



Nairobi Elite Academy v Association of Evangelicals in Africa (Tribunal Case E427 of 2024) [2024] KEBPRT 1567 (KLR) (8 November 2024) (Ruling)

Neutral citation: [2024] KEBPRT 1567 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E427 OF 2024
GAKUHI CHEGE, CHAIR & J OSODO, MEMBER
NOVEMBER 8, 2024**

BETWEEN

NAIROBI ELITE ACADEMY APPLICANT

AND

ASSOCIATION OF EVANGELICALS IN AFRICA RESPONDENT

RULING

A. Dispute Background

1. The tenant has once again moved this tribunal seeking for review, setting aside and/or variation of the ruling delivered herein on 28th August 2024 and in its place, a determination on merit on whether it owes the landlord rent on the basis of its written submissions.
2. The tenant further seeks for interim orders of stay of execution pending the hearing on the issue as to whether it owes rent to the landlord.
3. The application is predicated upon the grounds on the face thereof and the affidavit of NESTOR VALENTINE RAGOT sworn on 30th August 2024 wherein it is deposed that although it was held in the Tribunal's ruling that the tenant's submissions were not filed, indeed, the same were filed and served on 17th July 2024 which was within the time frame given by this court.
4. According to the tenant, the said finding was an error which is apparent on the face of record and that it is necessary for this Tribunal to reconsider the case and issue a ruling on merit. A copy of the tenant's submissions is attached as annexure NVR-2. The submissions were uploaded on the e-filing portal and served upon the landlord's Counsel. The tenant also filed supplementary submissions on 1st August 2024 which are attached and marked as annexure NVR-5. It is therefore the tenant's case that its case was struck out without considering the merits of its case.



5. It is the tenant's plea that it is in the interest of justice that the orders sought in the application be granted in order to correct the error apparent on the face of the record.
6. In response to the application, the Respondent filed a notice of preliminary objection in which it contends that the Plaintiff filed its submissions on 30th August 2024 which was two (2) days after the ruling was delivered by the Tribunal on 28th August 2024. Consequently, the Plaintiff's application is res judicata as it is predicated on filings made after the Ruling.
7. The Respondent further contends that the prayers sought by the Plaintiff/Applicant in the Application are not capable of being granted as there is no error apparent on the face of the record since submissions are not evidence on which a case is decided. The application is also attacked for being an abuse of the court process and that the Applicant is merely seeking to avoid payment of rent and rent arrears that are due to the Defendant/Respondent. As such, the Notice of Motion dated 30th August 2024 be struck out with costs to the Defendant.
8. The parties were directed to file written submissions on the application and both complied. The landlord filed submissions dated 11th September 2024 while the tenant filed its submissions dated 19th September 2024. We shall consider both submissions together with the issues for determination.

B. Issues for determination

9. The following issues arise for determination;-
 - a. Whether the landlord's notice of preliminary objection dated 11th September 2024 is merited.
 - b. Whether the tenant is entitled to the reliefs sought in the application dated 30th August 2024.
 - c. Who shall bear the costs of the application?

Issue (a) Whether the landlord's notice of preliminary objection dated 11th September 2024 is merited.

10. In response to the application dated 30th August 2024, the Respondent filed a notice of preliminary objection in which it contends that the Plaintiff filed its submissions on 30th August 2024 which was two (2) days after the ruling was delivered by the Tribunal on 28th August 2024. Consequently, the Plaintiff's application is res judicata as it is predicated on filings made after the Ruling.
11. The Respondent further contends that the prayers sought by the Plaintiff/Applicant in the Application are not capable of being granted as there is no error apparent on the face of the record since submissions are not evidence on which a case is decided. The application is also attacked for being an abuse of the court process and that the Applicant is merely seeking to avoid payment of rent and rent arrears that are due to the Defendant/Respondent. As such, the Notice of Motion dated 30th August 2024 be struck out with costs to the Defendant.
12. In response to the objection, the tenant through the affidavit of NESTOR VALENTINE RAGOT sworn on 30th August 2024 deposes that although it was held in the Tribunal's ruling that its submissions were not filed, indeed, the same were filed and served on 17th July 2024 which was within the time frame given by this court.
13. According to the tenant, the said finding was an error which is apparent on the face of record and that it is necessary for this Tribunal to reconsider the case and issue a ruling on merit. A copy of the tenant's submissions is attached as annexure NVR-2. The submissions were uploaded on the e-filing portal and served upon the landlord's Counsel. The tenant also filed supplementary submissions on 1st August



2024 which are attached and marked as annexure NVR-5. It is therefore the tenant's case that its case was struck out without considering the merits of its case.

14. It is the tenant's plea that it is in the interest of justice that the orders sought in the application be granted in order to correct the error apparent on the face of the record.
15. We have read and considered the submissions of the landlord wherein Section 7 of the Civil Procedure Act, Cap 301 and the decisions in KANORERO RIVER FARM LTD & 3 OTHERS VS NATIONAL BANK OF KENYA LTD (2002) KLR & ROBERT NGANDE KATHATHI VS FRANCIS KIVUVA KITONDE (2020) eKLR in support of the preliminary objection.
16. We have looked at the Tribunal's e-filing portal and have noted that indeed, the tenant filed its submissions on 17th July 2024 at 14:26:42 and on 1st August 2024 at 13:47:35, it filed supplementary submissions. The said submissions were not printed and were therefore not considered when the impugned ruling was delivered.
17. It is imperative to note that the matter had been directed to be canvassed by way of written submissions and therefore, in absence of any consideration of the tenant's submissions, it follows that it was condemned unheard. It has been held that the right to hearing is a valued right and any decision rendered without according a party the said right even if right ought to be set aside ex-debito justitiae (see the court of appeal decisions in the cases of MBAKI & OTHERS VS MACHARIA & ANOTHER (2005) 2 E.A 206 at page 210 & ONYANGO VS ATTORNEY GENERAL (1986-1989) E.A 456 at page 460).
18. In regard to this Tribunal's jurisdiction to review, vary or set aside its own orders, we rely on the Section 12(1)(i) of Cap 301, Laws of Kenya which provides one of the powers of this Tribunal as follows; -

“(i) to vary or rescind any order made by the Tribunal under the provisions of this Act.”
19. It is our view that the application of the doctrine of Res Judicata and functus officio are modified by the power of review and that courts will often exercise the power of review of their decisions without being caught up by the said doctrines.
20. In view of the foregoing, the notice of preliminary objection has no merit and is declined.

Issue b) Whether the tenant is entitled to the reliefs sought in the application dated 30th August 2024.

21. We have already observed that the ruling of this Tribunal delivered on 28th August 2024 was arrived at without considering the submissions of the tenant. We have looked at the said submissions and have noted that the same raise serious issues as regards its indebtedness to the Respondent. Without addressing the said issues, it is imperative that the matter is subjected to a merit-based hearing and determination.
22. Although we agree that submissions are the market place for each party's case, we are of the view that it is necessary for a court to consider the same before arriving at the determination of any matter especially where there is no other form of hearing. We shall therefore allow the application as prayed.

Issue (c) Who shall bear the costs of the application?

23. As regards costs, the same are in the Tribunal's discretion under Section 12(1)(k) of Cap. 301, but always follow the event unless for good reasons otherwise ordered. We shall order that the costs of the application abide the outcome of the main case.



C. Orders

24. Given the above analysis, the following orders commend to us;

- a. The landlord's notice of preliminary objection dated 11th September 2024 has no merit and is hereby declined.
- b. The tenant's application dated 30th August 2024 is hereby allowed in terms of prayers 3 & 4.
- c. The dispute over rent arrears shall be subjected to a viva voce hearing on priority basis besides the parties' submissions.
- d. Costs of the application shall abide the outcome of the case.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 8TH DAY OF NOVEMBER 2024

HON. GAKUHI CHEGE

(PANEL CHAIRPERSON)

BUSINESS PREMISES RENT TRIBUNAL

HON. JOYCE AKINYI OSODO

(MEMBER)

In the presence of:

