



**REPUBLIC OF KENYA**

**BUSINESS PREMISES RENT TRIBUNAL**

**VIEW PARK TOWERS 7<sup>TH</sup> & 8<sup>TH</sup> FLOOR**

**TRIBUNAL CASE NO. 1084 OF 2019 (NAIROBI)**

**SAMUEL MWANIKI.....TENANT/APPLICANT**

**VERSUS**

**SUSAN NYAMBURA & ..... RESPONDENT/LANDLORD**

**IRENE NJERI**

**RULING**

1. By his motion dated 31<sup>st</sup> October 2019, the Tenant is seeking in material part for a restraining order against the Landlords from interfering in any manner with his quiet occupation and lawful enjoyment of the suit premises at Kamulu pending the hearing and determination of the complaint.
2. He further seeks that the O.C.S Kamulu Police Station do assist in compliance with the orders.
3. The application is supported by the Tenant's affidavit sworn on even date and the grounds on the face of the application.
4. Prayers 1,2,3 & 4 of the application were granted ex-parte by the former chairman Mbichi Mboroki and I will not dwell on evidence tendered in their support.
5. What prompted the application is the locking of the business premises by the Respondents and the Tenant feared a possible eviction and letting out of the premises to another tenant.
6. It is the Tenant's case that the Respondents hold his rent deposit of Kshs.105,000/- and that he had carried out renovations and improvements in the business premises valued at an estimated cost of Kshs.1.7 million.
7. In response to the application, the 1<sup>st</sup> Respondent swore an affidavit on 14<sup>th</sup> January 2021 in which she deposes that the Tenant's application is made up of lies.
8. It is the Respondent's case that the Tenant personally and out of his own volition closed the premises since January 2019, welded the padlock on the door and left.
9. The Respondents contend that the Tenant had already collected and recovered his money totaling to Kshs.985,732/- and was in arrears of Kshs.1,100,000/- which he should be ordered to clear or they be allowed to levy distress and evict him.
10. The Respondents have annexed a tabulation marked SN & IN/1. They request that the matter be heard viva voce and there be a visit by the tribunal to the suit premises.
11. The Tenant filed a further affidavit sworn on 1<sup>st</sup> September 2020 in which he introduces a new angle to the case.
12. He states that he entered into a tenancy agreement with Samuel Mwangi Thuita at an agreed monthly rent of Kshs.35,000/- out of which Kshs.20,000/- was to be retained by the Tenant as monthly repayment of cost of improvements effected on the suit premises in the sum of Kshs.877,732.

13. The said agreement is dated 20<sup>th</sup> June 2015 marked "SM1". Kshs.15,000/- was payable as monthly rent balance to the Landlord.
14. According to the Tenant, there were other repairs yet to be completed totaling to Kshs.895,800/- which were recoverable from monthly rent at a rate of Kshs.20,000/-.
15. The Tenant sublet part of the suit premises to various Tenants and upon demise of the original/Landlord, the Respondents violently took over management of the said property and have been receiving monthly rent of Kshs.36,000/- since February 2019 to the date of swearing the affidavit. They also locked the premises when the Tenant had only recovered Kshs.877,732/- leaving a balance of Kshs.895,800/-.
16. The Tenant deposes that his property worth Kshs.162,700/- had been taken without his consent or knowledge during the period when the suit premises was locked. This was reported to Kamulu Police Station vide OB No. 38/16/11/2019 at 18.56hours.
17. It was agreed by consent to dispose the said application by way of written submissions and both parties complied.
18. I have considered the pleadings and submissions and in my view, the twin issues for determination are:-
  - (a) Whether or not the Tenant is entitled to the reliefs sought in the application.
  - (b) Whether or not the Respondents are entitled to receive rent from the Tenant.
19. The Tenant has produced an agreement dated 20<sup>th</sup> June 2015 between him and the late Samuel Mwangi Thuita.
20. Although the said agreement states that some of the improvements and structural adjustments were yet to be completed, it does not state that the Tenant would be entitled to any other amount save the sum of Kshs.877,732/- provided in the agreement.
21. Section 97 of the Evidence Act, Cap. 80, Laws of Kenya provides that when the terms of a contract, or a grant or any other disposition of property have been reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property or of such matter except the document itself or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of the Act.
22. No secondary evidence has been tendered by the Tenant to show that it was intended to recover more than the amount stated in the agreement dated 20<sup>th</sup> June 2015 within the meaning and interpretation of section 98 of the Evidence Act.
23. The Tenant admits having recovered the sum of Kshs.877,732/- in paragraph 9 of his further affidavit which is the amount agreed upon with the deceased Landlord as the cost of repairs.
24. In absence of any evidence that there was a further agreement obligating the Landlord to pay more than what was agreed upon, this Tribunal cannot hold so.
25. In the premises, I find that the Tenant has not proved entitlement to more than Kshs.877,732/- agreed upon with the deceased Landlord.
26. The test to be applied in determining an application for temporary injunction was settled in the case of **GIELLA –VS- CASSMAN BROWN & CO. LTD (1973) E.A 358.**
27. In line with the said decision, I find that the Tenant has however established a prima facie case with a probability of success despite having failed to prove that he is entitled to more than Kshs.877,732/- agreed upon with the deceased Landlord.
28. I do not believe the Respondents when they allege that the Tenant closed and welded the suit premises voluntarily. No same person would do that and then rush to court for a reopening order. This is moreso considering that the Respondents despite service of the ex-parte order persisted in failing to give the Tenant access to the premises.
29. The suit premises no doubt is a source of livelihood for the Tenant and denial of an income therefrom would amount to substantial and irreparable loss to him.
30. In any event, the balance of convenience tilts in favour of granting the injunction sought.
31. As to whether or not the Respondents are entitled to receive rent from the Tenant, I will only need to refer to section 2 of Cap 301, Laws of Kenya which defines the term Landlord as follows:-

***“ landlord in relation to a tenancy, means the person for the time being entitled, as between himself and the Tenant to the rents and profits of the premises payable under the terms of the tenancy”.***
32. It is contended that the Respondents are wife and daughter of the deceased Landlord and as such beneficiaries of the deceased's estate. This contention has not been disputed by the Tenant.
33. Although no letters of administration in respect of the deceased Landlord's estate have been exhibited by the Respondents, I find and

hold that as beneficiaries of his estate, they are entitled to the rental income accruing from the suit premises under section 2 of Cap 301, Laws of Kenya.

34. I am fortified in this holding by the decision in the case of **RAMADHAN MOHAMMED ALI - VS- HASHIN SALIM GHANIM (2013) eKLR** where it was held at paragraph 11 as follows:-

*“ There is no dispute that the Respondent was in relation to the payment of rent, the Applicant’s Landlord and from the evidence before the Tribunal he is the person who is entitled to rents and profits from the suit property as part of the deceased’s estate. As such it was not compulsory for him to apply for and take out a grant of letters of administration under section 45 of the Law of succession Act before giving the notice of termination of tenancy. The Tribunal’s finding at page 3 of the judgment is correct that:-*

*“ownership is not an issue that is relevant under the Landlord and Tenant (shops, Hotels and Catering Establishments ) Act Cap. 301, Laws of Kenya”.*

35. In the premises, I make the following orders:-

(a) The Respondents are restrained from evicting the Tenant, closing, harassing, threatening, disconnecting water and power supply or interfering with the Tenant’s quiet occupation and lawful enjoyment of the suit premises at Kamulu pending the hearing and determination of the complaint.

(b) The Tenant shall continue paying to the Respondents the full rent of Kshs.35,000/- in respect of the demised premises as originally agreed with the deceased landlord and shall be entitled to collect rent from those subtenants brought into the suit premises by him pending hearing and determination of the complaint.

(c) Costs of the application shall abide the outcome of the main complaint.

It is so ordered.

**DATE, SIGNED & DELIVERED VIRTUALLY THIS 5<sup>TH</sup> DAY OF AUGUST 2021.**

**HON. GAKUHI CHEGE**

**VICE CHAIR**

**BUSINESS PREMISES RENT TRIBUNAL**

Ruling delivered in absence of both parties virtually.