



**Ogolla v Nyamor (Environment and Land Appeal E077 of 2021)  
[2023] KEELC 17415 (KLR) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17415 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E077 OF 2021**

**SO OKONG'O, J  
MAY 18, 2023**

**BETWEEN**

**JACK OGOLLA OGOLLA ..... APPELLANT**

**AND**

**GEORGE ONYANGO NYAMOR ..... RESPONDENT**

*(Appeal from the judgment and Order of Hon. Ms. P. May, the Vice Chairperson of the Business Premises Rent Tribunal in Kisumu BPRT Case No. 5 of 2020 as consolidated with KISUMU BPRT Case No. 4 of 2021 delivered on the 16th July 2021)*

**JUDGMENT**

**Background:**

1. This appeal is challenging the judgment of Hon Ms P May, the Vice-Chairperson of the Business Premises Rent Tribunal in Kisumu BPRT Case No 5 of 2020 as consolidated with Kisumu BPRT Case No 4 of 2021 delivered on July 16, 2021. The Appellant entered into lease agreements with the Respondent on January 1, 2017, January 1, 2019 and May 24, 2019 in respect of the premises known as Kisumu/Municipality/Block6/404(hereinafter referred to as “the suit property”) owned by George Rae and Rodah Rae and managed by the Respondent. The Appellant defaulted on his rent payment obligations to the Respondent under the said leases. The leases were controlled under the Landlord and Tenant (Shops, Hotels & Catering Establishments) Act, Chapter 300 Laws of Kenya (hereinafter referred to as “the Act”).
2. On or about January 31, 2020, the Respondent served the Appellant with a notice issued under section 4(1) of the Act of his intention to terminate the Appellant’s tenancy with effect from 1<sup>st</sup> April 2020 on the grounds that the Respondent wanted to use the suit property for his personal use and that the appellant was in arrears of rent to the tune of Kshs 650,000/-. The Appellant was aggrieved with the said notice and filed a reference at the Business Premises Rent Tribunal (hereinafter referred to only



as “the Tribunal” or “the BPRT”) on February 14, 2020 asking the Tribunal to investigate the matter and determine the issues raised by the Respondent. The said reference was given Kisumu BPRT Case No 5 of 2020.

3. On January 20, 2021, the Appellant filed another reference at the Tribunal complaining that the Respondent had levied distress against him while he was not in rent arrears. The Appellant asked the Tribunal to investigate the matter and issue orders for the opening of the premises on the suit property belonging to the Appellant that the Respondent had locked and restraining the Respondent from evicting the Appellant from the suit property. This second reference was given Kisumu BPRT Case No 4 of 2021. Kisumu BPRT Case No 5 of 2020 and Kisumu BPRT Case No 4 of 2021 were consolidated and heard together.
4. On or about 1<sup>st</sup> February 2020, the Appellant also served the Respondent with a notice issued under section 4(1) of the Act seeking the reduction of the rent payable for the suit property from Kshs 250,000/- to Kshs 52,500/- with effect from April 1, 2020. The reduction of the rent was sought on several grounds among others that the agreement between the parties provided for a rent increase of 5% from Kshs 50,000/- to Kshs 52,500/- upon the expiry of the initial lease and that the Appellant increased rent from Kshs 50,000/- to Kshs 200,000/- per month and after 6 months, rent was increased again to Kshs 250,000/-. The Appellant contended that he could not afford to pay the said rent of Kshs 250,000/- which he termed too high. The Respondent filed a reference at the Tribunal in response to this notice on 23<sup>rd</sup> July 2020. It is not clear from the record what BPRT Case Number was given to this reference by the Tribunal. The Respondent opposed the Appellant’s notice for the alteration of rent for the suit property downwards on several grounds among them that;
  - a. The lease/tenancy agreements over and in respect of the suit property between the Appellant and the Respondent had since lapsed and/or become extinguished.
  - b. The intended re-assessment of rent in the manner sought by the Appellant was calculated to procure and/or obtain another lease in respect of the suit property through the backdoor.
  - c. The intended re-assessment of rent was a ploy by the Appellant to dupe the Tribunal into re-writing the terms of contracts between the Appellant and the Respondent in contravention of the law.
  - d. The tenancy/lease agreements which stipulated the contractual rent were mutually negotiated and agreed upon.
  - e. The relationship between the Appellant and the Respondent was negotiated at arms-length.
  - f. The contractual rent had mutually been paid and/or remitted save for the subsequent intransigence perpetrated by the Appellant.
  - g. The suit property attracted substantial profits to the Appellant and as such there must be a corresponding/reciprocal obligation on the part of the Appellant to pay contractual rent.
  - h. The intended re-assessment of rent constituted an infringement of the Respondent’s legitimate rights and/or interests over the suit property and thus amounted to a violation of Articles 27 (1) and 40 of the *Constitution of Kenya, 2010*.
5. The Tribunal heard the two references by the Appellant and the reference by the Respondent together. In a judgment delivered on July 16, 2021, the Tribunal upheld the Respondent’s notice to the Appellant to vacate the suit property. The Tribunal ordered the Appellant to vacate the suit property forthwith failure to which he be evicted therefrom. The Tribunal also ordered the Appellant to pay



to the Respondent rent arrears in the sum of Kshs 5,120,000/- within 30 days from the date of the judgment. The Respondent was also awarded the costs of the suit.

6. On the Appellant's notice for the alteration of rent downwards, the Tribunal held that the rent that was being paid by the Appellant was contractual and that the Tribunal's powers to intervene in contractual arrangements were limited. The Tribunal held that the Appellant did not prove his allegation that he was coerced to enter into the disputed lease agreements with the Respondent. The Tribunal held that the Appellant was bound by the terms of the lease agreements that he entered into with the Respondent. The Tribunal held further that the Appellant should have challenged the rents that were proposed by the Respondent before executing the new lease agreements. The Tribunal held that altering the agreed rent would be tantamount to assisting the Appellant to renegotiate the terms of the contracts that he entered into with the Respondent. The Tribunal found no merit in the Appellant's notice for assessment of rent for the suit property.
7. On the Respondent's notice to terminate the tenancy, the Tribunal held that persistent default in the payment of rent was a ground for termination of a tenancy under section 7 of the Act. The Tribunal found that the Respondent had proved that the Appellant was in default of his rent payment obligations and that the default had persisted. The Tribunal held that the notice for assessment of rent did not exempt the Appellant from paying the agreed rent since such notice could only take effect following an order by the Tribunal. The Tribunal found that the Appellant was in rent arrears to the tune of Kshs 5,120,000/- as at March 8, 2021.
8. The Appellant was aggrieved with the said decision and preferred the present appeal. In his Memorandum of Appeal dated November 1, 2021, the Appellant challenged the Tribunal's decision on the following grounds;
  1. The Learned Vice Chairperson erred in both law and fact by dismissing the Appellant's reference yet enough grounds had been provided by the Appellant in support thereof while the Respondent had failed to demonstrate that the Appellant owed him Kshs 5,120,000/- in rent arrears.
  2. The Learned Vice Chairperson erred in both law and fact in failing to appreciate that the Respondent had not proved its case on a balance of probabilities.
  3. The Learned Vice Chairperson erred in both law and fact in failing to find that the Respondent having failed to respond to the Appellant's notice for re-assessment of rent downs to Kshs 52,500/-, by operation of the law, the notice took effect and the new rent ought to be computed at the rate of Kshs 52,500/= per month.
  4. The Learned Vice Chairperson erred in both law and fact by failing to find that in a controlled tenancy, the provisions of the [Landlord and Tenant \(Shop, Hotels & Catering Establishments\) Act](#) Chapter 301 Laws of Kenya (the Act) take precedence over the terms of a tenancy agreement as far as the termination or alteration of the terms of a tenancy is concerned.
  5. The Learned Vice Chairman erred in law and in fact in failing to consider the Appellant's evidence during trial before arriving at her decision.
  6. The judgment was against the weight of the evidence.
9. The Appellant prayed that the Appeal be allowed with costs and the judgment of the Tribunal be set aside to the extent of the holding that the Appellant was indebted to the Respondent to the tune of Kshs 5,120,000/= in rent arrears.
10. The Appeal was heard by way of written submissions.



### **The Appellant's submissions:**

11. The Appellant filed his submissions on December 5, 2022 in which he raised two issues for determination. The first issue was whether the Appellant's notice for rent assessment had merit while the second issue was whether the Respondent's notice of termination of the Appellant's tenancy was valid. The Appellant submitted that he was aggrieved by the increment of rent from Kshs 50,000/- to Kshs 200,000/- and finally to Kshs 250,000/- for the suit property and filed a reference seeking a re-assessment of the rent. The Appellant submitted that the rent of Kshs 250,000/- was too high and unconscionable. The Appellant submitted that he was coerced into signing the new leases with the increased rent with a threat of eviction if he failed to do so. The Appellant submitted that he filed a subsequent reference when distress for rent was levied against him. The Appellant submitted that the Tribunal erred in law and fact in not finding that the high increment of rent under threat of eviction of the Appellant if he did not sign the lease agreements was unconscionable. The Appellant submitted that an increment of rent within a period of fewer than 24 months under the guise of fresh leases was tantamount to an unreasonable and oppressive agreement. In support of his submission on this issue, the Appellant relied on [\*Danson Muriuki Kibara v. Amos Kathua Gatuingo\*](#) (2012) eKLR and [\*Angeline Akinyi Otieno v. Malaba Malakisi Farmers Co-op Union Ltd.\*](#) [1998] eKLR.
12. The Appellant submitted further that the Respondent had failed to respond to the Appellant's notice for re-assessment of rent downwards to Kshs 52,500/-. The Appellant submitted that, by operation of law, the notice took effect and as such, the new rent if at all, ought to have been computed at the rate of Kshs 52, 500/- per month and not Kshs 250,000/- per month.
13. On the second issue, the Appellant submitted that he sought the intervention of the Tribunal on the Respondent's move to increase rent unconscionably while the Respondent issued a notice on 8<sup>th</sup> January 2020 to terminate and/or alter the terms of his tenancy with effect on 1<sup>st</sup> April 2020. The Appellant submitted that the Respondent's purported notice to terminate tenancy was based on rent arrears calculated on the invalid monthly rent which should have been refused by the Tribunal. In support of this submission, the Appellant cited [\*Manaver N. Alibhai t/a Diani Boutique v. South Coast Fitness & Sports Centre Limited\*](#), Civil Appeal No 203 of 1994 and [\*Fisher v. Taylors Furnishing Stores Ltd.\*](#) [1956] 2 All ER 78. The Appellant submitted that the notice of termination of his tenancy was also issued on the ground that the Respondent wanted to put the premises to his own use. The Appellant submitted that the Respondent did not prove that he required the premises for his own use. The Appellant prayed that the appeal be allowed as prayed for in the Memorandum of Appeal.

### **The Respondent's submissions:**

14. The Respondent filed his submissions on February 2, 2023. On grounds 1, 2, 5 and 6 of appeal, the Respondent submitted that he produced the various lease agreements entered into between the Respondent and the Appellant which were voluntarily executed by the parties and statements of account in proof of the rent that was owed by the Appellant. The Respondent submitted that the Appellant admitted that he was in rent arrears and did not challenge the statement of rent arrears that was produced by the Respondent. The Respondent submitted that the Tribunal was right in ordering the Appellant to pay the rent arrears the Respondent having proved on a balance of probabilities that the Appellant had rent arrears. In support of this submission, the Respondent cited [\*James Muniu Mucheru v. National Bank of Kenya Limited\*](#) [2019] eKLR. The Respondent submitted that the Appellant having admitted that he had not paid rent since 2020, the notice terminating his tenancy was warranted.



15. On ground 3 of appeal, the Respondent submitted that there was no reassessment of rent as alleged by the Appellant since the issue of reassessment was before the Tribunal for determination. The Respondent submitted that the rent for the suit property remained Kshs 250,000/- per month as agreed by the parties. On ground 4 of appeal, the Respondent submitted that the parties had a contractual relationship that created obligations that bound the parties. The Respondent cited *National Bank of Kenya Ltd v. Pipelastik Samkolit (K) Ltd & another* [2001] eKLR and submitted that the court can only relieve a party from a bad bargain where coercion, fraud or undue influence is proved. The Respondent submitted that the Appellant failed to prove that he was coerced into signing the lease agreements that he entered into with the Respondent. The Respondent urged the court to dismiss the appeal with costs to him.

### **Analysis and Determination:**

16. I have considered the proceedings and the judgment of the Tribunal, the memorandum of appeal and the submissions filed by the parties. I will consider all the grounds of appeal together starting with the first ground. I am satisfied that the Respondent proved that the Appellant had rent arrears to the tune of Kshs 5,120,000/-. The Respondent produced evidence that was not controverted showing that based on the lease agreements that the Respondent entered into with the Appellant, the outstanding rent was Kshs 5, 120,000/- as at March 2021. Save for his claim that the rent that was agreed between him and the Respondent was unconscionable and as such void, the Appellant did not dispute the statement of account that was produced in evidence by the Respondent that showed how the outstanding rent was calculated. I am in agreement with the Respondent that until the rent was reassessed by the Tribunal, the Appellant had to pay the agreed rent. The Tribunal found no merit in the Appellant's application for the reduction of the rent from Kshs 250,000/- to Kshs 52,500/-. The Appellant was therefore liable to pay rent at the rate that was agreed upon. The Respondent proved the outstanding rent and as such was entitled to judgment in respect thereof. The Respondent having proved that the Appellant had defaulted in his rent payment obligations as at the date of being served with a notice of termination of his tenancy and that the default was persistent, the Tribunal was right in upholding the Respondent's notice of termination of tenancy and ordering the Appellant to vacate the suit property. Due to the foregoing, I find no merit in grounds 1 and 2 of appeal.
17. The Appellant has not persuaded me that the Respondent did not file a reference to the Appellant's notice for a reassessment of rent. The Tribunal made a finding that indeed there was a reference by the Respondent. The said reference is at pages 50 and 51 of the supplementary record of appeal. In case there was a problem with the said reference, the Appellant should have raised it at the Tribunal instead of claiming that the reference did not exist and as such his notice for the reassessment of rent was not opposed. Since a reference was filed by the Respondent at the Tribunal in response to the said notice, the notice did not take effect by operation of law as claimed by the Appellant. Due to the foregoing, I find no merit in ground 3 of appeal.
18. With regard to ground 4 of appeal, I am in agreement with the Appellant that while exercising its power to reassess rent, the Tribunal was not bound by the terms of the lease agreements that the Appellant had entered into with the Respondent. Section 9(2)(a) of the *Act* provides as follows:

Without prejudice to the generality of this section, a Tribunal may, upon any reference;

- (a) determine or vary the rent to be payable in respect of the controlled tenancy, having regard to the terms thereof and to the rent at which the premises concerned might reasonably be expected to be let in the open market..."



19. Section 12(1)(b) of the *Act* also gives the Tribunal power to determine or vary the rent payable in respect of any controlled tenancy having regard to all the circumstances thereof. The burden was on the Appellant to establish a case for the reduction of the rent. In my view, it was not enough for the Appellant to claim that due to the economic situation that was prevailing, he could not afford to pay a rent of Kshs 250,000/- which he considered too high. There was nothing placed before the Tribunal to prove that the rent was too high. The Appellant did not tender any evidence on what would be considered a market rent for the premises. There was therefore no basis upon which the Tribunal could reduce the rent from Kshs 250,000/- to Kshs 52,500/- per month. The lease agreement dated 1<sup>st</sup> January 2017 could not form a basis for such reduction since the said agreement had expired and the parties had entered into two subsequent tenancy agreements. I am in agreement with the Tribunal that the Appellant did not prove that he was coerced into signing the said subsequent lease agreements. As the Tribunal rightly observed, if indeed the Appellant was threatened with forceful eviction unless he signed the said lease agreements, nothing would have stopped him from moving the Tribunal for redress rather than agreeing to pay unconscionable rent. In the absence of evidence of coercion, the Appellant was bound by the terms of the said lease agreements. Since the Appellant failed to demonstrate to the Tribunal that the agreed rent was far beyond the market rent or rent for comparable premises in the same neighbourhood, the Tribunal cannot be faulted for its finding that the Appellant was bound by the rents that he had agreed to pay under the lease agreements that he entered into with the Respondent. For the foregoing reasons, I find no merit in ground 4 of appeal.
20. For the reasons that I have given above, I find no merit in grounds 5 and 6 of appeal. The Tribunal considered the evidence adduced by both parties in its judgment the subject of this appeal. The Appellant has not pointed out the evidence that the Tribunal failed to consider.

**Conclusion:**

21. In the final analysis, I find no merit in the appeal before the court. The appeal is dismissed with costs to the Respondent.

**DELIVERED AND DATED AT KISUMU ON THIS 18<sup>TH</sup> DAY OF MAY 2023**

**S. OKONG'O**

**JUDGE**

**Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

Mr. Odeny for the Appellant

Mr. Wafula for the Respondent

Ms. J. Omondi-Court Assistant

