



**Gatatha Farmers Co Limited v Wairimu (Tribunal Case  
E1207 of 2022) [2023] KEBPRT 322 (KLR) (19 April 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 322 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E1207 OF 2022  
GAKUHI CHEGE, VICE CHAIR  
APRIL 19, 2023**

**BETWEEN**

**GATATHA FARMERS CO LIMITED ..... APPLICANT**

**AND**

**JULIET WAIRIMU ..... RESPONDENT**

**RULING**

1. Through a motion dated December 19, 2022, the landlord herein moved this Tribunal seeking for leave to levy distress so as to recover rent arrears in the sum of Kshs 1,022,751/- owing by the Tenant as at December 2022.
2. The landlord further seeks that the tenant be compelled to pay electricity bill of Kshs 572,915 before vacating the suit property.
3. The landlord also seeks for an order for vacant possession against the tenant and that the OCS, Central Police Station ensures compliance with the orders.
4. The application is supported by the affidavit of Peter Mburu Gakwa who is the chairman of the landlord company sworn on December 19, 2022 and the grounds on the face of the application. It is deposed that the tenant occupies shops No 8,9 & 13 at Bano House situate on LR No 209/163/60.
5. According to the landlord, the tenant owed Kshs 1,022,751/- to it as per annexure marked “PMG-3(a) & (b)” being the statement of account prepared by Masterways Real Estate.
6. The tenant had also failed to pay a sum of Kshs 572,915/- in accumulated electricity bill in terms of annexure “PMG-4”.
7. Despite demand made vide annexures marked “PMG-2”, the tenant had failed to settle the arrears and electricity bill and fearing that she would vacate the suit premises without paying the debt, the landlord now seeks the assistance of this Tribunal to recover the same.



8. The total amount due as at December 19, 2022 was Kshs 1,599,666/- in rent arrears and unpaid electricity bills made up as follows:-
- “shop 8 & 9 Kshs 956,431/-
- Shop 13 Kshs 66,320/-
- Electricity Kshs 572,915/-
9. The landlord seeks leave to levy distress for a sum of Kshs 1,312,819/- against the tenant who is a controlled tenant pursuant to Section 12(1) (h) of [Cap. 301](#), Laws of Kenya.
10. The application was directed to be served for hearing inter-partes on January 17, 2023. On January 16, 2023, the Respondent swore and filed a replying Affidavit attaching a letter dated June 13, 2022 marked “JW1” in response to the demand letter dated June 8, 2022.
11. According to the tenant, she does not owe the amount of rent arrears sought to be recovered against her based on the arrears sought on the statements provided by Masterways Real Estate marked as annexures “JW2” “JW3” and “JW4” alleging that the amount claimed as arrears is a combination of rent and alleged electricity bills.
12. It is the tenant’s case that she has electricity supply contracts with KPLC and the landlord cannot purport to recover any arrears on behalf of the said service provider. She deposes that she has been engaging KPLC on the issue and had reached into an agreement marked “JW5” with it and the landlord was not a party to the arrangement.
13. The tenant deposes that she temporarily closed down the shops subject matter herein after they were broken into in July 2022 and expensive property stolen therefrom as evidenced by annexure “JW6”.
14. In a further affidavit sworn on February 10, 2023, the landlord’s director (Peter Mburu Gakwa) deposes that the tenant pays Kshs 42,920/- as rent for shops No 8 & 9 and Kshs 9,860/- for shop No 13.
15. The landlord reiterates that the tenant was in huge rent arrears of Kshs 752,650/- as at December 8, 2021 prior to the agent taking over the management of the suit premises and all documentation thereof in terms of annexures PMG-1 & 2 respectively.
16. The opening rent balance as at January 1, 2022 was Kshs 53,580/- in respect of shop No 13 whereas shops No 8 and 9 had an opening balance of Kshs 752,650/- which the tenant fails to disclose in his pleadings. No proof of payment has been tendered by the tenant in respect of shops No 8 and 9 in this matter.
17. The tenant according to the landlord was removing most of the valuable items and the latter feared that she would vacate without paying the electricity bill which would become a burden to it. The electricity bill as at December 7, 2022 stood at Kshs 572,914/80 which the landlord demands that it be settled with the service provider. The payment plan entered between KPLC and the tenant expired on March 14, 2022.
18. According to the landlord, the tenant’s closure of the premises and failure to pay rent and utility bills is not justified and she should be ordered to surrender the same back to it. The landlord was under legal duty to ensure that all utility bills are paid up to date to avoid interruptions to the neighbours.
19. The tenant according to the landlord has not demonstrated that she has paid rent directly into its bank account as no bank slips have been submitted to it or the Tribunal. The only receipts exhibited herein are for the months of August 2022, October 31, 2022 and one acknowledgement receipt.



20. The application was directed to be disposed of by way of written submissions and both counsels complied. I shall address the submissions together with issues for determination listed hereunder.
21. The issues for determination herein based on the pleadings are:
  - a. Whether the Landlord/Applicant is entitled to the reliefs sought in the motion dated December 19, 2022.
  - b. Who is liable to pay costs of the application?
22. The Landlord moved this Tribunal seeking for leave to levy distress against the Tenant to recover a sum of Kshs 1,022,751/- owing in rent arrears as at December 2022. The landlord further seeks that the tenant be compelled to settle electricity bill of Kshs 572,915/- before vacating the suit property.
23. As at December 19, 2022, the total amount owing under both heads was Kshs 1,599,666/-. The tenant denies owing the said amount through her replying affidavit dated January 16, 2023 and further states that the landlord is not entitled to enforce payment of electricity bill on behalf of the service provider as she has been engaging the latter and had reached an agreement on settlement.
24. The tenant submits that rent does not include electricity bills under Section 2(1) of [Cap. 301](#), Laws of Kenya and leave to levy distress in respect thereof cannot be given.
25. According to the tenant, there are multiple entries in the statements annexed to the Affidavits of the Landlord described as a late payment penalties which do not constitute rent payable by the tenant within the meaning of Section 2 of [Cap. 301](#).
26. The tenant's counsel submits that by including electricity bills and alleged late payment penalties as part of their claim in an application for leave to levy distress, the applicant is asking this court to exercise jurisdiction it does not have under the law which renders the whole application unsustainable in law.
27. In regard to the rent arrears claimed by the landlord, the tenant's counsel submits that the tenant has denied being indebted and had provided evidence of having made good the bounced cheques and that he has paid the amounts shown in the Applicant's agents statements.
28. It is further submitted that the rent statements furnished to the court are not clear and do not reflect a cogent and undisputable position on the landlord's claim vis-avis the tenant's depositions and evidence on rent payment. It is thus submitted that owing to mixed up multiple entries included in the claim for rent arrears including electricity bills and late payment penalties, the court should dismiss the claim.
29. On the other hand, the landlord's counsel submits that the application is merited and has been proved on a balance of probabilities as the respondent is indebted in terms of rent arrears. The rent account statement shows the amount in arrears and amounts paid by the tenant. Only three payment receipts dated August 27, 2022, October 31, 2022 and three receipts dated March 17, 2022 have been exhibited by the tenant. The said payments have been factored in the landlord's statement of account.
30. I have considered the issues raised by both parties and it is clear that the tenant has not been able to demonstrate that no rent is owing to the landlord as claimed. Although the rent account statement exhibited by the landlord includes penalties for late payment of rent, it is a matter of judicial notoriety that some tenancy agreements contain clauses for charging such penalties. Even if the said penalties were to be excluded, the tenant would still be in arrears of rent.



31. Section 3(1) of the [Distress for Rent Act](#), Cap. 293, Laws of Kenya provides as follows:-

“(1) Subject to the provisions of this Act and any other written law, any person having any rent or rent service in arrears and due upon a grant, demise lease or contract shall have the same remedy by distress for the recovery of that rent or rent service as is given by the common law of England in a similar case”.

32. The tenant in this case has not demonstrated that she has paid the rent demanded by the landlord by way of production of bank payment slips or other evidence to controvert the statements of rent account presented by the landlord. I have not seen any contradictions in the said statements and I agree with the landlord’s counsel’s submissions that the payments evidenced by the tenant’s annexures marked “JW3” have been factored in the rent account statements exhibited by the landlord.

33. Section 108 of the [Evidence Act](#), Cap. 80 Laws of Kenya provides as follows:-

“The burden of proof in a suit lies on the person who would fail if no evidence at all were given on either side”.

34. In this case, the tenant has completely failed to provide evidence that she paid the amount claimed against her. I however agree that payment of electricity and other utility bills cannot be enforced by way of distress for rent but the landlord has claimed the same under a separate relief and I am not convinced that it would not be its duty to ensure that the outstanding bill is paid to the service provider. I shall compel the tenant to settle the said bill taking judicial notice that non-payment thereof may lead to poll disconnection by the service provider against the landlord’s property. This shall no doubt affect all tenants in the building.

35. I have seen the decision in the case of [Royal Gardens Hospital v Ibrahim Omenyi Abwere & Another](#) [2018] eKLR which echoes Section 3(1) of [Cap. 293](#). I have also seen the case of Julius Mogaka Gekonde t/a E-Smart Technical College v Ouro Power Limited & Another [2016] e KLR on this Tribunal’s Jurisdiction to grant leave to levy distress and I entirely agree with it.

36. Costs of every action before the Tribunal are in its discretion under Section 12(1)(k) of [Cap. 301](#), Laws of Kenya but always follow the event unless for good reasons otherwise ordered. I have no reason to deny costs to the landlord.

37. In the premises, the following final orders commend to me in this case:-

- a. The landlord’s application dated December 19, 2022 is allowed and the landlord is granted leave to levy distress against the tenant’s goods in recovery of all the amount of rent in arrears up to date.
- b. The tenant is ordered to pay electricity bill of Kshs 572,915/- together with any other amount accrued after the filing of the application herein.
- c. The tenant shall deliver vacant possession for non-payment of rent or shall be evicted from the suit premises in default.
- d. The OCS, Central Police Station shall give security to the Auctioneer appointed by the landlord during execution of the orders herein.
- e. Costs of Kshs 30,000/- awarded to the landlord.

It is so ordered.

**RULING SIGNED & VIRTUALLY DELIVERED THIS 19TH DAY OF APRIL 2023.**



**HON. GAKUHI CHEGE**

**VICE CHAIR**

**BUSINESS PREMISES RENT TRIBUNAL**

**Ruling delivered in the presence of:**

**Miss Faith Oketch for Landlord/Applicant**

**No appearance for the Tenant**

