



**Nyabali v Mbugua & another (Tribunal Case 1027 of 2020)
[2023] KEBPRT 281 (KLR) (5 May 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 281 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE 1027 OF 2020
GAKUHI CHEGE, VICE CHAIR
MAY 5, 2023**

BETWEEN

PETER KIBISU NYABALI APPLICANT

AND

ROBERT MBUGUA 1ST RESPONDENT

MARGARET WAMAITHA 2ND RESPONDENT

RULING

1. Through a motion dated January 23, 2023, the 2nd Respondent moved this Tribunal seeking for setting aside and/or variation of its orders issued on December 22, 2020.
2. She also seeks for an order to compel the Tenant/Respondent to pay outstanding rent arrears amounting to Kshs 1,780,000/- as at January 2023 within 14 days and in default, she be at liberty to levy distress for rent to recover the said amount and enter the leased premises on Land Reference no 1504/7 (Original number 1504/2/2 IR No 6458) and evict the tenant therefrom with the OCS Mlolongo Police Station ensuring compliance with the orders.
3. Through an affidavit sworn on even date, the 2nd Respondent deposes that the tenant herein entered into a tenancy agreement with the estate of Margaret Wamaitha Humprey (Deceased) on April 29, 2020 which is exhibited as annexure 'MWH-2'. The agreed monthly rent was Kshs 60,000/-. The tenant however only paid rent for March 2020 upon signing the agreement.
4. By June 4, 2020, the tenant was in rent arrears of Kshs 150,000/- which was demanded vide annexure 'MWH-3'. In July 2020, the tenant paid Kshs 80,000/- but thereafter failed to make payments and on October 1, 2020 signed an agreement to pay Kshs 249,000/- by the end of that month.
5. On December 1, 2020, the 2nd Respondent issued another notice to the tenant demanding arrears then amounting to Kshs 220,000/- but he failed to comply. The 2nd Respondent instructed Auctioneers to



levy distress against the tenant who run to this Tribunal and obtained an order of injunction dated December 22, 2020 which is the subject matter herein.

6. It is the 2nd Respondent's contention that the said order does not serve the ends of justice and has been used as a carte blanche licence to avoid rent by the tenant since then which is oppressive to the deceased's estate.
7. It is contended that it is unjust and inequitable to let the order remain in force as it was being abused by the tenant to defeat the ends of justice. The said order did not absolve the tenant from paying rent to the estate under the tenancy contract.
8. The order has been in force for two (2) years and was being used to disadvantage the estate by the tenant in not paying rent due. It is disputed that the tenant purchased the property as it was still in the name of Margaret Wamaitha Humprey (deceased) and the original 1st Respondent having not been issued with a grant of letters of administration had no capacity to deal with the deceased's estate.
9. The application is opposed through the replying affidavit of the tenant sworn on March 20, 2023 wherein it is deposed that he has been a tenant of the landlords in respect of the suit premises which he uses as a garage having entered into a tenancy agreement marked 'PKN-1'.
10. The tenant deposes that he has been diligently paying rent to his landlord one Robert Chege Mbugua since 2012 who had appointed JOSKINYANGA as his agent. The landlord later appointed Perfume Value Limited as his agent for rent collection in terms of annexure marked 'PKN-2'.
11. The said agency later changed its name to Rock Peak Ventures Limited as per annexure marked 'PKN-3'.
12. It is the tenant's contention that he has been paying rent regularly and at one point had been given the property on sale and paid a deposit of Kshs 3 million. The said property is subject to litigation involving sons of the late Margaret Wamaitha and persons claiming against her estate.
13. As a result, the tenant withheld the balance of Kshs 2 million and agreed with Robert Mbugua to continue paying rent until the High Court decides who were the heirs of the estate. In November 2020, the tenant deposes that he gave his landlord Kshs 101,000/- as rent upto April 2021 as per annexure marked 'PKN4'.
14. In December 2020, the 1st and 2nd Respondents interchangeable demanded payment of rent from the tenant and kept on harassing him. On the other hand the 1st Respondent sent one Peter Sosi to collect Kshs 30,000/- from the tenant as evidenced by annexure 'PKN5'.
15. On December 16, 2020, the 1st Respondent visited the suit premises through his agent and attempted to evict the tenant. The tenant was constrained to file the instant proceedings whereupon the impugned restraining orders were granted by this Tribunal.
16. According to the Tenant, his landlord passed away on May 18, 2022 and he started paying rent to his widow one Loise Mbugua as per annexure 'PKN8'. On January 27, 2023, the tenant received a letter from PK Kibet & Co Advocates for the administrators and beneficiaries of the Estate of Margaret Wamaitha Humprey directing him to pay monthly rent into a joint family account and in which Sopeo Kenya Enterprises Ltd was appointed as their agent. The letter is marked 'PKN9'.
17. The tenant deposes that he has never entered into a tenancy agreement with the 2nd Respondent/Applicant as alleged and had continued to honour his tenancy agreement with Robert Chege Mbugua since 2012.



18. The 2nd Respondent filed a supplementary affidavit sworn on April 11, 2023 wherein she deposes that Margaret Wamaitha Humprey (deceased) is the registered proprietor of the suit property where the tenant has been operating from. The 1st Respondent (Robert Chege Mbugua) is neither the owner nor the landlord of the suit premises and could not lease out the property to the tenant herein.
19. It is deposed that the tenancy agreement annexed by the tenant is illegible and appears to be a forgery and the term of tenancy is indicated as 20212 which offends common sense. The agreement shows clearly that the landlord is the Estate of Margaret Wamaitha Humprey (Deceased) represented by the Applicant.
20. The agreement is a replica of the one entered on April 29, 2020 by the tenant and the deceased 2nd Respondent. On October 1, 2020, the tenant signed an agreement to pay arrears of Kshs 249,000/- owed to the Estate by October 31, 2020 at the police station. No evidence has been exhibited of alleged payment of Kshs 101,000/- in the month of November 2020.
21. The Mpesa statement annexed to the replying affidavit is according to the 2nd Respondent not authenticated by Safaricom Company Limited and shows the name of Margaret although the tenant claims the payment was made to the 1st Respondent. The 1st Respondent is one Robert Chege Mbugua and not Robert Mbugua Chege who is said to have died on May 18, 2022.
22. As such, the alleged widow of 1st Respondent being not the owner of the premises nor administrator of the estate of Margaret Wamaitha Humprey is not entitled to receive rent on behalf of the estate. The letter by PK Kibet & Co Advocates is attacked on the basis that it is not a court order and does not absolve the tenant from paying rent.
23. According to the Applicant, the beneficiaries of estate of Margaret Wamaitha humprey (Deceased) are John Lloyd Kama Humprey, Loise Wanjiru Mbugua, Mercy Wamaitha Mbugua, Joseph Henry Wainaina Humprey, Robert Muigai Humprey and Oscar Mbugua Humprey and the tenant ought to honor the terms of the agreement signed on April 29, 2020.
24. The application was directed to be canvassed through written submissions and both counsels complied. I shall consider the submissions while dealing with issues for determination.
25. Based on pleadings filed herein, the following issues arise for determination in this case:-
 - a. Whether the 2nd Respondent/Applicant is entitled to the reliefs sought in the application dated January 23, 2023.
 - b. Who is entitled to the rental income accruing from the suit property?
 - c. Who is liable to pay costs?
26. On February 25, 2022, this Tribunal delivered a ruling in which the following orders were made:-
 - ' (a) The application and reference shall be disposed at by way of cross-examination of all the parties on the matters in issue and affidavits filed herein.
 - (b) The Applicant shall file in court the affidavit allegedly sworn by an imposter on behalf of the 1st Respondent in this matter.
 - (c) The Interim orders given on December 22, 2020 shall remain in force until the determination of the application and reference.
 - d. Hearing of the application and reference shall be fixed on priority basis'.



27. On April 13, 2022, the matter came up for hearing of the reference but the same was adjourned to May 26, 2022 on account of unavailability of the 1st Respondent who was meant to be cross-examined by counsel for the 2nd Respondent.
28. On May 26, 2022, the Tribunal was informed that the landlord had passed away by counsel for the tenant. The matter was fixed for mention on July 18, 2022 to confirm filing of an application for substitution of the deceased 1st Respondent.
29. On July 18, 2022 the matter was mentioned but no application for substitution had been filed and it was fixed for mention on October 24, 2022.
30. On October 24, 2022, the tenant's counsel informed the Tribunal that no citation proceedings had been filed as there was an ongoing Milimani High Court P&A Cause no 1754 of 2009 in respect of the Estate of Margaret Wamaitha which was coming up on November 30, 2022 for directions. This matter was thus fixed for mention on December 5, 2022 to await the directions in the said cause.
31. On December 5, 2022, the Tribunal was informed that the 1st Respondent was yet to be substituted and that the citation filed by the 2nd Respondent was coming up for mention on January 23, 2023. The matter was therefore slated for mention on January 30, 2023 to confirm the same.
32. On the said date, the Tribunal was informed that the 2nd Respondent/Applicant had filed the application dated January 23, 2023 seeking to set aside the orders of December 22, 2020. That was the last time the issue of substitution of the deceased 1st Respondent was heard of.
33. From the foregoing analysis of evidence, it is clear to me that the main contest in this matter is who is entitled to the rental income accruing from the suit property.
34. According to the tenant, his landlord was one Robert Mbugua who is the deceased 1st Respondent herein. It is the tenant's case that the suit property was subject matter of Milimani High Court P& A cause no 1754 pf 2009 and ELC case No 108 of 2019 whose pleadings are not annexed or exhibited in this case. The tenant admits that he is not a party in the said cases.
35. The Applicant on the other hand has exhibited a tenancy agreement dated April 29, 2020 between the estate of Margaret Wamaitha Humprey (Deceased) and the tenant herein marked 'MWH-2' which is for a period of Eight (8) years commencing in March 2020 with the reserved rent being Kshs 60,000/- payable not later than 5th day of each calendar month. The same is drawn by Naikuni Ngaah & Miencha Co Advocates and is duly executed and witnessed.
36. On the other hand, the tenant claims to have entered into a tenancy agreement with the 1st Respondent marked as annexure 'PKN1' attached to his replying affidavit of March 20, 2023. The date of execution of the agreement is not legible but it is expressed to be for a term of 2012'. It is clearly not a genuine document and 2012 and it is suspect the same is not even witnessed as required under Section 3(3) of the Law of Contract Act, Cap 23 Laws of Kenya which provides as follows:-

- ' (3) No suit shall be brought upon a contract for the disposition of an interest in land unless.
 - a. The contract upon which the suit is founded:-
 - i. Is in writing.
 - ii. Is signed by all the parties thereto and witness who is present when the contract was signed by such party'.



37. Disposition is defined under subsection (6) thereof to include a transfer and a device, bequest or appointment of property contained in a will. Transfer is defined to include a lease like in the instant case.
38. The tenant in his replying affidavit denies entering into a tenancy agreement with the 2nd Respondent yet he has not disowned the signature in annexure marked 'MHW2' attached to the supporting affidavit of the Applicant which is duly witnessed by Isaac Omeke Miencha Advocate on 2 April 9, 2020. He does not deny having executed the documents marked 'MHW-4' annexed to the same affidavit wherein he and one Daniel Otieno acknowledge being indebted to Maggy Wamaitha in the sum of Kshs 249,000/- as at October 1, 2020.
39. The tenant has not denied paying rent to the 2nd Respondent upon execution of the tenancy agreement and subsequently a sum of Kshs 81,000/- in July 2020 after the demand notice marked 'MWH-3' was written.
40. It is not in dispute that the suit property is owned by the late Margaret Wamaitha Humphrey (Deceased) whose estate is the subject matter of Nairobi High Court P&A Case No 1754 of 2009 in which it was on February 2, 2011 ordered inter-alia as follows in terms of annexure :MHW-1'.
- ' 5. That rent proceeds of LR No 1504/7 after deductions of the monthly expenses which shall be agreed by the counsels of the parties shall be divided equally among the four (4) children of the deceased including the children of Rachel Wambui pending further orders of this court'.
41. The property mentioned in the said order is the subject matter herein and it is inconceivable how the tenant can claim that the rent accruing therefrom is payable to the 1st Respondent or his widow having all along known that is belonged to the estate of Margaret Wamaitha Humphrey (Deceased) as admitted in his own filed affidavits and having known that was subject matter of litigation in the succession cause. He has not produced any order by a court of law directing him to pay rent to the 1st Respondent or any other person contrary to the orders of February 2, 2011. He is thus liable to the deceased's estate and any money allegedly paid elsewhere is not to be taken as payment to the estate.
42. Any purported tenancy agreement entered into with the 1st Respondent in 2012 as alleged is null and void and could not confer any right upon the tenant to make payment of rent to him in contravention of the High Court order of February 2, 2011. It does not offer him any protection against recovery of rent by the deceased's estate.
43. It is therefore clear that the orders of December 22, 2020 were given on account of gross misrepresentation and/or concealment of material facts of the orders of the High Court in P&A Cause no 1754 of 2009 (Nairobi) which the tenant was aware about in view of the contents of paragraph 10 of his supporting affidavit sworn on December 21, 2020 where he stated as follows:-
- ' 10. That I came to know the various parties are wrongful in various cases being ELC Case No 108 of 2019 and Milimani Succession Cause no 1754 of 2009'.
44. It is therefore clear to me that the tenant has been acting in the manner he does with a clear intention to aid the 1st Respondent to disobey and escape the effects of the superior court order of February 2, 2011. Any money alleged paid by him in that regard as rent cannot be money paid to the estate.



45. In the premises, I am satisfied that the Applicant has met the conditions for setting aside or variation of the Tribunal orders of December 22, 2020 pursuant to the provisions of Section 12(1) (i) of Cap 301, which gives it the power to:-
- i. To vary or rescind any order made by the Tribunal under the provisions of this Act'.
46. The tenant has not demonstrated that he paid the amount of Kshs 1,780,000/- claimed by the Applicant/2nd Respondent as at January 2023 as he maintains that all payments were allegedly made to the 1st Respondent or his widow contrary to the superior court's order in Nairobi P&A Cause no 1754 of 2009. I shall therefore allow the Applicant to recover the amount in the manner sought in the application and shall exercise my discretion to waive the court fees payable on the distress for rent order given that the estate has been denied the said amount in contravention of a court order.
47. Given the conduct of the tenant in this matter and in particular his failure to adhere to the superior court order which he knew about and/or ought to have known about with exercise of due diligence resulting into conflict among the beneficiaries of the deceased's estate, I shall order that he be evicted from the suit premises in the event of failure to settle the amount due forthwith with assistance of a licensed Auctioneer who shall be accorded security by the OCS Mlolongo Police Station.
48. Costs of any action before the Tribunal are at 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 2nd Respondent/Applicant.
49. In conclusion, the final orders which commend to me in this case under Section 12(1) (e) and 12 (4) of Cap. 301, Laws of Kenya are:-
- a. The interim orders issued on December 22, 2020 in this case are hereby rescinded and/or set aside forthwith.
- b. The tenant is hereby ordered to pay outstanding rent arrears in the sum of Kshs 1,780,000/- as at January 2023 and any other amount accrued thereafter within fourteen (14) days hereof.
- c. In default of the tenant to pay the said arrears as above, the 2nd Respondent/Applicant will be at liberty to levy distress the leased premises on LR NO 1504/7 (Original no 1504/2/2 IR No 6458) and licensed Auctioneer who shall be accorded security by the OCS, Mlolongo Police Station.
- d. The tenant shall pay costs of Kshs 50,000/- to the 2nd Respondent/Applicant.
- e. The tenant's complaint dated December 21, 2020 is marked as settled in the above terms since it raised the same issues addressed herein.

RULING SIGNED & VIRTUALLY DELIVERED THIS 5TH DAY OF MAY 2023.

HON. GAKUHI CHEGE

VICE CHAIR

BUSINESS PREMISES RENT TRIBUNAL

Ruling delivered in the presence of:

Kipkurui for 2nd Respondent/Applicant

Miss Kerubo for Tenant/Respondent

No appearance for the 1st Respondent

