



**Legacy Bookshop Limited v Kenyatta International Convention Center
(Tribunal Case 735 of 2016) [2023] KEBPRT 1257 (KLR) (8 June 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 1257 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE 735 OF 2016
CN MUGAMBI, CHAIR
JUNE 8, 2023**

BETWEEN

LEGACY BOOKSHOP LIMITED TENANT

AND

KENYATTA INTERNATIONAL CONVENTION CENTER LANDLORD

RULING

Introduction

1. The Tenant's application dated 20.1.2023 seeks orders that the orders issued by the tribunal on 31.1.2017 be reinstated, that the Tribunal be pleased to set aside its dismissal order of the reference dated 5.9.2016 and made on 28.7.2022 for want of prosecution. The tenant has also sought the costs of the application.

The Tenant's depositions

2. The tenant's affidavit sworn by Ms. Everlyne Nyambura Njoroge Advocate, may be summarized as follows;-
 - a. That the firm of Jacklyne P.A. Omolo & Company Advocates where the deponent works is fully seized of this matter.
 - b. That the reference dated 5.9.2016 was dismissed for want of prosecution on 28.7.2022 and the deponent had been in employment for only two days when the matter was dismissed.
 - c. That at the material time, the deponent had not gotten conversant with the issue of Microsoft teams on an apple lap top using the IOS operating system and therefore she had difficulties navigating the link to log into the court session.



- d. That the Counsel's failure to attend court was due to a technical malfunction on her part that should not be visited upon the tenant/Applicant.
- e. That the Applicant who has been barred from the suit premises is desirous to have this suit reinstated.
- f. That the Respondent has increased the rent arbitrary without due notice to the tenant/Applicant and has breached the terms of the agreement.
- g. That on 26.10.2016, the Respondent served the Applicant with a notice of termination of lease on the grounds of reconstruction and renovation.
- h. That the application has been done without undue delay.

The landlord's depositions

- 3. The Respondent's affidavit has been sworn by Bosket W. Taank Advocate who has deponed that the Applicant's suit was dismissed on 28.7.2022 after the Tribunal established that the Respondent's application dated 7.1.2020 had merit.
- 4. That the Applicant instituted this suit on 5.9.2016, took no action for a period of two years and it is therefore improper to impute that the suit was dismissed for non-attendance, the Applicant's delay in prosecuting their case has not been sufficiently explained and is inexcusable.
- 5. The deponent has further deponed that if the suit is reinstated, the Applicant will suffer untold prejudice in terms of time and legal costs and the tribunal should exercise its discretion and dismiss the application.
- 6. It is further deponed that, despite not being served with a notice to increase rent, the tenant was served with a new lease contract stating the new terms.

Analysis an determination

- 7. The only issue that arises for determination is whether the tenant's application under consideration ought to be allowed in terms of the prayers sought.
- 8. Both parties have filed written submissions and I will consider the same in the ruling.
- 9. The tenant's reference to the Tribunal brought under Section 12(4) of Cap 301 dated 5.9.2016, was presented and received in court on 17.1.2017 and was first heard on 31.1.2017. By an application dated 5.9.2016, the tenant applied for orders that the landlord be restrained from increasing rent and that the Applicant be "granted leave" to continue running its business in the premises. In the complaint, the tenant had complained that the landlord had increased the rent from Kshs. 219,240/= to Kshs. 440,818.56/= without issuing any notice of rent increase.
- 10. From the record, the matter appeared in court on 8.3.2017 when it was fixed for hearing on 19.5.2017. Nothing seems to have happened until 10.2.2020 when the Counsel for the landlord fixed the matter for hearing on 16.4.2020. On 16.4.2020, nothing seems to have proceeded again and on 26.6.2022, the Counsel for the landlord again fixed the application for hearing on 28.7.2022. On this date, there was no appearance from the firm of Jackline Omolo for the tenant and the reference was dismissed for want of prosecution with costs to the landlord.



11. It must be pointed out that from the record, the tenant has not taken any steps to prosecute its reference and application since March 2017. That is a period of approximately five years! After 2017, only the landlord has made any meaningful attempts to have this matter heard.
12. The reason the tenant gives for the reinstatement of the suit is that its Counsel had technical challenges to log into the proceedings for the day and that Counsel had only been engaged two days before the 28.7.2022. I think the tenant's argument does not address the elephant in the room, which is, what had the tenant done to prosecute its reference since March 2017 and not merely what happened on 28.7.2022. The landlord's application dated 7.1.2020, sought to have the reference dismissed for want of prosecution. It was made and filed before Counsel herein was engaged. The reference was clearly dismissed for want of prosecution and not due to absence of Counsel.
13. It is also to be noted that from a perusal of the record, the tenant did not file any response to the application, no explanation has been offered why no steps was taken to prosecute the matter between March 2017 and February 2020 when the application for dismissal was made. Even in the instant application, no reasons for the delay have been adduced as the tenant has only contended itself with explaining its absence from court on 28.7.2022.
14. The tenant has brought up the issue of abnormal court operations due to the effects of Covid 19 pandemic. I do not think this holds any water for the simple reason that there was no Covid 19 pandemic during the period March 2017 to February 2020 which is the material time for the prayers for this relief.
15. I agree with the views of Counsel for the landlord that it is the duty of the tenant's counsel to get on with the case and which clearly has not been done in this case.
16. The power to set aside the judgment is a discretionary power and which the court exercises judiciously. In Nairobi ELC Civil Case No. 322 OF 2009 – *Eric Oluoch Olele vs Kenneth Obae*, the court stated;

“the court has discretion to reinstate a suit that has been dismissed such as the plaintiff's instant suit but such discretion cannot be exercised in a vacuum. In the circumstances of the present application, the Applicant is obligated to satisfy the court that he was prevented from attending the court when the matter came up for hearing of the notice to show cause by sufficient cause and that there was a reasonable explanation for the delay and/or non-prosecution of the suit.”
17. I am of the firm view that the tenant has not given any good reasons for the delay in the prosecution of its reference to the tribunal and in those circumstances, is not deserving of the exercise of the Tribunal's discretion in its favour. Consequently, and for the reasons above proffered, the tenant's application dated 30.1.2023 is dismissed with costs to the landlord.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 8TH DAY OF JUNE 2023

HON. CYPRIAN MUGAMBI

CHAIRPERSON

In the presence of;

Ms. Taank for the Respondent/landlord

Ms. Njoroge for the Applicant/Tenant

