



Case Number	Tribunal Case 5 of 2020 & 4 of 2021 (Kisumu) (Consolidated)
Parties	Jack Ogola Ogolla v George Onyango Nyamor
Case Class	Civil
Judges	HON. P. MAY VICE CHAIR
Advocates	Kipkurui for the Tenant/applicant Kibii for the Landlords
Case Action	Judgment
Case Outcome	Notice of motion dismissed
Date Delivered	16 Jul 2021
Court County	Kisumu
Case Court	Business Premises Rent Tribunal
Court Division	Tribunal

REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
VIEW PARK TOWERS 7TH & 8TH FLOOR
TRIBUNAL CASE NO. 5 OF 2020
CONSOLIDATED WITH 4 OF 2021 (KISUMU)

JACK OGOLA OGOLLATENANT

VERSUS

GEORGE ONYANGO NYAMOR.....LANDLORD

JUDGEMENT

1. The Landlord issued a notice to terminate or alter the terms of tenancy on 8th January, 2020 which was to take effect on 1st April, 2020. The grounds of termination of the tenancy were that the Landlord wished to use the demised premises and that the tenant had been in persistent default in rent payment. The tenant was aggrieved by the said notice and proceeded to file a reference sometimes on 8th February, 2020 seeking the reassessment of rent. The tenant contends that the rent of Kshs. 250, 000 was too high and unconscionable and he proposed the same to be reduced to Kshs. 52,500. The tenant further stated that he was coerced into accepting the rent increment as he was threatened with an eviction.
2. The tenant further filed an application dated 27th February, 2020 whereby he sought temporary orders of injunction. The said application was certified urgent on 28th February, 2020 and temporary orders of injunction granted.
3. The landlord opposed the notice to obtain the reassessment of rent stating that it was a ploy by the tenant to obtain another lease over the demised premises through the backdoor and that the tenant wanted to dupe the Tribunal into rewriting a contract.
4. The tenant would file a separate reference on 18th January, 2021 alleging that the Landlord had instructed Victoria Blue Services to levy distress in order to recover the rent amounts due.
5. It is imperative to lay a background to the sequence of events that gave rise to this protracted litigation. The parties herein do not dispute to having entered into a lease agreement sometimes in 2017. The said lease expired on 31st December, 2018. Upon the lapse of the said lease, the parties negotiated and subsequently entered into another lease agreement on 10th February, 2019 but the same was to take effect as from 1st January, 2019.
6. Each of the parties in this reference testified as the sole witness in support of their respective positions. Upon the close of the hearing, the parties were directed to file written submissions. A perusal of the record indicates that only the landlord complied with this direction.

ANALYSIS:

7. I have considered the submissions and pleadings filed and the evidence tendered orally during the hearing of the reference. The issues for determination are as follows:

- a. Whether the tenant's notice for rent assessment has merits.
- b. The validity of the Landlord's notice of termination.

8. I will deal with the issue of rent assessment first. The power of this Tribunal to vary or determine the rent payable is provided for under Section 12(1) (b) of Cap 301. The Tribunal is given a wide discretion on the same but it is expected that in exercising this power, the surrounding circumstances should be taken into consideration.

9. In the present reference the parties have agreed that they entered into lease agreements. A lease agreement creates contractual obligations amongst the parties. The role of the courts and or tribunals to interfere with the terms of an agreement is limited. This position is fortified by the Court of Appeal decision in ***National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR*** where the court stated as thus:

A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.

10. In the present reference the tenant alleged to be coerced or undue influence being exerted upon him to enter into the second lease agreement which saw the rent increased. During the hearing he could not explain nor tender evidence in support of these assertions. They are therefore without any basis.

11. The parties proceeded in the course of their dealings on the strength that they were bound by the terms of the lease agreement executed on 24th May, 2019.

12. Section 120 of the Evidence Act provides as follows:

When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

13. Lord Denman CJ in the English case, **Pickard v Sears 112 E.R. 179** stated as follows:

The rule of law is clear that where one, by his words or conduct, willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the time..

14. The Court of appeal has pronounced itself on the doctrine of estoppel in **Serah Njeri Mwobi v John Kimani Njoroge (2013) eKLR**, where the Court held that:

The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person.

15. I am persuaded by the above decisions. The parties herein entered into the agreements out of their own free will. The tenant ought to have challenged the rent increment before entering into the lease agreement. He was aware of the then prevailing economic situation and if he made a bad bargain, then he made his bed. This Tribunal shall not be invited to make amendments to a contract in order to assist a party renegotiate the same in their favour. The notice of assessment of rent is therefore devoid of merit. It should be noted that the filing of a notice of assessment of rent does not stop the tenant from paying the agreed rent until the Tribunal makes a determination on the same.

16. I will now turn to the notice of termination of tenancy. The grounds for terminating controlled tenancy are explicitly provided for under section 7 of Cap 301. Persistent default in rent payment is one such ground. The Landlord has tendered evidence to prove that the tenant was in default and the same was persistent as per the provisions of the Act. A landlord like any other investor is expected to reap from their investment.

17. The tenant's notice for reassessment having failed, it is prudent to assess the rent arrears due. The Landlord has stated in their submissions that the rent due is Kshs. 5,120,000 as at the time of filing the said submissions i.e on 8th March, 2021. The Tenant only paid Kshs.100,000/- in the year 2020.

18. In the upshot I shall make the following orders:

DISPOSITION:

1. The tenant to forthwith vacate the Landlord's premises failure to which the landlord shall evict the tenant with supervision from OCS Central Police Station Kisumu
2. The tenant owes the landlord rent of Kshs. 5,120,000 and hereby orders that the tenant pays within 30 days failure to which the Landlord is at liberty to proceed under section 14.
3. Costs of the reference to be borne by the tenant. Costs assessed at Kshs.50,000/-.

It is so ordered.

JUDGMENT DATED, SIGNED & DELIVERED THIS **16TH** DAY OF **JULY** 2021

HON. P. MAY

VICE CHAIR

BUSINESS PREMISES RENT TRIBUNAL

In the presence of:

Kipkurui for the Tenant/applicant

Rotich holding for Kibii for the Landlords