that the tenant would have filed an affidavit citing its disagreement with the lease agreement produced by the landlord. I am in the circumstances inclined to go with the landlord and find that the lease agreement produced by the landlord reflected the agreement between the parties and therefore their intentions.”

7. Does the lease agreement give rise to a controlled tenancy between the parties? Whereas the agreement provided that it was for a period of five years and three months, it also provided under clause 3(e), that the lease may be determined by either party giving to the other six months' notice in writing of such determination. This clause of the lease agreement brought the said lease within the meaning of a controlled tenancy under Section 2 of Cap 301 and I do find the tenancy agreement between the parties herein is a controlled tenancy.

Issue B

8. The tenant's contention is that it does not owe any rent arrears to the landlord. The tenant's further contention is that the landlord is demanding for the rent increments after five years which the tenant contends is absurd. But is it? The lease agreement which I have already found contains the agreement between the parties herein clearly states at clause 4 that the rent shall be reviewed upwards every twelve months at the rate of 5% and at the renewal of the lease, the increment shall be 10%. It is my view therefore that whether or not the increment had taken place or had been demanded, the tenant was obligated under the terms of the agreement to pay the rent increment as per the lease agreement. I have not been shown any evidence of a variation of the lease agreement and the parties are therefore bound by the same.
9. To the extent that the tenant has not paid rent in accordance with the terms of the lease agreement, I do find that the tenant is in rent arrears. In the landlord's further affidavit, the landlord has also stated that the tenant issued three cheques each for the amount of Kshs. 174,000/= and which cheques were dishonoured. The landlord has pleaded that the tenant be compelled to pay all the outstanding rent in respect of which it issued bad cheques as well as the Bank cheques levied on the tenant. Even on this uncontroverted evidence, I do further find that the tenant is indeed in rent arrears.



Issue C, D and E

10. The tenant has sought orders that the Respondent be enjoined from enforcing an illegal rent increment and from disconnecting any amenities to the suit premises. I have already found the rent increment to be proper and to be an act done under the provisions of the agreement entered into between the parties. The tenant has also not challenged the landlord's position that it has not paid the electricity bill for the premises it occupies. I have also found that the tenant is in rent arrears and it is the law that a tenant who has not fulfilled his fundamental obligation to pay rent cannot find solace in the equitable relief of an injunction.
11. In the circumstances, I find no merit in the tenant's application dated 3.3.2023 and the same is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 13TH DAY OF JULY 2023

HON. CYPRIAN MUGAMBI - CHAIRPERSON 13. 7.2023

