



**Mucheke v Mbugua & another (Tribunal Case E224 of 2023)  
[2024] KEBPRT 769 (KLR) (Civ) (21 May 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 769 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
CIVIL  
TRIBUNAL CASE E224 OF 2023  
N WAHOME, CHAIR & J OSODO, MEMBER  
MAY 21, 2024**

**BETWEEN**

**JAMES MAINA MUCHEKE ..... APPLICANT**

**AND**

**KENNEDY NJOROGE MBUGUA ..... 1<sup>ST</sup> RESPONDENT**

**FECUND COMMERCIAL AGENCY ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Tenant/Applicant founded these proceedings on the reference dated 11<sup>th</sup> December 2023. The same was under Section 12(4) of the [Landlord and Tenant \(Shops, Hotels and Catering establishments\) Act](#) (Cap. 301) hereinafter “the Act”. The grievance in the reference is that:-

“The respondents closed the premises to compel the Applicant to vacate the suit premises for failing to pay the increased rent from Kshs.7,000/- to Kshs.10,000/- per month without approval from this Honourable Tribunal”.
2. Accompanying the reference was the Notice of Motion of the even date. It principally sought for restraining orders against the Respondents from interfering with his quiet possession of the demised premises pending the hearing of the application and the suit. The Respondents were also to be compelled to reopen the demised premises and not increase rent arbitrarily.
3. The evidence of the Applicant is that:-
  - a. The rent for the demised premises was Kshs.7,000/- per month which the Respondent had arbitrarily increased to Kshs.10,000/-.



- b. While away from the premises, the respondents illegally closed the same down with the intention of evicting him.
  - c. He had paid all the rents in arrears including the rent for January and February, 2024 at Kshs.82,000/- (annexure “JMM1” and “JMM2”).
  - d. The rent for December, 2023 should not be payable as the premises had been closed.
  - e. Rent paid for December, 2023 if already paid should be ordered to cater for other months in the future.
4. On their part, the respondents filed the replying affidavit sworn by Margaret Wanjiku on the 5<sup>th</sup> February 2024 and submissions dated 15<sup>th</sup> February 2024. The case for the respondents is that:-
- a. The Tenant was a serial rent defaulter and was in arrears for 11 months at the time of coming to court.
  - b. The Tenant had failed to clear the rental arrears at Kshs.82,000/- as he had only paid Kshs.37,500.
  - c. She had the right to levy distress in recovery of rent arrears.
  - d. The applicant should not be allowed quiet possession while he continues to accrue rent in arrears.
  - e. Required to close down premises to compel the Tenant to pay rent.
  - f. No evidence had been offered to show that there was any attempt to increase rent.
  - g. The tenant had not satisfied the requirements for the grant of the orders sought.
5. Having perused the parties evidence and submissions, I am of the view that the issues for determination in this matter are the following:-
- A. Whether the Applicant’s application dated 11<sup>th</sup> December 2023 is merited.
  - B. Whether the Landlord was entitled to close down the Tenant’s premises and to levy distress.
  - C. Whether the Landlord is entitled to increase rent payable on the demised premises.
  - D. Who should bear the costs of the suit.

**Issued No. A- Whether the Applicant’s application dated 11<sup>th</sup> December 2023 is merited.**

6. The landlord has admitted that she closed down the demised premises to enable her levy distress. There is however no evidence offered to show that any required process of levying distress had been effected. There is no notification of intention to levy distress and no inventory if at all has been presented to the court.
7. Though Section 3(1) of the [Distress for rent Act](#) allows a Landlord as a matter of right to levy distress, the same should be through a licensed auctioneer and all the protocols attendant thereto must be observed. It was not the case here.
8. I therefore do find that the Tenant had a right to resort to court action for intervention to preserve his fundamental and property rights. In this am convinced that the Applicant has established and satisfied all the pre-requisites for the grant of the orders sought as laid down in the case of Giella – vs- Cassman Brown (1973) EA.



9. The process of levying distress as known to law does not entail locking up a business premises. I also note that the Respondents did not deny having intimated to increase rent on the demised premises from Kshs.7,000/- to Kshs.10,000/-. This was not denied in their pleadings, the denial only came up in the respondents submissions. It trite law that submissions are not evidence and therefore doubt the probative value of that denial. I would therefore allow the Applicant's application for the reasons given.

**Issue B- Whether the landlord was entitled to close down the Tenant's premises and to levy distress.**

10. As earlier determined in this Ruling, the Landlord is entitled under Section 3(1) of the [Distress for Rent Act](#) to levy distress. The only qualification for that right to accrue, is that there are rents in arrears. There is no dispute that the Tenant had rent in arrears at Kshs.82,000/- which was only paid on the strength of the orders of this court.
11. It is also settled that a landlord does not require the authority of the court to levy such distress. However there must be notification and proclamation in execution of the distress and due process all through to the sale and eventual issuance of a certificate of sale. There however do not seem to have been any process undertaken by the respondents in the purported levy of distress.
12. In any event, levy of distress does not entail locking up of the demised premises and the whole process was therefore fraught with irregularities and untenable in the eyes of the law.

**Issue C. Whether the landlord is entitled to increase rent on the demised premises.**

13. The landlord has denied any such intention to increase rent on the demised premises. The Tenant on his part has insisted that his refusal to comply by payment of the increased rent at Kshs.10,000/- led to the closure of the demised premises.
14. The Landlord having denied such increment, and there being no materials to support such an increment as provided for under section 4(2) of the Act and Regulation 4(1) of the Regulations to the Act, such purported increment of rent would be a nullity in law and of no legal effect.

**Issue No. D Who should bear the costs of this suit.**

15. The Tenant was in arrears at Kshs.82,000/- when the landlord locked up the demised premises for the month of December, 2023. He was therefore not meeting his cardinal obligations one of which was to pay rent when and as it fell due. The landlord on her part took the law into her hands by purporting to arbitrarily increase rent payable on the demised premises and illegally locking the same up. In the circumstances, each party is to bear own costs.
16. There is no dispute that the demised premises were closed during the month of December 2023. The same was not with the authority of the court nor the law. The rent payable for the month of December, 2023 if already paid is to be used as rent for any other future month. It would be oppressive to require the Tenant to pay rent for that particular month.
16. On looking at the reference dated 11/12/2024, I find that the issues therein have been fully determined in this Ruling. There is therefore nothing for further determination. The same is also ordered as settled in the same terms as the application.
17. In the final analysis, I make the following orders:-
- (i) That the applicant's shall be allowed quiet possession of the demised premises.
  - (ii) That the purported levy of distress and rent increment on the demised premises was unlawful.



- (iii) That the rent for December, 2023 when the demised premises was closed is not payable and if already paid, the same to be credited to the Tenant's rent account.
- (iv) The reference dated 11<sup>th</sup> December 2023 is fully comprised by this Ruling and is settled in the same terms.
- (v) That each party to bear own costs.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 21<sup>ST</sup> DAY OF MAY 2024.**

**HON. NDEGWA WAHOME MBS - PANEL CHAIRPERSON**

**HON. JOYCE MURIGI - MEMBER**

**BUSINESS PREMISES RENT TRIBUNAL**

Ruling delivered in the presence of M/S Nasimiyu holding brief for M/S Wanjiku Wamae for the Applicant/Tenant and Mr. Maina for the 1<sup>st</sup> Respondent/Landlord.

Court: The parties to be supplied with certified copies of the Ruling upon payment of the requisite fees.

**HON. NDEGWA WAHOME MBS - PANEL CHAIRPERSON**

**HON. JOYCE MURIGI - MEMBER**

**BUSINESS PREMISES RENT TRIBUNAL**

