



Camp Zodiac Africa Group Limited v Atieno & another (Tribunal Case E154 of 2022) [2023] KEBPRT 1145 (KLR) (22 December 2023) (Ruling)

Neutral citation: [2023] KEBPRT 1145 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E154 OF 2022
CN MUGAMBI, CHAIR
DECEMBER 22, 2023**

BETWEEN

CAMP ZODIAC AFRICA GROUP LIMITED TENANT

AND

PENINA ATIENO 1ST LANDLORD

ANGELA AWUOR 2ND LANDLORD

RULING

Introduction

1. The Landlord's application dated 29.11.2023 seeks orders that the tenant be compelled to pay to the landlord Kshs 720,000/= being the rent arrears from June 2022. The Landlord further seeks an order that the tenant be compelled to vacate the suit premises due to "effluxion of a tenancy agreement."

The Landlords affidavit in support of her application

2. The Landlord's supporting affidavit may be summarized as follows:-
 - a. That the tenant is abusing the court orders by failing to pay rent and has already defaulted in paying rent for eighteen (18) months and his possession of the suit premises is therefore detrimental to the landlord.
 - b. That the Landlord is sickly and the non-payment of rent has made it impossible for her to travel to India for treatment.
 - c. That the Landlord has discovered that the tenant has ill intentions of changing the ownership of the suit premises through cronies.



- d. That the tenant has made improvements on the suit premises without the consent of the Landlord and even purported to be able and willing to purchase the suit premises from the landlords.

The Tenant's replying affidavit

3. The replying affidavit sworn by the tenant on 13.12.2023 may be summarized as follows:-

- a. That the Landlord's application is res judicata as the tenant is already enjoying injunctive orders pending the hearing of the case.
- b. That on 5.9.2023, the Landlord in contempt of the orders issued by the Tribunal instructed Kenya Power & Lighting Company (KPLC) to disconnect the tenant's electricity.
- c. That the Landlord has repeatedly interfered with the tenant's ability to run the business and cannot therefore claim for rent after compromising the tenant's ability to run/make use of the premises.
- d. That the tenant is unable to compel Kenya Power & Lighting Company (KPLC) to return power to the suit premises since he is a stranger to the account.
- e. That the tenant cannot make use of the suit premises without power, the use of generators by the tenant became costly and a nuisance to the guests who failed to extend their stay at the suit premises.
- f. That the lack of proper paper work between the parties have made it impossible for the tenant to get any financial (loan) facilities to run the business.
- g. That the parties herein had agreed to part ways and the only pending issue was the value of the improvements.
- h. That the Landlord ought not to be allowed to demand rent after grounding the tenant's business to a standstill and the grant of the orders sought by the Landlord Landlord at this stage would be prejudicial to the tenant who has not been granted an opportunity to present his evidence before court.

The Landlord's further affidavit

4. The Landlord's further affidavit on 14.12.2023 may by summarized as follows:-

- a. That the tenant has no agreement with the Landlord and after the earlier agreement lapsed, the tenant should vacate.
- b. That the Landlord has a statutory right to seek for rent payment and the tenant cannot limit the said right.
- c. That the Landlord has no say on how Kenya Power & Lighting Company (KPLC) carries out its business and no evidence of the Landlord's interference with power has been produced by the tenant.
- d. That the tenant after obtaining the injunction orders, seeks to run on a notion that he has no duty to pay rent.



- e. That the tenant never requested for any consent from the Landlord to improve the premises, the illegal constructions will have to be demolished anyway as they contravene the bylaws of Kilifi County.
 - f. That the amount of rent arrears owed by the tenant is substantial.
 - g. That the tenant has used court orders to prevent the Landlord from disposing of the property which has greatly prejudiced the Landlord.
 - h. That the court ought not be the refuge of a tenant who cannot pay rent.
5. The parties have filed what they both refer to as Further replying affidavit (tenant) and Further further affidavit (Landlord). Both documents are filed without leave and in excess of the court orders issued on 13.12.2023. They are reflective of the arguments in the affidavits earlier filed. Both affidavits are hereby ordered expunged from the record.
 6. The tenant has also filed a notice to cross examine the Landlord on the contents of the affidavit filed on 14.12.2023, I will deal with this aspect of the application hereinbelow.

Analysis and determination

7. The issues that arise for determination in this application are in my view, the following;
 - a. Whether the Landlord's application is res judicata?
 - b. Whether the Landlord ought to be called for cross examination on the contents of her affidavit dated 14.12.2023.
 - c. Whether the Landlord is entitled to the orders sought in the application.

Issue A

8. The tenant has contended that the Landlord's application is res judicata as there are already orders of injunction issued against the Landlord in this matter. I understand the Landlord's application to be one demanding for the payment of rent arrears. The arrears are said to have accumulated from June 2022 to date. The demand for rent is a continuing demand as and when it falls due and in arrears and cannot therefore be subjected to the doctrine of res judicata. The Landlord's prayer for an order of vacant possession is a different matter altogether. The Tribunal in its ruling delivered on 26.5.2023 had observed as follows;-

At paragraph 8,

“That being the case, if the landladies were desirous of terminating the tenancy between themselves and the tenant as indeed they were, then they were obligated by the law to issue a notice to terminate the tenancy under Section 4(2) of Cap 301.”

At paragraph 9,

“I have perused the notices by the landladies Advocates dated 17.5.2022, 24.5.2022 and do note that the notices do not comply with the requirements of Section 4(2), 4(4) and 4(5) of Cap 301 and they are therefore invalid notices and of no



effect. To this extent, I find the complaint by the tenant as regards the notices to be merited.”

Issue B

9. The issue that remains for determination in this application is whether or not the tenant ought to be compelled to pay the alleged outstanding rent arrears of Kshs 720,000/= being the rent since June 2022. The tenant does not deny owing this rent and indeed he has not produced any evidence that he has paid the same. The tenant’s only contention is that the landlord has made it difficult for the tenant to utilize the suit premises by among other things disconnecting electricity or ordering for the disconnection of the same. Would these circumstances warrant the calling of the landlady for cross examination? I do not think so!
10. On whether the notice to cross examine the deponent should be permitted, order 19 Rule (2) of the *Civil Procedure Rules* states;
 1. Upon any application, evidence may be given by affidavit, but the court may at the instance of either party order the attendance for cross examination of the deponent.”
11. In the case of; *GGR v H.P.S* (2012) eKLR the court outlined instances where a deponent may be subjected to cross examination as follows:-

“The law has allowed evidence to be proved by way of affidavits under order 19. But under Rule 2 of the said order, the court may order the deponent to be cross examined. It would appear that where allegations of matters touching on fraud, malafides, authenticity of the facts deponed, bad motive among others are raised, cross examination of a deponent of an affidavit may be ordered. This also extends to where there is a conflict of affidavits on record or where the evidence deponed (sic) to is conflicting in itself. Further, the order for cross examination is a discretionary order but as in all discretions, the same must be exercised judiciously and not whimsically. There should be special circumstances before ordering a cross examination of a deponent on an affidavit. The court must feel that adequate material has been placed before it that show that in the interest of justice and to arrive at the truth, it is just and fair to order cross examination.”
12. I am not convinced in the circumstances of this case and as set out under paragraph 10 above, any special circumstances have been demonstrated to exist to warrant the cross examination of the deponent of the affidavit sworn on 14.12.2023. I therefore decline to summon the landlady for cross examination as requested by the tenant.

Issue C

13. The landlord’s prayer for an order that the tenant be compelled to vacate the suit premises cannot be granted for the reasons already advanced on this ruling. The only prayer that I have to deal with is therefore the one for an order of payment of rent arrears amounting to Kshs 720,000/=.
14. The tenant has not specifically denied that he owes the rent demanded by the landlord. The tenant’s only contestation being that he has court orders issued on 26.05.2023 and further that the landlord ought not to demand for any rent since it is the landlady who has made it impossible for the tenant to utilize the premises by among other things, requesting Kenya Power & Lighting Company (KPLC) to disconnect the tenant’s electricity. The landlord has denied issuing any such instructions to Kenya Power & Lighting Company (KPLC) anyway.



15. From the outset, it has to be clarified that the Tribunal did not at any time issue any orders to the effect that the tenant was not to pay rent. I do not think that it is fair to mix up the issue of electricity with the clear duty of a tenant to pay rent and I therefore do not find that excuse sustainable at this point in time. In the case of, *Samuel Kipkorir Ng'eno & another v the Local Authorities Pension Trust (Registered Trustees & another* [2013] eKLR, the court in this regard held as follows:-
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...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."
18. In the circumstances, I will allow the landlord's application dated 29.11.2023 in the following terms:-
- (a) That the tenant is ordered to pay to the landlord the sum of Kshs 720,000/= being the rent arrears due since June 2022 within the next thirty (30) days of this ruling.
- (b) That the tenant failing to pay the rent in (a) above, the landlord shall be at liberty to levy distress for rent for the outstanding rent arrears with the assistance of a licensed auctioneer.
- (c) That the landlord shall have the costs of the application to be agreed or assessed on application.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 22ND DAY OF DECEMBER 2023

HON. CYPRIAN N. MUGAMBI

CHAIRPERSON

12.2023

In the presence of;

Ms. Mokuu for the tenant

Ms. Shimillah for the landlord

