



Gachie t/a Megapart Investments v Wanyoike t/a Beaver Industries & 2 others (Tribunal Case E521 of 2024) [2024] KEBPRT 1456 (KLR) (Civ) (4 October 2024) (Ruling)

Neutral citation: [2024] KEBPRT 1456 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
CIVIL
TRIBUNAL CASE E521 OF 2024
GAKUHI CHEGE, CHAIR & J OSODO, MEMBER
OCTOBER 4, 2024**

BETWEEN

PATRICK MAINA GACHIE T/A MEGAPART INVESTMENTS TENANT

AND

KINYANJUI WANYOIKE T/A BEAVER INDUSTRIES LANDLORD

AND

SORTMASTERS INVESTMENTS LTD AGENT

AND

CHAKA & CO AUCTIONEERS AUCTIONEER

RULING

A. Dispute Background

1. The tenant/applicant moved this Tribunal vide a Reference dated 3rd May 2024 under Section 12(4) of the *[Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#)*, Cap 301, Laws of Kenya with a complaint that the landlord had served him with a proclamation of attachment by way of distress for rent dated 17th April 2024. The proclamation was for rent arrears amounting to Kshs 303,400/= which according to the tenant was exaggerated, erroneous, unsubstantiated, fictitious and contested.
2. The tenant however acknowledges owing the landlord Kshs 185,600/= which had been occasioned by high inflation rate and weakening of the Kenyan currency vis-à-vis the US dollar which he had agreed with the landlord to clear in instalments.

3. The landlord went ahead to instruct the 3rd Respondent to execute for recovery of the contested rent arrears. The tenant therefore moved this Tribunal seeking for cancellation, revocation, setting aside and/or invalidation of the proclamation of distress dated 17th April 2024.
4. He is also seeking for an order directing the landlord to serve him with a rent book concerning the suit premises for inspection and verification of the rent arrears. Finally, he seeks that a payment arrangement be entered into for purposes of clearing the confirmed rent arrears and in the meantime, he be granted peaceful and quiet possession of the suit premises.
5. The tenant/applicant simultaneously filed a notice of motion dated 3rd May 2024 under certificate of urgency seeking for restraining orders against the Respondents, their agents, servants or anyone acting on their behalf from evicting, entering, closing, blocking, distressing for rent arrears, carting away and/or selling the proclaimed goods or in any way interfering with his quiet possession and/or running of his shop in the premises situate on L.R No. 209/2763/29, Gikomba. He also sought for the same reliefs set out in his reference of even date.
6. The application is premised on the grounds set out on the face thereof and the supporting affidavit of the tenant/applicant sworn on 3rd May 2024 wherein he deposes that the landlord sought to recover Kshs 303,400/=. The proclamation of attachment is attached thereto as annexure PM-2. The notice lapsed on 1st May 2024.
7. The monthly rent payable by the tenant is Kshs 46,400/= and he acknowledges having been in rent arrears of Kshs 185,600/= by the time of filing this suit. He attaches rent payment receipts as annexure PM-3 to prove the rent payable. According to the tenant, he received an SMS from the 2nd Respondent indicating that the rent due as at 15th February 2024 stood at Kshs 123,900/= and it was therefore impractical that by 17th April 2024, the arrears would have risen to Kshs 303,400/= based on a monthly rent of Kshs 46,400/=.
8. Interim orders were granted on 7th May 2024 in terms of prayers 2, 4, 6 and 7 pending hearing inter-partes on 4th June 2024. On the subsequent hearing date, the Respondents did not attend court but there was no affidavit of service. The tenant was granted leave to file a supplementary affidavit within 7 days, if need be, and thereafter each party to file and exchange written submissions with the tenant starting together with their rent account statements. The matter was therefore fixed for mention on 29th July 2024.
9. On 29th July 2024, the tenant's Counsel appeared and indicated that he had not served a mention notice and sought for 7 days to file the rent account statement. The matter was then adjourned and fixed for further mention on 14th August 2024.
10. On 14th August 2024, only the Respondent's Counsel appeared and indicated that she was unaware of the orders of 14th August 2024. She therefore sought for more time to comply and the matter was therefore set down for further mention on 27th August 2024.
11. On 27th August 2024, both parties were represented and the Respondents' Counsel confirmed having filed a rent account statement together with a replying affidavit sworn by Gilbert Koros. The statement of account shows that the tenant owed the landlord a sum of Kshs 455,100/= as at May 2024.
12. The Respondents admit having moved to distress for the rent arrears which was over and above two (2) months stating that the same was lawful and cannot be injuncted or revoked. It is the Respondents' case that the tenant has not provided any documents to proof that she has paid the admitted rent arrears

of Kshs 185,000/=. It is denied that the tenant was allowed to operate in the suit premises without paying rent.

13. The tenant is accused of approaching this Tribunal with dirty hands and the court's discretion ought not be exercised in his favour. On the contrary, the Respondents contend that the landlord is entitled to the fruits of his investment and an order of injunction would be unfair and unjust.
14. It is to be noted that the tenant did not file his rent account statement.

B. Issues for determination

15. The following issues arise for determination.
 - a. Whether the tenant is entitled to the reliefs sought in his reference and application dated 3rd May 2024.
 - b. Who shall bear the costs of the case?

Issue (a) Whether the tenant is entitled to the reliefs sought in his reference and application dated 3rd May 2024

16. As noted above the tenant/applicant moved this Tribunal vide a Reference 3rd May 2024 under Section 12(4) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Cap 301, Laws of Kenya with a complaint that the landlord had served him with a proclamation of attachment by way of distress for rent dated 17th April 2024. The proclamation was for rent arrears of Kshs 303,400/= which according to the tenant was exaggerated, erroneous, unsubstantiated, fictitious and contested
17. The tenant however acknowledges owing the landlord Kshs 185,600/= which had been occasioned by high inflation rate and weakening of the Kenya currency vis-à-vis the US dollar which he had agreed with the landlord to clear in instalments.
18. The landlord went ahead to instruct the 3rd Respondent to execute for recovery of the contested rent arrears. The tenant therefore moved this Tribunal seeking for cancellation, revocation, setting aside and/or invalidation of the proclamation of distress dated 17th April 2024.
19. He is also seeking for an order directing the landlord to serve him with a rent book concerning the suit premises for inspection and verification of the rent arrears. Finally, he seeks that a payment arrangement be entered into for purposes of clearing the confirmed rent arrears and in the meantime, he be granted peaceful and quiet possession of the suit premises.
20. The tenant/applicant simultaneously filed a notice of motion dated 3rd May 2024 under certificate of urgency seeking for restraining orders against the Respondents, their agents, servants or anyone acting on their behalf from evicting, entering, closing, blocking, distressing for rent arrears, carting away and/or selling the proclaimed goods or in any way interfering with his quiet possession and/or running of his shop in the premises situate on L.R NO. 209/2763/29, GIKOMBA He also sought for the same reliefs set out in his reference of even date.
21. The application is premised on the grounds set out on the face thereof and the supporting affidavit of the tenant/applicant sworn on 3rd May 2024 wherein he deposes that the landlord sought to recover Kshs 303,400/=. The proclamation is attached thereto as annexure PM-2. The notice lapsed on 1st May 2024.
22. The monthly rent payable by the tenant is Kshs 46,400/= and he acknowledges having been in rent arrears of Kshs 185,600/= by the time of filing this suit. He attaches rent payment receipts as annexure

PM-3 to prove the rent payable. According to the tenant, he received an SMS from the 2nd Respondent indicating that the rent due as at 15th February 2024 stood at Kshs 123,900/= and it was therefore impractical that by 17th April 2024, the arrears would have risen to Kshs 303,400/= based on a monthly rent of Kshs 46,400/=.

23. Interim orders were granted on 7th May 2024 in terms of prayers 2, 4, 6 and 7 pending hearing inter-partes on 4th June 2024.
24. Although the 1st tenant deposes in his supporting affidavit that they have faithfully fulfilled their obligations under the tenancy agreement by paying rent, he has admitted in his replying affidavit sworn on 17th July 2024 that there were indeed rent arrears outstanding. He further states that he attempted to pay Kshs 50,000/= vide his bankers' cheque marked EMM2 but the landlord declined insisting on payment of the whole balance.
25. On 27th August 2024, both parties were represented and the Respondents' Counsel confirmed having filed a rent account statement together with a replying affidavit sworn by Gilbert Koros. The statement of account shows that the tenant owed the landlord a sum of Kshs 455,100/= as at May 2024.
26. The Respondents admit having moved to distress for the rent arrears which was over and above two (2) months stating that the same was lawful and could not therefore be injunctioned or revoked. It is the Respondents' case that the tenant has not provided any documents to proof that she has paid the admitted arrears of Kshs 185,000/=. It is denied that the tenant was allowed to operate in the suit premises without paying rent.
27. The tenant is accused of approaching this Tribunal with dirty hands and the court's discretion ought not be exercised in his favour. On the contrary, the Respondents contend that the landlord is entitled to the fruits of his investment and an order of injunction would be unfair and unjust.
28. It is to be noted that the tenant did not file his rent account statement.
29. In the case of Samuel Kipkori Ngeno and Another v Local Authorities Pension Trust (Registered Trustees) & Another [2013] eKLR at paragraphs 9 and 12, the Superior Court 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. Why would a tenant allow himself to fall into such huge arrears of rent”?

“12. The temporary injunction sought in the present application is an equitable remedy at the court's discretion. He who comes to equity must come with clean hands. A tenant who is in huge arrears of rent is underserving of the court's discretion. The court cannot be refuge of a tenant who fails to meet his principal obligation of paying rent as and when it becomes due”.

30. In the instant case, the 2nd Respondent/agent has sworn an affidavit and presented a rent account statement showing that the tenant was indeed indebted to the landlord in the sum of Kshs 455,100/= as at May 2024. The tenant did not dispute the said tabulation neither has he provided any evidence to contradict the same. He has in any event admitted owing Kshs 185,600/= which he has failed to pay since the institution of this suit in a clear act of abuse of court process. This Tribunal cannot force parties to enter into the undisclosed payment arrangement and we agree with the Respondents' submission that the tenant approached this court with unclean hands.

31. Having failed to pay rent as and when the same fell due and payable, the tenant is not entitled to the equitable remedy of injunction against the Respondents. The interim orders of injunction issued herein were given after the tenant misrepresented facts by alleging that the rent arrears were in dispute.
32. The tenant having fallen into huge arrears, the landlord was entitled to use lawful means to recover the same and the injunction orders issued herein ought to be discharged and/or set aside.

Issue (b) Who shall bear the costs of the case?

33. 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 award costs to the Respondents being the successful parties.

C. Orders

34. Given the above analysis, the final orders which commend to us are;
 - a. The tenants' application and reference dated 3rd May 2024 are hereby dismissed with costs and the interim orders discharged.
 - b. The landlord is entitled to use lawful means to recover the rent in arrears.
 - c. The Respondents' costs are assessed at Kshs.30,000/= against the tenant.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 4TH DAY OF OCTOBER 2024

HON. GAKUHI CHEGE

(PANEL CHAIRPERSON)

BUSINESS PREMISES RENT TRIBUNAL

HON JOYCE A OSODO

(MEMBER)

In the presence of:

Miss Ayuma h/b for Khisa for tenant

No appearance for the landlord