



**Makenzi v Mburu (Tribunal Case E1177 of 2022)
[2024] KEBPRT 874 (KLR) (1 July 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 874 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E1177 OF 2022
A MUMA, MEMBER
JULY 1, 2024**

BETWEEN

JOSPHAT MUTINDA MAKENZI TENANT

AND

CHARLES GATHERU MBURU LANDLORD

RULING

A. Parties and their Representatives

1. Josphat Mutinda Makenzi is the Tenant running a business (Chips Eatery) located on a plot of land in Kangemi near Kiumbuini Primary School (the “suit premises”)
2. The firm of Waruiru Kariuki and Mwangale Advocates represents the Tenant in this matter
3. Charles Gatheru Mburu, (the “Landlord”) is the owner of the suit premises located on the plot of land in Kangemi near Kiumbuini Primary School.
4. The Landlord appears in person.

B. Background of the Dispute

5. Through a Reference and an Application dated 13th December, 2022 canvassed through Certificate of Urgency of even date, the Tenant moved this Honourable Tribunal seeking the following orders that inter-alia: the Landlord be ordered to restore the electricity to the suit premises, the Landlord be restrained from interfering with the quiet occupation and enjoyment of the suit premises and the OCS Kangemi Police Station to assist with compliance of the Orders of this Honourable Tribunal.
6. Upon perusal of the Tenant’s Application and Reference, the Honourable Tribunal, on 15th December, 2022, issued the following orders ex-parte: pending hearing of the Application inter-parties the Landlord be restrained from interfering with the quiet occupation and enjoyment of the suit



premises and the OCS Kangemi Police Station to assist with compliance of the Orders. The Tribunal further directed the matter be heard on 9th January, 2023 and the Tenant to pay the rent for the months of December 2022 and January 2023.

7. In response, the Landlord filed a Replying Affidavit dated 13th May, 2024 sworn by the Landlord.
8. Therefore, it is the Tenant's Application dated 13th December, 2022 which is subject of this Ruling.

C. Tenant's Case

9. Vide the Affidavit sworn by the Tenant on 13th December, 2022, the Tenant avers that the Landlord without any justifiable reason and with the intention of evicting him from the suit premises disconnected the electricity power supply to the premises.
10. The Tenant further avers that as a result of the disconnection he has suffered loss and damage.

D. Landlords' Case

11. The Landlord, vide his Replying Affidavit dated 13th May, 2024, swears that the Tenant continuously failed to pay his rent and was in breach of the terms of the tenancy. The Landlord further swears that the Tenant has been continued to default paying rent despite being ordered to pay the outstanding rent arrears on two (2) separate occasions by this Honourable Tribunal.
12. The Landlord avers that he did not disconnect the electricity as the same was done by the service provider after the Tenant had failed to pay for services rendered. He further avers that he had made attempts, in good faith, to restore the power to the premises and had even allowed the Tenant access to the suit premises despite the outstanding rent arrears.
13. The Landlord also avers that he has allowed the Tenant to operate his business however the premises have remained closed by the Tenant. He notes that the Tenant has been reluctant to open the business as his tools of trade had been earmarked for auction by other creditors.

E. Jurisdiction

14. The Jurisdiction of this Honourable Tribunal is not contested by either party and therefore is not in dispute.

F. List For Issues For Determination

15. Having carefully perused the Pleadings presented before this Honourable Tribunal by the parties, it is therefore my respectful finding that the sole issue for determination before this Honourable Tribunal is: Whether the Tenant is in arrears of rent

G. Analysis And Determination

a. Whether the Tenant is in arrears of rent?

16. The Tenant moved this Honourable Tribunal seeking to restrain the Landlord from interfering with the peaceful occupation of the suit premises and for the Landlord to restore the electricity of the suit premises. The Application is founded on ground that the Landlord is intent on evicting him from the premises and as a result has continued to frustrate him by continuously disconnecting the electricity.
17. The Tenant's Application is founded on Section 12 (4) of Landlord and Tenant (Shops, Hotels and Catering Establishments), Cap 301, Laws of Kenya which provides that:



- 4) In addition to any other powers specifically conferred on it by or under this Act, a Tribunal may investigate any complaint relating to a controlled tenancy made to it by the landlord or the tenant, and may make such order thereon as it deems fit
18. In response to the allegations, the Landlord furnished this Honourable Tribunal with a filtered M-pesa statement, from the period of 1st January, 2022 to 23rd April, 2024, which covered the transactions between himself and the Tenant. He further produced an electricity prepayment statement for the month of January, 2023 for the suit premises as evidence of him settling the electricity bill per this Tribunal's instructions. The Landlord also provided a Decree issued in the suit SCCCOMM/E065/2023: JAMBO CREDIT LIMITED V JOSPHAT MUTINDA MAKEZI. The Decree denotes that Judgement was entered in favour of Jambo Credit Limited for Kshs. 132,000.00 plus costs of the claim assessed at Kshs. 36,800.00.
19. This Honourable Tribunal notes that the Tenant did not file any response challenging the Landlord's response.
20. In light of the above averments, this Honourable Tribunal notes from the Electricity prepayment statement submitted by the Landlord, the duty to settle the electricity bill falls to the user. The rationale for this is that the system employs a prepaid tokens system which needs to be prepaid by the user before using the electricity. Therefore, in the matter herein, there is rebuttable presumption that the user, in this case the Tenant, is mandated to settle the electricity bill before use.
21. On the issue of rent, it is not in contest that the agreed upon monthly rent for the suit premises is Kshs. 10,000.00. However, the Landlord claims that Tenant has defaulted paying rent for the premises for a period of two (2) years in the sum of Kshs. 240,000.00. In support, the Landlord adduced a statement denoting the total amount paid by the Tenant to be Kshs. 22,000.00. This Tribunal notes that the Tenant did not challenge the statement or adduce any evidence challenging the outstanding arrears.
22. The Tribunal also appreciates that the Tenant failed to comply with this Tribunal's directions issued on 22nd February, 2023 and 6th February, 2024 in which he was directed to pay the rent of the premises and adduce evidence of the same. As a result of the foregoing, I find that the Tenant is in arrears and he has failed to settle the rent amount due for the last two years.
23. The Tenant also avers that he has suffered losses to a tune of Kshs. 235,000.00. The Tenant, however, did not plead for the same nor did he provide any evidence in support of the same. It is trite law that a claim for special damages have to be claimed and strictly proved by evidence. On this I am guided by the decision of the Court of Appeal in *Richard Okuku Oloo v South Nyanza Sugar Co. Ltd* (2013) eKLR where the Court held that:

“We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity

24. For those reasons and after careful consideration of the facts and pleadings presented to this Tribunal, I find that the Tenant's Application and Reference dated 13th December, 2022 lacks merit and it's a mere tool used by the Tenant to escape his responsibilities.

H. Orders

25. In the upshot the following orders shall abide;
- a. The Tenant's Reference and Application dated 13th December, 2022 are hereby dismissed;



- b. The Tenant is hereby ordered to clear his arrears of Kshs. 240,000.00 within 14 days of this Ruling failure to which the Landlord shall be at liberty to distress, break in and take back possession of the suit premises;
- c. The OCS Kangemi Police Station to assist with compliance of the Orders; and
- d. Each party shall their own costs of this suit.

HON A. MUMA

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

RULING DATED, DELIVERED AND SIGNED AT NAIROBI ON THIS 1ST DAY OF JULY 2024

In the absence of the parties.

HON A. MUMA

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

