



**Ombasa v George Muchanga t/a Eagle Containers (Tribunal Case
E872 of 2023) [2023] KEBPRT 1199 (KLR) (17 November 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 1199 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E872 OF 2023
M MAKORI, MEMBER
NOVEMBER 17, 2023**

BETWEEN

LYDIA NYABONYI OMBASA TENANT

AND

GEORGE MUCHANGA T/A EAGLE CONTAINERS RESPONDENT

RULING

1. The Tenant/Applicant filed the present application dated 8/9/2023 seeking primarily to have the Respondent compelled to immediately re-open the premises herein being Shop Number B5, Brown Muchanga Business situated in Kiserian within Kajiado County.
2. The Honourable Court issued interim orders on 13/9/2023 directing that the Respondent does immediately re-open the premises herein being Shop Number B5, Brown Muchanga Business situated in Kiserian within Kajiado County.
3. The Landlord/Respondent filed a Replying Affidavit denying the averments and stating that the Tenant/Applicant is no longer occupying the suit property. In a quick rebuttal the Tenant/Applicant filed a further affidavit dated 16/10/2023.
4. The Tenant/Applicant further asserted that for the period that the shop was closed, she suffered a loss of Kshs 140,000/=
5. One vital question that this Honourable Court must determine is whether the application dated 8/9/2023 for reopening of the suit premises and restoring of electricity for Shop Number B5 Brown Muchanga Business, situated in Kiserian is merited and what is the appropriate relief grant in circumstances.



6. In addressing the above underscored issues, the Court wishes to re-state the mandate it has in determining the disputes brought before it pursuant to the provisions of section 12 (1) of the Landlords & Tenants (Shops, Hotel & Catering Establishments Act, Cap 301 Laws of Kenya) that; -
1. 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;
 - b. to determine or vary the rent to be payable in respect of any controlled tenancy, having regard to all the circumstances thereof;
 - c. to apportion the payment of rent payable under a controlled tenancy among tenants sharing the occupation of the premises comprised in the controlled tenancy;
 - d. where the rent chargeable in respect of any controlled tenancy includes a payment by way of service charge, to fix the amount of such service charge;
 - e. to make orders, upon such terms and conditions as it thinks fit, for the recovery of possession and for the payment of arrears of rent and mesne profits, which orders may be applicable to any person, whether or not he is a tenant, being at any material time in occupation of the premises comprised in a controlled tenancy;
 - f. for the purpose of enabling additional buildings to be erected, to make orders permitting landlords to excise vacant land out of premises of which, but for the provisions of this Act, the landlord could have recovered possession;
 - g. where the landlord fails to carry out any repairs for which he is liable—
 - i. to have the required repairs carried out at the cost of the landlord and, if the landlord fails to pay the cost of such repairs, to recover the cost thereof by requiring the tenant;
 - ii. to pay rent to the Tribunal for such period as may be required to defray the cost of such repairs, and so that the receipt of the Tribunal shall be a good discharge for any rent so paid;
 - iii. to authorize the tenant to carry out the required repairs, and to deduct the cost of such repairs from the rent payable to the landlord;
 - h. to permit the levy of distress for rent;
 - i. to vary or rescind any order made by the Tribunal under the provisions of this Act;
 - j. to administer oaths and order discovery and production of documents in like manner as in civil proceedings before the High Court, to require any landlord or tenant to disclose any information or evidence which the Tribunal considers relevant regarding rents and terms or conditions of tenancies, and to issue summons for the attendance of witnesses to give evidence or produce documents, or both, before the award costs in respect of references made to it, which costs may be exemplary costs where the Tribunal is satisfied that a reference to it is frivolous or vexatious;



- k. to award compensation for any loss incurred by a tenant on termination of a controlled tenancy in respect of goodwill, and improvements carried out by the tenant with the landlord's consent;
 - l. to require a tenant or landlord to attend before the Tribunal at a time and place specified by it, and if such tenant or landlord fails to attend, the Tribunal may investigate or determine the matter before it in the absence of such tenant or landlord;
 - m. to enter and inspect premises comprised in a controlled tenancy in respect of which a reference has been made to the Tribunal.
7. It is clear that in exercising the powers conferred under the Landlord and Tenants, Shops, Hotels, and Catering Establishments Act, the Tribunal must restrict itself to the powers conferred under section 12 aforesaid in giving the appropriate relief to the disputants.
 8. Having captured the provision of I wish to terms agreed upon by parties with respect of the suit property. It's noting that none of the parties has raised the issue of non-payment of rent when is the bedrock of Landlord-Tenant relationship.
 9. It is worth noting it was never agreed anywhere and between the parties that in default of any of them, locking the premises and disconnecting electricity is a recourse the offended party (most likely being the Landlord) shall take.
 10. When this matter was filed, the court directed that the Respondent/Landlord immediately and unconditionally re-opens the premises and restore electricity pending hearing and determination of application dated 8/9/2023.
 11. That the suit premise was opened on 16/9/2023 after having been closed for about 40 days as averred by the Tenant/Applicant. I wish to note that no proper reason was given as to why the Respondent/Landlord had locked the premises and disconnected electricity to the suit house.
 12. The additional issues that begs for this Courts determination is the amount of damages that the Tenant/Applicant should be granted for the duration the suit premises had been closed. The term damages were defined in the case of *Antique Auctions Ltd vs Pan African Auctions Ltd* [1993] eKLR where the Court of Appeal defined the term damages according to the McGregor book on Damages as follows:

The definition of the term, "damages" is set out in McGregor on Damages Fifteenth Edition paragraph 1 as: "pecuniary compensation, obtainable by success, for a wrong which is either a tort or a breach of contract, the compensation in the form of a lump sum which is awarded unconditionally, and is generally, but now not necessarily, expressed in English currency."
 13. Damages may be in the form of general damages or special damages however; the Tenant has failed to specify the category of damages that she seeks. Special damages have to be specifically pleaded and strictly proved by evidence. This would include the costs incurred by the Tenant as a result of the eviction or specific damage to property that was in the premises during the eviction.
 14. The Court of Appeal stated its position on specific damages in the case of *Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd* [2013] eKLR as follows:

"We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that



degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.”

15. The Tenant has neither specifically pleaded special damages nor has she tendered evidence in support of special damages, therefore this Tribunal will not delve into assessing the same. The claim of Kshs 140,000/= the closest to special damages and claim for loss of earnings.
16. While differentiating between special and general damages the Court of Appeal in the case of *Antique Auctions Ltd v Pan African Auctions Ltd* [1993] eKLR stated that:

Compensation for a wrong committed could be claimed as general damages or special damages. In general damages compensation cannot be quantified but will be assessed by the court. In the case of special damage, such claim of the loss must be specifically pleaded and strictly proved. Proof of damages is by evidence and the Court will decide each case on balance of probability.

17. I will proceed to discuss the issue of general damages. General damages are compensation awarded by a Tribunal or Court as an assessment arrived at by considering the total effect of the loss suffered by the Applicant hence cannot be quantified by the Applicant but assessed by the Tribunal or Court while taking into account various factors. Thus need not be specifically pleaded or proved by an Applicant.
18. The Court takes note of the M-Pesa Statement alluded to in the Tenant/Applicant Further Affidavit dated 16/10/2023 and besides the figure of Kshs 140,000/= there is no explanation of how the amount accrued for the period the shop was closed is amounting to Kshs 140,000/=.
19. I am minded to take note of the rule of thumb that has crystalized in section 107 of the [Evidence Act](#) on the burden of proof provides that; 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
20. That additionally, it cannot be lost that when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person. It was incumbent upon the Tenant/Applicant to explain how the figure of Kshs 140,000/= was coming about.
21. I have keenly weighed the reasons given by the Respondent, against the prayers of the Applicant and in light of the documented wishes of parties and I am not persuaded by the reasons given for locking of the premises and disconnecting electricity to the premises occupied by the Applicant/Tenant.
22. In the upshot, I am as thus convinced that the Applicant/Tenant application dated 8/9/2023 is merited and allowed in the following terms;
 - i. The Respondent/Landlord to immediately re-open the premises being Shop Number B5. Brown Muchanga Business situated in Kiserian within Kajiado County forthwith and not later than 7 days.
 - ii. The Respondent/Landlord is condemned to pay Costs of Kshs 40,000/= as general damages for closing the premises being Shop Number B5. Brown Muchanga Business situated in Kiserian within Kajiado County without reasonable cause.
 - iii. The Respondent/Landlord is hereby restrained from interfering with the Tenant’s Lawful Occupation of Shop Number B5. Brown Muchanga Business situated in Kiserian within Kajiado County.
 - iv. That OCS Kiserian Police Station to ensure compliance with orders (i), (ii) and (iii) above.

It is so ordered.



RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 17TH DAY OF NOVEMBER, 2023.

HON. MIKE MAKORI (MR.)

MEMBER

17.11.2023

In the presence of;

Mr. Walela for the tenant/Applicant

Mr. Miiri for the landlord/Respondent

