



REPUBLIC OF KENYA

BUSINESS PREMISES RENT TRIBUNAL

VIEW PARK TOWERS 7TH & 8TH FLOOR

TRIBUNAL CASE NO. E006 OF 2021 (MOMBASA)

GEOFFREY KIPYEGON CHERUIYOT.....APPLICANT

VERSUS

D.K. REAL ESTATES LIMITED & 9 OTHERS.....1ST RESPONDENT

PETER WAIKWA NJAGI.....1ST INTERESTED PARTY

ESTATE OF JULIUS NJOKI NYAGA.....2ND INTERESTED PARTY

RULING

1. By a motion dated 28th June 2021, the Applicant is seeking in material part for a temporary injunction prohibiting the Respondent from levying distress, evicting and or interfering with the tenant's use and occupation of the suit premises.
2. The applicant is further seeking that the Respondents be compelled to provide him with correct receipts of all rents paid reflecting his national identity as per the agreement and that the Respondents do apportion all rents paid to reflect the correct return for each month as per agreement with him.
3. The Applicant is also seeking that the Respondents be compelled to continue receiving rent as per the agreement with him and/or in the alternative be allowed to deposit the said rents in the Tribunal.
4. Finally, the Applicant seeks that the Respondents be compelled to indemnify him in the sum of Kshs.110,000/- being the amount spent on or about 27th June 2020 to repair the drainage system of the subject property situated in land Reference plot no. 337, section xx, Mombasa Island which had become hazardous to all the tenants, occupants and their clients and in the alternative, the said money be absorbed as rent.
5. The application is supported by the affidavit of the Applicant sworn on 28/6/2021 and his further affidavit of 22/9/2021 as well as grounds on the face thereof.
6. The applicant occupies the suit premises where he operates shops no. 1 and 2 as food café and garage respectively. The suit premises is situate on L.R 337 section xx, Mombasa Island. The monthly rent is Kshs.18,000/- and Kshs.15,000/- respectively.
7. According to the Applicant, he acquired the first premises being shop no. 1 from one Julius Njoki Nyaga (former tenant) who was running the food café. It is deposed that the said Julius Njoki Nyaga had sought approval of the landlord's agents to find another tenant on their behalf since he required to be paid goodwill of Kshs.340,000/-.
8. On 9th February 2020, the Applicant expressed interest in the said business to Julius Njoki Nyaga who in turn introduced him to one Mwanzia of mobile phone no. 0733570571 as agent of the landlord who confirmed to be working for D.K. Real Estate Limited which was managing the property.
9. As a result, the Applicant offered to lease the property at a rent of Kshs.18,000/- and payment of Kshs.34,000/- as goodwill to Julius Njoki Nyaga and his rent arrears of Kshs.118,000/-.
10. The said amount was agreed upon to be made by way of instalments to both Mwanzia and Julius Njoki Nyaga. Mwanzia was to prepare a lease agreement under the Applicant's name and have the water and power connection details changed accordingly.

11. It is deposed that a lease agreement was presented to Kenya Power & Lighting Co. Ltd under the Applicant's name. However, it is the applicant's contention that the document was never signed by him nor terms contained therein agreed upon.
12. The Applicant deposes that he paid all money owed to Julius Njoki Nyaga through Mpesa and made cash payments to Mwanzia in respect of what was payable to the landlord in terms of annexure 'GKC-1'.
13. The said transactions were witnessed by two witnesses named in paragraph 15 of the supporting affidavit. As such the Applicant disputes owing money in respect of arrears incurred by the previous tenant.
14. He denies knowledge of previous court proceedings as he was never a party thereto.
15. He further deposes that on 1st August 2020, he was informed by one Peter Waikwa Njagi that he was vacating the garage premises and selling the remaining stock and expressed interest to lease the same. On the same day, he spoke to Mwanzia whom he knew as the landlord's agent at D.K. Real Estate Limited and agreed to lease the premises at a monthly rent of Kshs.15,000/-.
16. As Peter Waikwa Njagi had arrears of Kshs.110,000/- according to Mwanzia, it was agreed to settle the same and pay additional sum of Kshs.69,000/- as the value of business stock. Money changed hands in terms of annexure 'GKC2' and the applicant took over the suit premises.
17. The transaction was witnessed by three (3) persons named in paragraph 25 of the supporting affidavit. As such, it is the Applicant's case that he was a stranger to the rent arrears accrued by Peter Waikwa Njagi as he never inherited any debts. He denies having been party to previous court proceedings involving the suit premises.
18. As such, the Applicant contends that the orders given in such previous proceedings cannot be enforced against him. No lease agreement has been issued in the Applicant's favour despite efforts to obtain the same through Mwanzia.
19. A check at Kenya Power & Lighting co. Ltd by the Applicant revealed that there was a lease agreement dated 1st September 2020 which contains terms and conditions he had never agreed neither did he sign it or authorize anyone to do so on his behalf.
20. The Applicant complains of a scheme to defraud him against the Respondents stating that any rent increment sanctioned by this Tribunal cannot be applicable to him.
21. It is the Applicant's case that he has dutifully and religiously paid monthly rents to the Respondents. He further avers that he repaired broken sewerage system and had it unblocked at a cost of Kshs.110,000/- after consulting Mwanzia who assured him that the same would be reimbursed.
22. The Applicant deposes that the Respondent has deliberately refused to accept rent due for payment until accumulated rent arrears of previous tenants are paid.
23. Demand letter dated 22nd June 2021 addressed to Peter Waikwa Njagi and Julius Njoki Nyaga are annexed as 'GKC5'.
24. The applicant's efforts through Mwanzia to have rent receipts rectified and or proper receipts done in his name have been in vain.
25. It is the Applicant's case that he was threatened with distress and stood to suffer irreparable damage if the same was allowed.
26. The application is opposed through the replying affidavit of Bhasker Patel sworn on 12th August 2021. He is the property manager of the 1st Respondent which collects rent and manages the suit property on behalf of the 2nd to 10th Respondents.
27. The 1st Respondent through the said witness denies knowledge of the Applicant or his occupation of shops no. 1 and 2 as the tenants in respect thereof are Peter Waikwa Njagi and Julius Njoki Nyaga.
28. It further denies sanctioning arrangements to make the Applicant a tenant in place of Julius Njoki and Peter Waikwa Njagi. According to the deponent, no payments have ever been received from the Applicant in settlement of rent arrears owing by the two tenants as alleged.
29. It further denies entering into lease agreements with the applicant or changing the names in the records of Kenya Power & Lighting Co. Ltd and Mombasa water supply as alleged by the applicant.
30. All receipts produced by the applicant show that the tenants are Julius Njoki Nyaga and Peter Waikwa Njagi and the Mpesa statements do not prove his tenancy in respect of the suit premises.
31. The 1st Respondent deposes that it has never made any claim of rent arrears against the applicant as the demand letters are addressed to its known tenants against whom distress for rent have been previously levied.
32. According to the 1st Respondent, all rent payments have been made by the said Julius Njoki Nyaga and Peter Waikwa Njagi in respect of the suit premises and none has been received from the applicant.

33. It is the respondents contention that the rent payable by Julius Njoki Nyaga and Peter Waikwa Njagi is Kshs.32,000/- and Kshs.36,000/- respectively with effect from 1st June 2019 as per the orders marked H’.

34. No proof of rent payment has been tendered by the Applicant according to the Respondents as he has no tenancy relationship with them.

35. It is also denied that the applicant was allowed to effect repairs with a promise for reimbursement. No letters in the name of the applicant were sent to him in respect of rent arrears.

36. Finally, the 1st respondent contends that annexures ‘C’ and ‘G’ clearly show that the levy of distress was commenced against Julius Njoki Nyaga and Peter Waikwa Njagi respectively and as such the applicant has no legal standing to impugn the same on their behalf.

37. The applicant filed a further affidavit sworn on 22nd September 2021 denying the contents of the replying affidavit. In the said affidavit, the applicant reiterates that he is a tenant in the suit premises and all payments made in respect of rent were done by him in cash at the 1st respondent’s office and that Bhasker Patel was all along aware of the tenancy relationship.

38. The applicant disowns the letter marked ‘E’ attached to the replying affidavit as well as the lease agreement marked ‘GKC3’ annexed to the supporting affidavit.

39. The application was ordered to be disposed of by way of written submissions and both parties complied.

40. I am now required to determine the following issues:-

(a) Whether there exists a landlord/tenant relationship between the applicant and the respondents herein.

(b) Whether the applicant is entitled to the reliefs sought in the instant case.

(c) Who is liable to pay costs of the suit?

41. In the case of Republic – vs- Chairperson, business Premises Rent Tribunal at Nairobi and Another ex-parte Suraj Housing and Properties Limited & 2 others (2016) eKLR, Justice G.V. Odunga at paragraph 28 cited with approval the decision in Pritam – vs- Ratilal & Another (1972) EA 560 on the powers of this Tribunal under Section 12 of Cap. 301, Laws of Kenya as follows:-

“As stated in the landlord and Tenant (Shops, Hotels and Catering Establishments) Act itself, it is an Act of Parliament to make provision with respect to certain premises for the protection of tenants of such premises from eviction or from exploitation and for matters connected therewith and incidental thereto. The scheme of this special legislation is to provide extra and special protection for tenants. A special class of tenants is created.

Therefore, the existence of the relationship of landlord and tenant is a pre-requisite to the application of the Act and where such relationship does not exist or it has come to or been brought to an end, the provisions of the Act will not apply. The applicability of the Act is a condition precedent to the exercise of jurisdiction by a tribunal, otherwise the tribunal will have no jurisdiction. There must be a controlled tenancy as defined in section 2 to which the provisions of the Act can be made to apply. Outside it, the tribunal has no jurisdiction”. (emphasis added).

42. In the instant case the respondents deny existence of landlord/tenant relationship between them and the applicant. They insist that the suit premises are rented to Julius Njoki Nyaga and Peter Waikwa Njagi respectively who have been paying rent and against whom the levy of distress was directed as per documents exhibited.

43. On the other hand, the applicant deposes that the suit premises were acquired by him from the said persons in transactions involving one Mwanzia of the 1st Respondent. In this regard, the applicant relies upon annexures GKC2 in form of Mpesa statements and receipts from D.K. Real Estates Limited. I have looked at the receipts and none is in the names of the applicant.

44. The applicant denies knowledge of annexures ‘GK-3’ saying that he never signed the lease agreement nor did he authorize anyone to sign it on his behalf. All rent demand letters exhibited by the applicant are addressed to Julius Njoki Nyaga and Peter Waikwa Njagi. None is addressed to the applicant.

45. Curiously, the applicant states that the transaction between him and Julius Njoki Nyaga was witnessed by Emma Nyambura Wairimu and Rachel Karimi Njoki but no agreement is annexed to confirm such transaction. Equally the transaction between him and Peter Waikwa Njagi was allegedly witnessed by Emma Nyambura Wairimu, Bernard Kiprono Malel and Benson Musau Kyalo but again no agreement to that effect is exhibited.

46. The applicant cites the decision in BP Nairobi service station Ltd – vs- BP Kenya Ltd (1989) eKLR where it was held as follows:-

“The nature of the relationship between the parties is to be determined on a full examination of the dealings between them in their entirety. It does not depend solely on the interpretation of any agreement between them nor does it depend on the payment or otherwise of any rent or other consideration. It does not, it appear, also depend merely on having or not having exclusive possession or as it is sometimes called exclusive occupation by the user. It is no longer possible to say that because a person has exclusive possession of the premises, for which he pays rent or other consideration, he is ipso facto a tenant and conversely, that

if he does not have such exclusive possession or occupation, he is by that reason alone to be regarded as a licensee”.

47. It is therefore clear that being in possession of a premises does not make the occupant a tenant. It was incumbent upon the applicant to demonstrate through empirical evidence that he is indeed a tenant of the respondent and that the latter were parties to his dealings with Julius Njoki Nyaga and Peter Waikwa Njagi from whom he allegedly acquired interest in the suit premises.

48. In the case of Agricultural Finance Corporation Limited – vs- Lang’etia Limited & Jack Mwangi (1985) eKLR, the court of Appeal cited with approval the treatise ‘Halsbury’s Laws of England, 3rd Edition Volume 8 at Paragraph 110 as follows:-

“As a general rule, a contract affects only the parties to it and cannot be enforced by or against a person who is not a party, even if the contract is made for his behalf and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract”.

49. In line with the said decision, there is no evidence before me that the Respondents were party to the dealings (if any) between the applicant and their two tenants. He is as such non-suited against the respondents who were not privy to his dealings with the said tenants.

50. The applicant has totally failed to discharge his burden of proof under section 107(1) of the Evidence Act, Cap.80 Laws of Kenya which provides as follows:-

“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”.

51. Section 109 of the said Act further provides as follows:-

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that proof of that fact shall lie on any particular person”.

52. In this case, the foundation of any relief will depend on existence or otherwise of a controlled tenancy between the applicant and the respondents.

53. Section 12(1) (a) of Cap. 301 mandates this Tribunal to determine whether or not any tenancy is a controlled tenancy.

54. Under section 2(1) of Cap. 301, the term ‘tenant’ is defined thus:-

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

55. In this case, the existence of tenancy relationship between the Applicant and the Respondents is in doubt. In absence of any evidence of its existence, the reliefs sought by the applicant cannot inure in his favour. He is a stranger to the respondents and has no locus standi to enforce any right accruing to a tenant in respect of the suit premises.

56. The Respondents recognize Julius Njoki Nyaga and Peter Waikwa Njagi as the tenants in respect of shops no. 1 and 2 respectively and are entitled to recover rent from them.

57. In the premises, I find that the applicant has failed to bring himself within the principles espoused in the case of Giella – vs- Cassman Brown & Co. Ltd (1973) EA 358.

58. In conclusion therefore, the following orders commend to me in final disposal of this case:-

- (a) The application dated 28th June 2021 and the accompanying reference is hereby dismissed with costs to the respondents.
- (b) It is hereby declared that the applicant is not a controlled tenant of the respondents in respect of shops no. 1 and 2 plot no. 337 section xx, Mombasa Island.
- (c) The Respondents are at liberty to use lawful means to recover rent in respect of the suit premises from the recognized tenants including by way of distress for rent.
- (d) Costs of the application and reference assessed at Kshs.30,000/- against the Applicant.

It is so ordered.

DATED, SIGNED and DELIVERED VIRTUALLY THIS 14TH DAY OF DECEMBER 2021.

HON. GAKUHI CHEGE

VICE CHAIR

BUSINESS PREMISES RENT TRIBUNAL

Ruling delivered in absence of the parties