



**FW Njoroge & Company Advocates v Harambee Co-operative and Credit Society Limited
(Tribunal Case E665 of 2023) [2024] KEBPRT 638 (KLR) (3 May 2024) (Judgment)**

Neutral citation: [2024] KEBPRT 638 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E665 OF 2023
P KITUR, MEMBER
MAY 3, 2024**

BETWEEN

FW NJOROGE & COMPANY ADVOCATES TENANT

AND

**HARAMBEE CO-OPERATIVE AND CREDIT SOCIETY
LIMITED LANDLORD**

JUDGMENT

A. Parties and Background

1. The Applicant, F.W Njoroge & Company Advocates is a Tenant occupying space on the 7th Floor of Harambee Plaza Building constructed on LR NO. 209/9966 having been offered the said space by the Landlord vide a Letter of Offer dated 16th October 2006 for a term of six years commencing 1st January 2007.
2. The Landlord is the registered owner of the suit property.
3. The Tenant is represented by Kithinji Thuranira & Company Advocates.
4. The Landlord is represented by Oraro & Company Advocates.

B. The Dispute Background

5. Vide the Letter of Offer, the Landlord offered the suit property for lease to the Tenant for a term of six years, with rent itemized payable as follows:
 - i. 1st and 2nd Years Kshs. 79,101/= per quarter;
 - ii. 3rd and 4th Years Kshs, 94,921.20/= per quarter; and
 - iii. 5th and 6th Years Kshs. 113,905.44/= per quarter.



6. The six-year term lapsed, and no written agreement was executed between the Landlord and Tenant.
7. The Tenant states that she presently on prejudice basis as there is no written agreement to pay for VAT and other charges therein.
8. The Tenant further avers that she made various complaints to the Landlord about the overcharging but the Landlord never responded. She further states she does not intend to comply with the demanded rents the same includes VAT which should not be included as the same should not apply to instances where tenancy agreements are not in writing.
9. Owing to the above, the Tenant filed a Complaint dated 6th July 2023 claiming that in the sum demanded, the Landlord computed the same as including service charge and VAT which should not be imposed where a Tenant is protected as the Tenant claims she is, and that the alleged demand of the arrears of Kshs. 3,779,160.40/= computer generated and unlawful for reasons as enumerated above.
10. The Tenant additionally filed an Amended Notice of Motion dated 6th July 2023 seeking the following prayers: -
 - i. That this application be certified as urgent and be heard ex-parte in the first instance.
 - ii. That the Landlord herein by themselves, its agents/servants and or employees be stopped from harassing the tenant herein by demanding from a controlled tenant herein increased rent via exaggerated computer statement and or invoices and or dealings with the tenant without following the provisions of Cap 301 Laws of Kenya
 - iii. That the Landlord herein and or agents servants, and or employees and or anyone whatsoever be stopped from demanding to be paid unknown amount of Kshs 3,779,160.41/= through a letter dated 21st June 2023 without giving and or taking account of the money without following the provisions of Cap 301 Laws of Kenya.
 - iv. That the Landlord and its agents/servants, property managers and or anyone whatsoever be ordered to give account of the demanded rent, service charge. and V.AT increments or forcing controlled tenants to pay V.A.T without any consent and or written documents/ agreement and without following the provisions of Cap 301 Laws of Kenya.
 - v. That the landlord be ordered to give credit of Kshs 102,233 being the amount overpaid.
 - vi. That the Honourable tribunal do investigate the tenants complaint filed herein and make the necessary orders as it deems fit and just to grant.
 - vii. That the costs of this application be provided for and the costs of the Complaint and disbursements.
11. This Tribunal pronounced itself on the aforementioned Tenant's Application vide an Order dated 14th July 2023 where the Landlord was restrained from levying distress upon the Tenant's property in the suit premises.
12. The Landlord filed a Replying Affidavit sworn on 11th September 2023 where it stated that rent payable for the premises has been escalating and that it on diverse dates commissioned the assessment of rent in their premises to establish the rate of rent escalation.
13. As at the date of filing the present application, the Tenant's main contention was that being a controlled tenancy, she is a protected tenant whose rent paid should not include service charge and VAT and additionally that any rent increment ought to comply with the provisions of Cap 301.



14. Parties agreed to file Written Submissions which were duly filed.

C. List of Issues for Determination

15. It is the contention of this Tribunal that the issues raised for determination are as follows: -
- a. Whether a controlled Tenancy is exempt from payment of VAT and Service charge.
 - b. Whether the rent increment was lawful.

D. Analysis and Findings

a. Whether this is a controlled Tenancy and whether a Tenant under this relationship is exempted from paying VAT and a Service Charge.

16. The Tenant herein duly executed a Letter of Offer dated 16th October 2006 for a term of six years commencing 1st January 2007. It is undisputed that upon the lapse of that period, no further agreement was made in writing.
17. Question then arises as whether this is a controlled tenancy. To answer this, I am guided by the provisions of section 2(1) of the Landlord and Tenants (Hotels, Shops and Catering Establishments) Act Cap 301 ("the Act") which states:

"controlled tenancy" means 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; 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;

18. There being no agreement reduced into writing, it is my determination that the same is a controlled tenancy as per section 2 (1) of Cap 301 reproduced above.
19. Following this, I will proceed to determine the second part of this issue, whether a Tenant under controlled Tenancy is exempt from paying VAT and Service Charge.
20. In doing so, I will rely on the provision of section 5 of the [Value Added Tax Act](#) which states;

Charge to tax

- (1) A tax, to be known as value added tax, shall be charged in accordance with the provisions of this Act on—
 - (a) a taxable supply made by a registered person in Kenya;



- (b) the importation of taxable goods; and
- (c) a supply of imported taxable services.

- 21. I have considered that the Tenancy herein qualifies as a taxable supply as defined under the same Act.
- 22. I have further considered that a controlled tenancy has not been exempted from payment of the VAT tax under the First Schedule of the Value Added Tax.
- 23. I have further considered that the terms of the Letter of Offer at clause 9 envisaged that the Tenant would pay service charge. It is my view that since the Tenant took up tenancy upon receipt of the Letter of Offer, whose terms they sought not to vary, the Landlord was then entitled to expect that the Tenancy was commenced under the said terms and the Tenant's continued stay upon the lapse of the term were by her conduct deemed to subsist.

b. Whether the rent increment was lawful

- 24. Having established that the Tenancy herein is a controlled tenancy, I will proceed to examine whether the rent increment complied with the provisions of Cap 301 and can thus be termed as lawful.
- 25. Section 4 (1) & (2) of Cap 301 provide as follows:-

4. Termination of and alteration of terms and conditions in controlled tenancy

- (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.

- 26. I also wish to cite the decision in *Munaver N Alibhai t/a Diani Boutique v South Coast Fitness & Sports Centre Limited* [1995] eKLR as follows: -

“The Act lays down clearly and in detail, the procedure for the termination of a controlled tenancy. Section (1) of the Act states in very clear language that a controlled tenancy shall not terminate or be terminated and no term 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”

- 27. It is apparent that no notice was given by the Landlord to the Tenant on the alteration as to increase rent payable. Commissioning an assessment to establish the rent payable is a necessary step towards escalating rent but falls short of the requirement under Section 4 of Cap 301.
- 28. Failure to issues the Notice as envisaged above would also be tantamount to denying the Tenant an opportunity to oppose the same as prescribed under section 6 of the Act which provides:

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.

- (2) A Tribunal to which a reference is made shall, within seven days after the receipt thereof, give notice of such reference to the requesting party concerned.

29. I therefore proceed to order as follows;

E. Orders

- a. The upshot is that the Tenant's Amended Notice of Motion dated 6th July 2023 partially succeeds in the following terms;
- b. There exists a controlled Tenancy between the Landlord and the Tenant.
- c. Any rent increment by the Landlord must comply with the provisions of section 4 of Cap 301.
- d. V.A.T and service charge remain payable by the Tenant.
- e. Tenant to continue paying rent at the rate of Kshs. 155,069.58/= per quarter.
- f. Landlord at liberty to issue any Tenancy Notice.
- g. This Ruling settles the Complaint dated 6th July 2023.
- h. Costs are awarded to the Tenant assessed at Kshs. 50,000/= recoverable from rent payment.

HON P. KITUR

BUSINESS PREMISES RENT TRIBUNAL

RULING DATED, SIGNED AND DELIVERED VIRTUALLY BY HON P. KITUR THIS 3RD DAY OF MAY 2024 IN THE ABSENCE OF THE PARTIES.

HON P. KITUR

BUSINESS PREMISES RENT TRIBUNAL

