



**Mukami v Mbure & another (Tribunal Case E045 of 2023)
[2024] KEBPRT 290 (KLR) (26 March 2024) (Judgment)**

Neutral citation: [2024] KEBPRT 290 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E045 OF 2023
P MAY, MEMBER
MARCH 26, 2024**

BETWEEN

EDITH MUKAMI TENANT

AND

SIMON KINYANJUI LANDLORD

AND

JOSEPH WANGIGI MBURE RESPONDENT

JUDGMENT

1. The tenant filed the reference dated 16th January, 2023 seeking the protection of the Honourable Tribunal against the landlord. The parties had previously filed applications which were dispensed with before and the Tribunal rendered a determination. The parties were then directed to take a hearing date for the reference. On the scheduled date of hearing of the reference, the tenant was absent despite the date having been issued in their presence. The hearing nonetheless proceeded with the landlord testifying in support of their case.
2. At the close of the hearing the parties were directed to file submissions. Each party has complied with the submissions. A perusal of the submissions filed by the tenant reveal that they submitted on an application that had been previously deferred so that the parties could proceed to conclusively canvass the reference.
3. The facts giving rise to the present dispute are largely not in dispute. The landlord and the 2nd Respondent had previously entered into a lease. The terms of the lease were not reduced into writing. The 2nd Respondent sometimes in 2022 engaged the tenant and entered into an agreement with her to transfer the lease. The landlord states that this transaction was done behind his back and that he did not sanction the same.



4. The Tribunal had previously given orders to the effect that the tenant remains in the demised premises with access to electricity pending the determination of the reference. This position had been maintained during the pendency of the proceedings.
5. The issue for determination in the present dispute is whether there was tenancy relationship created between the tenant and the landlord. If the answer to the question is in the affirmative, then there is need to determine the nature of the tenancy created.
6. The *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Chapter 301 Laws of Kenya (the “Act”) provides for the statutory establishment of the Business Premises Rent Tribunal. The limits of the jurisdiction exercisable by the Tribunal are also explicitly set out therein. Section 12 of the Act grants the Tribunal its jurisdiction and provides that;

A Tribunal shall, in relation to its area of jurisdiction have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in addition to and without prejudice to the generality of the foregoing shall have power—

- (a) to determine whether or not any tenancy is a controlled tenancy;

7. Section 2 defines a controlled tenancy as;

“a tenancy of a shop, hotel or catering establishment—

- a. which has not been reduced into writing; or
- b. which has been reduced into writing and which—
 - i. is for a period not exceeding five years; or
 - ii. contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof;”

8. It goes without saying, that for there to exist a controlled tenancy, in addition to the requirements provided in the Act above, there must be a clear Landlord and Tenant relationship which is clearly defined according to the terms of the tenancy agreement or implied from their conduct.

9. Section 2 of Act defines a Tenant as;

“in relation to a tenancy means the person for the time being entitled to the tenancy whether or not he is in occupation of the holding, and includes a sub-tenant”

10. The same section above defines a Landlord as;

“in relation to a tenancy, means the person for the time being entitled, as between himself and the tenant, to the rents and profits of the premises payable under the terms of the tenancy”

11. In order to determine that there existed a controlled tenancy, I shall first asses and put into context of law the facts presented by the parties and establish the existence or lack of a contract between them. A contract can be either written or verbal. Firstly, there has to be a valid offer an acceptance granted by a free agent mind.



12. In *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC14, [45], the Supreme Court of the United Kingdom addressing itself on consideration as an essential ingredient for a contract stated thus:

“The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations.”

13. Furthermore, in *Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited* [2017] eKLR; the Court strongly affirmed consideration as a key element in the establishment of a contract and pronounced itself as follows:

“It is elementary learning that for there to be a contract, there has to be an acceptance of an offer on the same terms of the offer and such acceptance must be unconditional, unequivocal and absolute, accompanied by consideration.”

14. The narrow issue here is whether the continued stay in the suit premise by the Applicant hereof culminates into a controlled tenancy. In distilling with the foregoing issue, the Honorable Tribunal shall be guided by definition of a controlled tenancy under the veneer of the Landlord and Tenant (Shops, Hotel and Catering Establishment) Act and other relevant sources buttressing the aforementioned provision.

15. The *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* CAP 301 section 2 defines controlled tenancy as: -

- a) A tenancy of a shop, hotel or catering establishment-
- b) Which has not been reduced into writing; or
- c) Which has been reduced into writing and which-
 - i. Is for a period not exceeding five years; or
 - ii. Contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or
 - iii. Relates to premises of a class specified under subsection 2 of this section.

Provided that no tenancy to which the Government, the Community or a local authority is a party, whether as landlord or as tenant, shall be a controlled tenancy;

16. The tenant has in the present circumstances insisted that after signing the lease with the 2nd respondent, she was introduced to the landlord. The landlord even though having maintained that the 2nd Respondent sub-let the premises without his express consent has failed to adduce any evidence of them trying reprimand them. Considering that the initial lease was oral, it was necessary to call evidence to prove that the landlord apart from refusing to receive rent from the tenant had expressly communicated against the agreement between the tenant and the 2nd respondent.
17. I will now move to determine the question of the rent payable. Section 107 of the *Evidence Act* provides as follows:



107. Burden of proof
- (1) Whoever desires any court to give judgment as to any legal right or liability? Dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the Burden of proof lies on that person.” (Emphasis added)
18. Further, the court in *Re the Estate of Charles Ndegwa Kiragu alias Ndegwa Kiragu – (Deceased)* (2016) eKLR stated and affirmed to the provision of section 107 of the *Evidence Act* that, “he who alleges must prove.”
19. Cap 301 places obligations on a landlord which include a duty to keep a rent book. The parties having disputed from the onset on the rent payable, it was only prudent that the landlord availed to the Tribunal the rent book on how much the previous tenant paid. The landlord however failed to discharge this duty. The tenant provided screenshot of her communication with the 2nd Respondent which confirmed that the rent payable was Kshs. 10,000/. No evidence was tendered to controvert this.
20. The Tribunal takes cognizance of the strained relationship between the parties herein and the fact that the landlord was not expressly a party to the agreement entered on 14th December, 2022. The continued occupation of the tenant is therefore no longer tenable.
21. The upshot of the above is that the reference is determined in the following terms:
- a. The tenant shall pay and clear all the outstanding rent arrears calculated at payable rent of Kshs. 10,000 per month within 10 days from the date hereof. In default the landlord shall be at liberty to levy distress without any reference to the Tribunal.
 - b. The tenant shall vacate the premises within 2 months from the date hereof.
 - c. The OCS of the nearest police station shall supervise compliance with order (b) above
 - d. Each party shall bear their own costs.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF MARCH, 2024.

HON. PATRICIA MAY - MEMBER

BUSINESS PREMISES RENT TRIBUNAL

Further Order

Orders of 14.3.2024 are hereby vacated.

HON. PATRICIA MAY - MEMBER

BUSINESS PREMISES RENT TRIBUNAL

Delivered in the presence of;

Kerosi for the Applicant/Tenant

Kimutai for the landlord

