



**Kuria & another (The Liquidators of the Moi University Sacco Limited -
Under Liquidation) v Kutto & Kuria Nabasenge Advocates (Tribunal Case
E034 of 2022) [2023] KEBPRT 694 (KLR) (12 December 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 694 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E034 OF 2022
GAKUHI CHEGE, VICE CHAIR
DECEMBER 12, 2023**

BETWEEN

**HESBON M. KURIA AND JOEL K. BARBENGI THE LIQUIDATORS OF THE
MOI UNIVERSITY SACCO LIMITED (UNDER LIQUIDATION) ... LANDLORD**

AND

KUTTO & KURIA NABASENGE ADVOCATES TENANT

RULING

1. The landlord moved this Tribunal vide a reference dated 21st March 2022 under Section 12(4) of Cap. 301, Laws of Kenya complaining that the tenant failed to comply with their notice and further refused or defaulted in paying rent amounting to Kshs.1,082,088/- as at March 2022.
2. The landlords simultaneously filed a motion dated 21st March 2022 seeking permission of this Tribunal to levy distress for rent amounting to Kshs.1,082,088.00 as at March 2022.
3. The application is premised on the affidavit of Joel Kipsanai Barbengi as liquidator of Moi University Sacco Limited (under liquidation) sworn on 21st March 2022. It is deposed that the liquidators issued the tenant with a notice to terminate or alter terms of tenancy marked "JKB1" dated 16th September 2020 on grounds of default in payment of rent for the period 31st December 2018 to September 2020 amounting to Kshs.778,848/- as at 3rd September 2020. The notice was to take effect on 1st December 2020.
4. The Landlord/Applicant attached a statement of rent account marked "JKB2" showing a balance of rent of Kshs.1,082,088/- as at 1st February 2022. The tenant is said to have referred the matter to this Tribunal although no documentary evidence is attached to the supporting affidavit.



5. On 6th June 2022, the tenant filed an application seeking stay of distress for rent pending the outcome of taxation of its advocate/client bill of costs dated 5th May 2022 vide Eldoret HC. Misc. application no. 084 of 2022.
6. On 10th June 2022 when the matter came up in court, the tenants counsel sought for interim orders of stay of distress for rent in terms of prayer (b) of the application dated 6th June 2022. The said prayer was granted and the tenant was directed to immediately serve the application upon the landlord who was to file a response within 14 days thereof.
7. The tenant was granted leave to file further affidavit and submissions within 14 days of service of the response and the landlord was given 14 days thereafter to file submissions in response. The matter was therefore fixed for mention on 22nd July 2022 to fix a ruling date.
8. On 22nd July 2022, the tenant was ordered to pay rent for the months of March, April, May, June and July 2022 and any subsequent months within Thirty days (30) thereof failing which the stay of distress order would stand vacated. Parties were granted leave to file written submissions with each having 14 days and the Applicant starting. The matter was slated for mention on 29th August 2022 to confirm compliance.
9. On 29th August 2022, counsel for the landlord indicated that the tenant had failed to comply with orders of 22nd July 2022 and therefore sought that the orders of 10th June 2022 be vacated and application dated 21st March 2022 be allowed. As there was no court attendance on the part of the tenant, the orders of 10th June 2022 were ordered vacated/discharged and the application of 21st March 2022 was allowed with costs.
10. On 26th September 2022, the tenant moved this Tribunal under certificate of urgency seeking inter-alia for stay of distress for rent ordered on 29th August 2022 and setting aside of the said orders. It also sought for leave to pay rent for the months of April 2022 to the date of application as earlier ordered on the 22nd July 2022. The tenant also sought leave to file submissions in respect of the landlord's application dated 21st March 2022 and its application dated 6th June 2022.
11. On 6th October 2022, the matter was directed to be mentioned on 25th October 2022. On 25th October 2022, directions were issued on the application dated 26th September 2022 to the effect that the same be responded to by the landlord within 7 days thereof and parties to file written submissions thereon. The matter was slated for mention on 24th November 2022 to confirm compliance.
12. The application is opposed through the replying affidavit of Joel K. Barbengi sworn on 28th October 2022. Both parties complied with directions to file submissions which I shall consider together with the issues for determination listed hereunder.
13. The following issues arise for determination:-
 - a. Whether the tenant is entitled to the reliefs sought in the application dated 26th September 2022.
 - b. Who is liable to pay costs thereof?.
14. The main prayers in the tenant's application dated 26th September 2022 relates to stay of distress for rent and setting aside the orders of 29th August 2022 and any consequential and/or incidental orders thereto.
15. The application is supported by the affidavit of Kaira Nabasenge sworn on 26th September 2022 and his further affidavit of 23rd November 2022. The main contention is that the landlord sought for distress of



rent yet it owed the tenant legal fees which was pending for taxation before the High Court at Eldoret vide Misc. Application No. 87 of 2022 on 8th November 2022.

16. The tenant's counsel deposes that he failed to attend court on 29th August 2022 inadvertently when the landlord's application dated 21st March 2022 was allowed *ex-parte*. He had diarized the matter for 29th September 2022 as per annexure marked 'KN1' and "KN2" for purposes of mention to confirm submissions.
17. On 20th September 2022, the tenant's counsel wrote to the landlord's counsel expressing the tenant's willingness to continue paying rent as earlier directed on 22nd July 2022 awaiting the outcome of taxation proceedings pending in the High Court as per annexure marked 'KN3'.
18. The landlord's counsel responded *vide* a letter dated 21st September 2022 marked as annexure 'KN4' advising that the matter came up on 29th August 2022 and *ex-parte* orders were given on the landlord's application dated 21st March 2022 which the tenant attacks as having been done without giving the tenant a fair hearing by way of written submissions as earlier directed.
19. According to the tenant, since the matter was for mention on 29th August 2022, it was unfair to allow the application without giving it a fair hearing. It is therefore sought to set aside the *ex-parte* orders allowing distress for rent given on 29th August 2022 in the interest of justice to enable the tenant to file submissions on the application dated 21st March 2022.
20. It is the tenant's contention that the landlord owes it legal fees of Kshs.4,000,000/- but sought to recover Kshs.1,082,088/- in rent arrears despite the issue being subject matter of taxation *vide* Eldoret High Court Misc. Application No. 87 of 2022.
21. In its replying affidavit sworn by Joel Kipsang Barbengi on 28th October 2022, it is deposed that the tenant is not entitled to the stay orders or leave to pay rent from April 2022 to date at the detriment of the landlord whose business premises the tenant was using without pay since the filing of this matter on 25th March 2022.
22. At the time the impugned orders were given, the tenant had not complied with the previous directions and orders given by the Tribunal according to the landlord more so the orders of 22nd July 2022.
23. The landlord contends that the amount of Kshs.1,082,088/- is yet to be paid as well as rent from April 2022 to date.
24. The principles upon which court's consider applications to set aside *ex-parte* orders or judgments were settled by the time honoured decision in the case of *Shah – vs- Mbogo & Another* (1967) EA 116 at page 126 where it was held as follows:-

“....the principles governing the exercise of the court's discretion to set aside a judgment obtained *ex-parte*. This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice”.
25. In this matter, the tenant was on 22nd July 2022 *inter-alia* ordered to pay rent for the months of March, April, May, June, July 2022 and any subsequent months within 30 days failing which the stay of distress order would stand vacated.
26. By 29th August 2022, when the matter came up for mention to confirm compliance, the tenant had not complied as a result of which the landlord's application to proceed with distress for rent dated 21st



March 2022 was allowed. I do not see what was meant to be heard in that regard as the tenant does not contend to have complied with the conditional orders of 22nd July 2022.

27. In my considered view, the tenant is seeking by evasion to obstruct the course of justice and no court of equity can exercise discretion to set aside an order to assist such a party. The landlord is entitled to justice as much as the tenant.

28. In the case of *Kyangavo – vs- Kenya Commercial Bank Ltd & Another* (2004) eKLR, the superior court had the following to state at page 13/14:-

“Secondly, the injunction sought is an equitable remedy. He who comes to equity must come with clean hands and must also do equity. The conduct of the plaintiff in this case betrays him. It does not endear him to equitable remedies.

.....He who comes to equity must fulfill all or substantially all his outstanding obligations before insisting on his rights. The plaintiff has not done that. Consequently, he has not done equity”.

29. Equally in the case of *Samuel Kipkorir Ngeno & Another – vs- Local Authorities Trust (Registered Trustees) & Another* (2013) eKLR, the superior court had the following to state at paragraph 9 and 12:-

“9. 9. A tenant’s first and main obligation is to pay rent as and when it becomes due for the landlord has the right to an income from his investment.....”.

“12. The temporary injunction sought in the present application is an equitable remedy at the court’s discretion. He who comes to equity must come with clean hands. A tenant who is in huge arrears of rent is underserving of the court’s discretion. The court cannot be the refuge of a tenant who fails to meet his principal obligation of paying rent as and when it becomes due”.

30. The remedies of stay and setting aside sought by the tenant herein are equitable remedies at this Tribunal’s discretion. I shall refuse to exercise my discretion in favour of a tenant who has completely failed to meet its principal obligation to pay rent in the guise that there was a pending taxation before the superior court which is clearly unrelated to the issue before me. I refuse to believe that a tenant who is owed money by a landlord over a different and unrelated issue would be entitled to use it as a shield against the latter. In any event, I have not been shown any certificate of taxed costs and judgment by the superior court allowing a set off against rent arrears.

31. In the premises, the application is a candidate for dismissal and I proceed to order so with costs to the landlord under Section 12(1) (k) of Cap. 301, Laws of Kenya as read with Section 12(4) thereof.

32. In conclusion, the following final orders commend to me in this matter:-

- a. The notice of motion application dated 26th September 2022 is hereby dismissed with costs.
- b. The landlord’s costs are assessed at Kshs.25,000/- all inclusive.

It is so ordered.

RULING DATED, SIGNED & DELIVERED THIS 12TH DAY OF JANUARY 2023.

HON. GAKUHI CHEGE

VICE CHAIR

BUSINESS PREMISES RENT TRIBUNAL



Ruling delivered in the presence of:-

Cheptarus for the Landlord

No appearance for the tenant

