



Ngororo v Cares Catering and Supplies Ltd & 3 others (Tribunal Case E471 of 2023) [2023] KEBPRT 710 (KLR) (8 December 2023) (Ruling)

Neutral citation: [2023] KEBPRT 710 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E471 OF 2023
A MUMA, MEMBER
DECEMBER 8, 2023**

BETWEEN

JOHN NJOROGI NGORORO APPLICANT

AND

CARES CATERING AND SUPPLIES LTD 1ST RESPONDENT

ESTHER NJERI 2ND RESPONDENT

DAYSTAR AUCTIONEERS 3RD RESPONDENT

MORAN AUCTIONEERS 4TH RESPONDENT

RULING

A. Parties and Representatives

1. The applicant, John Njoroge Ngororo, is a Tenant who rented space at property known as LR Number Kiambaa/Ruaka/3039 within Kiambu County. (hereinafter known as the ‘the Tenant’).
2. The firm of S. Ndwiga & Co. Advocates appears for the Applicant/Tenant.
3. The 1st and 2nd Respondent is the Landlord and registered proprietor of the property LR Number Kiambaa/Ruaka/3039 within Kiambu County (hereinafter known as the ‘the suit premises’).
4. The firm of Mulanya & Maondo Advocates appears for the Respondent.
5. The Auctioneer/3rd Respondent (hereinafter referred to as “the Auctioneer”) is firm of Auctioneers under the [Auctioneers Act](#) 1996.
6. The Auctioneers/4th Respondent (hereinafter referred to as “the Auctioneer”) is firm of Auctioneers under the [Auctioneers Act](#) 1996.



B. The Dispute Background

7. The Tenant approached this Tribunal vide a Reference dated 2nd May 2023 and an Application dated 10th May 2023 seeking among other orders that pending the hearing and determination of the reference, the Tribunal restrain the 1st, 2nd and 4th Respondent from effecting the distraint or in any way interfering with the quiet possession and enjoyment by the tenant of the suit premises situate at Plot No Kiamba/ Ruaka 3039 Kiambu County.
8. The Tenant alleges that the Landlord had instructed two auctioneers, the 3rd and the 4th Respondent to effect rent distraint at the same time and demanded for rent arrears that cannot be justified. Further, the Tenant alleges that the Landlord threatened to evict him without the Tribunal's authority.
9. Vide an Order issued on 16th May 2023, the Tribunal issued an Order for injunction restraining the 1st, 2nd and 4th Respondent from effecting the distraint or in any way interfering with the quiet possession and enjoyment by the tenant of the suit premises situate at Plot No Kiamba/ Ruaka 3039 Kiambu County until the determination of the case. The Tribunal also ordered the Tenant to pay rent for the month of April and May.
10. The Landlord also filed an application dated 28th August 2023 seeking among many orders that the Tribunal issues an order of eviction against the Tenant and give vacant possession of the suit premises and allow the Landlord to levy distress for rent arrears against the Tenant.

C. Tenant's Case

11. The Tenant avers he entered into a Tenancy Agreement with the Landlord for the suit premises at a monthly rent of Kshs 200,000 which was later adjusted to Kshs 150,000 in August 2019 and further to Kshs 130,000 in December 2019.
12. He contended that the piece of land was not in a tenable condition and he had to undertake a backfiling exercise and installation of septic tanks on the property to have it in a tenable condition. He further stated that he sub-let part of the premises to another Tenant with the consent of the Landlord. However, he contends that the Landlord entered into an agreement with the sub-tenant without his knowledge and consent and started receiving rent directly from the sub-tenant.
13. He states that this prompted him to surrender the property back to the Landlord on condition that he provides another tenancy agreement for the portion he was occupying.
14. The Tenant avers that due to the costs incurred in the backfiling process and the loss of income from the sub-tenant, he was unable to meet the rent payable demands thus defaulting on the same.
15. He avers that the 3rd Respondent with instructions from the Landlord, proclaimed his items for rent arrears amounting to Kshs 2,700,000. He alleges that he paid Kshs 307,000 to Daystar Auctioneers in a bid to settle the rent arrears. He avers that even before he was through with Daystar Auctioneers, the Landlord instructed the 4th Respondent, Moran Auctioneers to proclaim the same items that were proclaimed by Daystar Auctioneers.
16. Further, he avers that the Proclamation Notice by Moran Auctioneers indicated that he was in arrears of Kshs 3,072,000, a figure that is different from the proclamation notice by Daystar Auctioneers which was Kshs 2,700,000.



D. Landlord's Case

17. The Landlord avers that Tenant occupied that suit premises in February 2018 at an agreed monthly rent of Kshs 200,000 which was later adjusted to Kshs 150,000 and later to Kshs 130,000 to cushion the Tenant from the harsh economic times caused by Covid-19.
18. She avers that when the Tenant took possession of the property, he leveled the ground and put up containers which were modified into small shops and let to various tenants from whom the tenant has been collecting rent.
19. She contends that the Tenant has not been consistent in payment of rent making him fall behind into arrears of Kshs 2,700,000 as of January 2023 forcing her to instruct the 3rd Respondent to levy distress for rent.
20. She contends that the Auctioneers never returned with any feedback and that they abandoned the attachment and sale of the goods proclaimed. This prompted her to seek the services of the 4th Respondent who proceeded to proclaim the goods of the Tenant.

E. 3rd Respondent's Case

21. The 3rd Respondent filed a Replying Affidavit sworn by Peter Mwangi Gathogo, who contends that he was instructed by the 1st Respondent to levy distress for rent arrears against the Tenant. He states that he proclaimed the distrainable items, served the proclamation to the Tenant and advertised for sale by public auction the proclaimed items on 2nd March 2023.
22. He states that the Tenant made an effort to stop the conduct of the sale by public auction by payment of Kshs 307,000. He avers that he got into an arrangement with the Tenant for payment of rent arrears at Kshs 50,000 per month in addition to paying the monthly rent as it fell due. He contends that the Landlord was made aware of this arrangement.
23. He contends that even before reconciliation of accounts, the Landlord instructed another Auctioneer on 28th April 2023 to levy distress for rent. Notably, he states that the Tenant paid Kshs 200,000 being the rent for April at Kshs 130,000 and an additional Kshs 70,000.

F. Jurisdiction

24. The Jurisdiction of this Honourable Court has not been contested.

G. Issues for Determination

25. I have carefully perused all the pleadings and evidence presented before this Honourable Tribunal by the parties. It is therefore my respectful finding that the following issues are ripe for determination;
 - a. Whether the Tenant is in arrears?
 - b. Whether the Proclamation Notice by the 4th Respondent is valid?
 - c. Whether the Court should grant the orders sought by the Landlord?



H. Analysis and Findings

a. Whether the Tenant is in arrears?

26. The Tenant at paragraph 5 his Supporting Affidavit dated 10th May 2023 and Written Submissions dated 12th September 2023 admitted to be in rent arrears.
27. The Landlord contends that as of January 2023, when he instructed the 3rd Respondent to levy distress for rent, the Tenant was in arrears of Kshs 2,700,000 which had escalated to Kshs 3,072,000 when she instructed the 4th Respondent to levy distress for rent.
28. I note that the Landlord has provided statements of account for the period between February 2018 and April 2023 detailing the inconsistency of the Tenant in payment of rent.
29. In view of the foregoing and in respect to issue of whether the Tenant is in rent arrears, this Tribunal finds that the Tenant is in rent arrears.
30. I also note that the amounts indicated as rent payment by the Tenant in the Statement of Account filed by the Respondent for the period for the month of April 2023 correspond to the receipts of rent payment filed by the Tenant for the same period. The Tenant has also provided statement of account evidencing payment of rent for the month of April and May as ordered by the Tribunal and for the month June 2023.

b. Whether the Proclamation Notice by the 4th Respondent is valid?

31. It is not in dispute that the Landlord instructed two different auctioneers, the 3rd and 4th Respondent herein to levy distress for rent against the Tenant. It is also evident from the Notices served by the two auctioneers that the items proclaimed by the 3rd Respondent are similar to the ones proclaimed by the 4th Respondent.
32. It is not in contention that the Tenant paid Kshs 307,000 to the 3rd Respondent as an agent of the Landlord in a bid to reduce the rent arrears.
33. I carefully note that the Landlord had not provided any evidence to show that he had withdrew his instructions to the 3rd Respondent. It is therefore my opinion that the Tenant was right to engage with the 3rd Respondent as an agent of the Landlord.
34. Further, by instructing two auctioneers, the Tenant will be condemned to pay the auctioneers charges and other incidental expenses that will be claimed by both auctioneers.
35. This was the position held in the case of *Patrick Kangethe Edward v Co-operative Bank of Kenya Limited & another* [2016] eKLR where the High Court at Mombasa held as follows;
 10. In the present case it has been pleaded and conceded that the 1st defendant has instructed the 2nd and 3rd defendant in this suit as well as the 2nd defendant in Suit No 54 of 2016 all seeking to recover the same sum of money and therefore entitled to recover for such sale their respective costs and expenses. Indeed the 2nd defendant in this matter, Nguru Auctioneers, has disclosed his fees excluding advertisements and other necessary incidental expenses and VAT at Kshs 1,225,000 or thereabout.
 11. Leakey auctioneers on the other hand has equally laid a claim to auctioneers charges and other incidental expenses. The same position has been taken by



Jusrick Merchant Auctioneers who have pegged their charges on the provisions of the Auctioneers Act.

12. This to me suggest that after the auction, whether successful or not, the three auctioneers will lay a claim to fees and in terms of clause 2.1 of the charge, such payment or burden would fall upon the shoulders of the plaintiff to bear. My concern as a court is whether the 1st defendant has discharged its duty of care to the plaintiff by exposing them to thrice the expenses of realisation. That to me is another issue that at trial the court will have to interrogate and resolve. Those two concerns lead me to the conclusion that the plaintiff may have as well demonstrated a *prima facie* case.

36. In light of the foregoing, the Tribunal finds the Proclamation by the 4th Respondent invalid.

c. Whether the Court should grant the orders sought by the Landlord.

37. The Landlord sought for orders of eviction of the Tenant to vacate and give vacant possession of the suit premises and for the Tribunal to allow the Landlord to levy distress for rent arrears.
38. It is trite law under Section 12 1 (h) of the Act that this Tribunal has the power to permit levy for distress of rent.
39. It is trite law as previously settled by various Courts that where the Tenant is in default of their rent obligations, the Landlord is at liberty to distress. Section 3(1) of the Distress for Rent Act, Cap. 293 provides as follows:

“Subject to the provisions of this Act and any other written law, any person having any rent or rent service in arrear and due upon a grant, lease, demise 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”.

40. It has been demonstrated that the Tenant has outstanding arrears of about Kshs 3,072,000 as of 28th April 2023. Therefore, the Landlord has a right to distress.
41. I note that the Landlord has been considerate enough to cushion the Tenant from the harsh economic effects of the Covid-19 pandemic by adjusting the rent payable from Kshs 200,000 to Kshs 130,000 in December 2019, which figure has not been adjusted upwards. Despite this adjustment, the Tenant still accrued arrears in rent.
42. However, the Tenant has demonstrated willingness to pay the rent and the arrears. The Tenant provided Mpesa statements evidencing payment of rent for the months of April, May and June 2023. I am therefore, inclined to give him a final opportunity to honour his commitment to offset the rent arrears.
43. Having made the above findings, I now turn to the prayers made by each party in these proceedings and make the following orders in the upshot.

I. Orders

44. In the upshot, the Tenant’s Reference dated 2nd May 2023 and Application dated 10th May 2023 is granted in the following terms:
- a. The Tribunal grants the Tenant a rebate of Kshs 1,000,000.00 and finds the Tenant in arrears of Kshs 2,000,000.00.



- b. The Tenant to defray all the arrears on or before 31st January 2024.
- c. In default, the Landlord's Application dated 28th August 2023 is granted.
- d. Each party shall bear their own costs.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY BY HON. MUMA THIS 8TH DAY OF DECEMBER 2023 IN PRESENCE OF MAYAKA HOLDING BRIEF FOR NYANTIKA FOR THE LANDLORD AND NDWIGA FOR THE APPLICANT/TENANT.

HON. A MUMA

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

