



**Warugongo v Hussein (Tribunal Case E391 of 2023)
[2024] KEBPRT 296 (KLR) (13 March 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 296 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E391 OF 2023
A MUMA, AG. CHAIR & J ROP, MEMBER
MARCH 13, 2024**

BETWEEN

JOHN WARUGONGO LANDLORD

AND

FEISAL HUSSEIN TENANT

RULING

A. Parties and their Representatives

1. The Applicant, John Warugongo is the Landlord of the business premises located at Pangani Shopping Centre (hereinafter referred to as the “Landlord”)
2. The firm of Brian Ogoma & Associates Advocates represents the Landlord in this matter.
3. The Respondent, Feisal Hussein, is an occupant of a section of the suit property, paying a monthly rent of Kshs. 15,000.00 (hereinafter referred to as the “Tenant”).
4. The firm of Sheila Mugo & Company Advocates represents the Tenant in this matter.

B. Background of the Dispute

5. Through a Reference and an Application dated 14th April, the Landlord moved this Honourable Tribunal seeking among other orders that; the Tenant be ordered to vacate the business premises located at Pangani shopping center on account of nonpayment of rent, that the Landlord be granted leave to break into the premises and gain access of the property and the O.C.S/ O.C.P.D Pangani Police Station to enforce eviction.
6. The Tribunal upon perusal of the Application issued an order dated 17th April, 2023 directing the Application to be served for inter-parties hearing on 15th May, 2023.



7. Upon hearing *ex parte*, the Tribunal in a ruling dated 15th May, 2023 issued the following orders that; the Tenant shall give a vacant possession of the business on account of nonpayment of rent in default, the Landlord was granted leave to break into the Tenant's business premises and the O.C.S/O.C.P.D. Pangani Police Station was to ensure compliance and to ensure peace prevails.
8. The Tenant, consequently, through a Notice of Motion Application dated 17th August, 2023 under Certificate of Urgency sought orders *inter alia* that the Tribunal stay and set aside the orders issued on 15th May, 2023, the Landlord be restrained from terminating the tenancy, the Tenant be allowed to file a reference in response to the Landlord's notice and the Tenant be afforded a chance to be heard.
9. The Tribunal on 24th August, 2023 certified the matter urgent and directed it be heard inter-parties on 19th September, 2023. It also directed that the Tenant to serve the Landlord with a hearing notice.
10. Following the hearing held on 19th September, 2023, the Tribunal vide an order dated 22nd September, 2023 directed the Tenant to pay Kshs. 45,000.00 being rent for August, September and October. It further stayed the orders made on 15th May, 2023 and granted the Tenant leave to file a reference in response to the Landlord's notice.
11. The Landlord proceeded to file a response through a Replying Affidavit dated 27th September, 2023 and Submissions dated 22nd November, 2023.
12. The Tenant filed a Reference in response to the Landlord's Termination Notice.
13. Therefore, it is the Tenant's Application dated 17th August, 2023 which is subject of this ruling.

C. Tenant's Case

14. The Tenant's case is based on the grounds that he was not aware of this suit and only come to know about it on 16th August, 2023, when the OCS Pangani Police Station informed him of the orders to evict the premises. He further notes that he was not served with either the notice of termination or the Application.
15. He avers that he has been paying his rent diligently. He supplied this Tribunal with copies of M-pesa messages highlighting payment of Kshs. 50,000.00, 20,000.00 and 38,000.00 with the Landlord as the recipient of all the aforementioned sums. He further avers that he paid the Landlord Kshs. 100,000.00 when he entered the premises as deposit.
16. He avers that he has continued to operate his business in the open and has been in constant communication with the Landlord.
17. The Tenant claims that he has done extensive renovations in the suit premises including gypsum, bulbs, painting, and various installations such as CCTV, Fridges, Flat screen TV and several seats as such he stands to suffer irreparable harm if evicted.

D. Landlord's Case

18. The Landlord in his Replying Affidavit sworn on 27th September, 2023 deposes that he issued a Termination Notice to the Tenant on the foundation that the said Tenant had persistently failed to pay rent and had defaulted payment of rent of nine (9) months. He continued to note that the default had accumulated to Kshs. 135,000.00.
19. The Landlord states that he properly served the Tenant with his Reference and Application dated 14th April, 2023 and subsequently filed an Affidavit of Service marked as "JW-003".



20. Consequently, the Tenant indulged him and sought an amicable agreement on the settlement of rent arrears and remitted part of the arrears.
21. The Landlord claims that the Tenant has continued to occupy the premises despite being issued and served with a Notice of Termination. He further claims that the notice has since taken effect however, the tenant has refused to vacate the premises or pay the outstanding balance.
22. The Landlord avers that the arrears in rent have continued to accrue during the pendency of this suit, to which he provided a cumulative sum Kshs. 147,000.00. He noted that this sum was calculated as at September 2023 and minus any amount paid by the Tenant towards the fulfilment of his obligation as to rent. The Landlord further avers that the Tenant has continued to disregard his obligation to pay rent.

E. List of Issues for Determination

23. I have given full consideration to the documents filed before this Court. It is my considered view that the sole issue that falls for determination is:
 - i. Whether the orders granted on 15th May 2023 ought to be reviewed and or set aside?

F. Analysis and Dertemination

24. Section 80 of the [Civil Procedure Act](#) Cap 21 provides as follows: -

“ Any person who considers himself aggrieved—

by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

25. Order 45 Rule 1 of the [Civil Procedure Rules](#), 2010 provides as follows: -

“ 1.

(1) Any person considering himself aggrieved—

by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”



26. The Court in the case of [*Republic v Public Procurement Administrative Review Board & 2 others*](#) [2018] eKLR held that: -

“Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds;

- (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;
- (b) on account of some mistake or error apparent on the face of the record, or
- (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

27. The powers of the Business Premises Rent Tribunal are provided by the [*Landlord and Tenant Shops Hotels and Catering Establishments Act*](#), Cap 301 Laws of Kenya (hereinafter the” Act”). Section 12(1) (i) of the [*Act*](#) provides that:

“A Tribunal shall, in relation to its area of jurisdiction have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in addition to and without prejudice to the generality of the foregoing shall have power--

- (i) to vary or rescind any order made by the Tribunal under the provisions of this Act;”

28. A reading of Section 80 of the [*Civil Procedure Act*](#) Cap 21, Section 12(1)(i) of the [*Landlord and Tenant Shops Hotels and Catering Establishments Act*](#), Cap 301 Laws of Kenya and Order 45 of the [*Civil Procedure Rules*](#), 2010 provide for that the power to review orders can be exercised on application of a person and which Application could be based on the three grounds provided. The Courts have further espoused that where an application is grounded on sufficient reason it is for the court to exercise its discretion. On this matter I am guided by the Court decision in [*Tokesi Mambili and others vs Simion Litsanga*](#) {2004} eKLR where the court noted that:

“...ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.”

29. In light of the above, this Tribunal notes that the Application brought by the Tenant places reliance on the third ground for review provided under Order 45 Rule 1 of the [*CPR*](#).
30. The Applicant seeks the orders issued on 15th May, 2023 to be set aside/reviewed. It is important to note at this juncture that the Tribunal on the 19th of September stayed the said exparte orders and gave directions for the hearing.
31. The Applicant argues that at the time orders were granted he had not been served with the Termination Notice and the Landlord’s Application. Consequently, he was neither aware of the Landlord’s intention to terminate the tenancy nor the proceedings herein.
32. However, upon perusal of the documents filed herein, I note that there is an Affidavit of Service sworn by Jefferys K. Kitemi, a Court process server, sworn on 5th May, 2023 in which he avers that he in the company of the Landlord, both proceeded to Pangani Shopping Centre and served the Tenant the



Application dated 14th April, 2023 and Orders dated 18th April, 2023 showing the matter was coming up for hearing on 15th May, 2023.

33. Order 5 Rule 15 of the [Civil Procedure Rules](#), 2010 denotes an Affidavit of Service to be proof of service. Therefore, the tenant was fully aware of the Landlord's intention to terminate the tenancy and the suit herein.
34. For that reason and after careful consideration of the facts and pleadings presented to this Tribunal, I find that the Tenant's Application fails to raise a sufficient reason within the meaning of Section 80 of the [Civil Procedure Act](#), Cap 21 and Order 45 Rule 1 of the [Civil Procedure Rules](#).
35. In addition there is no reasons advanced by the Tenant on how they intend to settle any rent arrears owing to the Landlord in fact the court intervened severally ordering for payment of rent it would be unjust for this court to turn a blind eye on the inability of the tenant to pay rent and still proceed to set aside the orders without sufficient compelling reason to do so.

G. Determination

36. In the upshot, the following orders shall abide:
 - a. The Tenant/Applicant's Application for review dated 17th August, 2023 is dismissed.
 - b. The Tenant to pay the rent arrears of Kshs. 147,000.00 being rent arrear as at September, 2023. Further the Orders of this Honorable Tribunal issued on 15th May, 2023 are upheld.

HON A. MUMA

AG Chair/MEMBER

HON. JACKSON ROP

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

**RULING DATED, DELIVERED AND SIGNED AT NAIROBI ON THIS 13TH OF MARCH 2024
IN THE ABSENCE OF ALL THE PARTIES.**

HON A. MUMA

AG Chair/MEMBER

HON. JACKSON ROP

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

