



**Infection Prevention & Control Associates Ltd v Simbi Investors Limited & 2 others  
(Tribunal Case E979 of 2023) [2023] KEBPRT 1106 (KLR) (22 December 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 1106 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E979 OF 2023  
N WAHOME, MEMBER  
DECEMBER 22, 2023**

**BETWEEN**

**INFECTION PREVENTION & CONTROL ASSOCIATES LTD ..... TENANT**

**AND**

**SIMBI INVESTORS LIMITED ..... 1<sup>ST</sup> LANDLORD**

**REGENT AUCTIONEERS ..... 2<sup>ND</sup> LANDLORD**

**AND**

**GEORGE NJUGUNA ..... AUCTIONEER**

**RULING**

1. The Tenant/Applicant approached this Tribunal by his reference dated 6<sup>th</sup> October 2023 consummating a complaint said to be founded on Section 12(4) of the Landlord and Tenant (Shops, Hotels and catering Establishments Act (Cap. 301) Laws of Kenya. Hereinafter the “The Act”.
2. The Tenant’s grievance was that:-

“The landlord has instructed Regent Auctioneers to auction my business goods and property meaning the intended auction will take place without allowing the court to determine the matter”.
3. For good measure, the Tenant attached a notification for sale of movable property by M/S Regent Auctioneers dated 11/10/2023.
4. The Reference was accompanied by a Notice of Motion brought under certificate of urgency and like the reference it is dated 6<sup>th</sup> October, 2023. The motion sought for the following reliefs:-
  - i. Spent



- ii. That the honourable tribunal issues an order compelling the 1<sup>st</sup> respondent to refrain from auctioning or disposing of the Applicant's business goods and properties forthwith.
  - iii. That the Honourable tribunal issues an order directing the 1<sup>st</sup> respondent to immediately unlock and reopen the business premises occupied by the Applicant, allowing the resumption of business operations without further interruption.
  - iv. That the Honourable court issues an order approving the Applicant's proposal to settle the accumulated rent arrears totaling Kshs.1,500,000/- in reasonable and manageable installments.
  - v. That the Honourable tribunal issues an order restraining the 1<sup>st</sup> Respondent from taking any action that might lead to the eviction of the Applicant from the premises.
  - vi. That the Honourable tribunal issues an order prohibiting the 1<sup>st</sup> respondent from selling, transferring or in anyway disposing of the Applicant's business goods and property until the final determination of this matter by the court.
  - vii. That this Honourable court is pleased to issue an order restraining the respondents jointly and severally from carrying out further distress for rent until further orders of the court.
  - viii. That the Landlord and/or his agent, servants and/or employees be prohibited forthwith by this court from unlawfully intercepting, harassing, intimidating and or evicting, closing or threatening, interfering, tampering, demolishing, levying distress, selling the tenant's business goods and properties, disconnecting electricity power and water supply, disposing by and or in any manner whatsoever and/or howsoever with the Applicant quiet occupation and lawful enjoyment of business suit premises located at Falcon Road off enterprise road in Industrial Area pending hearing and determination of the suit.
  - ix. That the honourable tribunal compels the respondents to reopen the business suit premises and allow the tenant to continue with his business pending hearing and determination of the suit.
  - x. That the honourable court is pleased to issue an order restraining the defendants from auctioning the plaintiff's business goods and properties until the case is heard and determined.
  - xi. That the honourable tribunal is pleased to grant an order allowing the tenant to clear the accumulated rent arrears in instalments together with monthly rent.
  - xii. That the OCS Industrial Area Police Station to assist in compliance with the orders.
  - xiii. That the costs of the application is provided.
5. The application had quite a mouthful of reliefs sought but I observe that all of them were effectively embraced by prayer No. 7 except prayer no. 5 which sought for liquidation of the purported rent in arrears at Kshs.1,500,000/- in monthly installments.
  6. The landlord on his part and in response to the motion herein by the Tenant filed a Replying Affidavit which encompassed the positions of the other two respondents. The same was sworn by Leon Nyachae said to be a director of the landlord on the 3/11/2023.
  7. The Tenant responded to the Landlord's Replying Affidavit by his Affidavit titled "Further Replying Affidavit sworn by Ochieng AZIZ Abdalla on the 5/10/2023 but which I believe meant 5/11/2023 because it refers to the landlord's Affidavit sworn on the 3/11/2023.



### **Tenant's Case**

8. The tenant complained that the landlord had illegally authorized the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to levy distress on his property. That this was unwarranted as the landlord had not afforded dialogue an opportunity.
9. He admitted that he owed the landlord the upward of Kshs.1,500,000/- which he was ready to pay by instalments as he met his current rental obligations.
10. That the landlord had further locked up his premises which initially seemed to have been in the obtaining reality but which later crystalized into an event that took place in February, 2023.
11. It was his evidence that the landlord purported to effect levy of distress by breaking into the demised premises when infact the same remained locked up with twin padlocks, one belonging to himself and the other to the landlord. He vowed that his goods were still securely housed in the demised premises.
12. The Tenant complained that the landlord purported to have secured an order to break-in into the demised premises from the chief magistrate's court which to him was not true as he was never served with such an application and there was no affidavit of service to show that he was ever served with such orders.
13. It was his case that all the actions of the landlord were illegal but paradoxically sought to be allowed to remove his tools of trade from the business premises and have them stored at his costs. He then testified by an Affidavit that on settling the rent in arrears he would be allowed back into the demised premises.
14. The Tenant could not understand why the landlord could not engage in dialogue to reach a settlement on the dispute. He insisted that the demised premises was still locked up with twin padlocks by himself and the landlord at the time of filing his further replying affidavit and submissions dated 5/11/2023 and 15/12/2023 respectively.

### **The Landlord's Case**

15. The landlord and the respondent's case is that the Tenant was a serial rent defaulter who owed it Kshs.2,326,170/- as at September, 2023 including auctioneers fees at Kshs.170,000/-.
16. The Respondents displayed a bundle of demand letters addressed to the Tenant for rent payment but which went unheeded. According to the landlord, the Tenant resorted to issuing cheques which were dishonored. The same were annexed to the landlord's Affidavit as "LNO5".
17. It was its evidence that though it was served with an order of this court on the 12/10/2023, the proclaimed goods from the Tenant in levy of distress had been auctioned on the 11/10/2023.
18. The landlord expressed that it gave instructions to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to levy distress (Annexure LNO6). The said respondents proclaimed the Tenant's goods (Annexure LNO7), a breaking order was obtained from the Milimani Commercial Court in the Chief Magistrate's court misc. Application No.E264 of 2023 (Annexure LN08), an advertisement for sale was placed in the standard Newspaper of 4/10/2023 for the disposal of the distrained goods on the 1/10/2023 (annexure LNO9) and that a certificate of sale was duly issued by the 2<sup>nd</sup> Respondent (Annexure LNO9).
19. The landlord therefore was of the assertion that the whole process of levying distress, obtaining the breaking orders and the eventual attachment and auction of the Tenant's goods was lawful and beyond reproach.



20. It was its case that the levy of distress having been completed and the landlord having taken possession in reversion, this court did not have jurisdiction to take these proceedings. It therefore sought for the dismissal of the Applicant's reference and motion thereof.
21. In this Ruling I have taken the required cognizance and regard to the parties submissions and did take notice of the following:-

#### **Tenant's Submissions\_\_\_:-**

22. By his submission dated 15/12/2023, the tenant submitted that it had taken a loan of Kshs.9,000,000/- million to set up the business. The business was negatively and adversely impacted on by the Covid 19 pandemic and the reason for the misunderstanding between he parties.
23. The tenant insisted that its rights were breached and infringed on because the break in orders were never served on him. It claimed that lack of an affidavit of service was an indictment on the respondents.
24. It therefore implored on the court to allow for an alternative dispute resolution, the court maintains the status quo until a valid order of possession is issued or a mutual termination of the Agreement is reached.

#### **Landlord's Submissions**

25. That the levy of distress was lawful and had been completed by the time the court orders were being served on the landlord on the 12/10/2023. The landlord had also taken vacant possession of the demised premises after the Tenant abandoned the same.
26. It was submitted that there was no longer a tenant/landlord relationship between the parties and that this tribunal was now fuctus officio. That remedies for the parties was the province of civil courts. The landlord therefore sought for the dismissal of both the reference and application herein by the Tenant.

#### **Case Law**

27. Both parties presented case laws in support of their respective cases.  
I list the same hereunder:-
  - i. Gachie vs Nairobi City Council (2004) EA 358,
  - ii. Kibicho vs. Wanjiru (2011) eKLR
  - iii. Giella vs. Cassman Brown Ltd (1973) EA 358,
  - iv. Vivo Energy Kenya Ltd vs. Maloba Petrol Station Ltd & 3 Others (2015) eKLR.
  - v. Ngurumani Ltd vs. Ian BONDE NIELSEN & 2 OTHERS and
  - vi. WEK VS. FM (2019) eKLR.
28. I confirm drawing from the wisdom of the above case law in this Ruling
29. The hearing discourse around the governing Act in relation to an understanding between a Landlord and Tenant which is Cap. 301 is appreciated but I also note the reliance by the Tenant on the Landlord and Tenant Act which is a non existent Law.
30. From the foregoing and looking at all the materials placed before me by the parties, am of the considered opinion that the issues for determination herein are the following:-



## A. Whether This Tribunal Has Power To Adjudicate Over This Matter

31. It cannot be overemphasized that jurisdiction is everything. Without it, the court has no where to sit to adjudicate over such matters. In the case of Owners and masters of the motor Tugs “Barbara and Steve B” (2007) eKLR the court of Appeal determined that the question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage using such evidence as may be placed. In the case of the Owners of motor vessel ‘Lilians’ – vs- Caltex Oil (Kenya) Ltd (1989) KLR the court held that:-

“.....I think it reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized....of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything without it a court has no power to move one more step. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. I can see no ground why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado”.

32. In this matter the position of the Tenant is that the demised premises is securely locked up by twin padlocks by himself and the landlord and that his tools of trade are also safely in the demised premises. He further asserts that the orders of breaking in claimed by the landlord were obtained irregularly and he was never served with any such proceedings emphasized that the court was never availed with an affidavit of service to authentic his attention to such proceedings or orders emerging therefrom.
33. On his part, the landlord and by extension the other respondents provided evidence of demands for rent arrears, failed attempts to pay the same by the Tenant, the proclamation, acquisition of break-in orders, attachment of the Tenant’s goods, advertisement for their auction, the auction and the eventual issuance of a certificate of sale.
34. It was the landlord’s further evidence that after the levy of distress, the Tenant abandoned the demised premises and whereof a new tenant has been introduced therein. He further asserted that when the orders of this court were served on him on the 12/10/2023, the levy of distress had already been completed on the 11/10/2023 as per evidence demonstrated in court.
35. At this point I would wish to note that except for the averments in his Affidavit, the Tenant never brought forth any materials to rebuilt or assert such position as he had taken. There was nothing to show that the demised premises were locked up by both the Tenant and the respondent and indeed nothing to demonstrate that his alleged tools of trade vested in the demised premises against the landlord’s position that the same had been disposed off through auction.
36. Section 107 of the [evidence Act](#) provides that:-

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of any facts which he asserts, must prove that those facts exists”.

Sub-section (2) provides that:-

“When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”.



37. Section 108 of the Evidence Act provide that:-

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side”.

Finally Section 109 of the Evidence Act provides that:-

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.

38. To emphasize this position the court in the case of Daniel Toroitich Arap Moi – vs- Mwangi Stephen Muriithi & Another (2014) eKLR held that:-

“It is firmly settled procedure that even where a defendant has not served the claim by filing a defence or an Affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine the evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, is on a balance of probabilities, does not change even in the absence of rebuttal by the other side”.

39. In the case of William Kabogo Gitau – vs- George Thuo and 2 Others (2010) IKLE 526 the Court (Justice (Luka Kimaru) determined that:-

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred”.

40. As earlier observed, the respondents have established without doubt nor any tangible rebuttal, that the entire process of distress was effectively concluded and documentation of the whole process was offered.

41. On the other part, the Tenant has claims that his goods were in the demised premises and that the break-in orders were irregular. There is nothing offered in his testament to support that position. Indeed the Tenant is seeking that he be allowed to move his tools of trade from the demised premises until he clears the rents in arrears, on the other part, the respondents have demonstrated that all the goods in the demised premises were carted away and auctioned.

42. This court cannot make orders in vain and the probable reality that persuades me is that there are no goods to be preserved as sought in view of the materials presented in the court by the respondents.

43. Indeed from the wholesome evaluation of the evidence, I find that the tenant is blowing cold and hot and is not certain about the reliefs that he wants from the court. At one point he wants protection of the court and to be sustained as a protected tenant, on the other hand he wants to be allowed to remove his tools of trade from the demised premises and finally he wants the court to recommend alternative dispute resolution.

44. The Tenant has also emphasized that the Milimani Commercial Courts decision to allow for the break-in into the demised premises were illegal. That the respondents never filed an Affidavit of service to



show his knowledge of the proceedings. He however has not offered any materials to show that he challenged the alleged irregular process. In my opinion, the chief magistrate's court to have issued such orders as herein, it must have been satisfied that due process had been followed.

45. I therefore from the foregoing determine that from the totality of the materials placed before the court, there is nothing left for this court to adjudicate on. I find reliance in Judicial Review case no. 25 of 2012 Republic – vs- Chairman Business Premises Tribunal and Italian Gelate (k) Ltd the court in a case similar to the present are held that:-

“Whether or not the Tribunal cited within jurisdiction turns on the status of the relationship between the interested party and the Applicant on the 21/2/2012 when it made the orders. On my evaluation of the evidence presented I have found that the auctioneers had already handed over empty premises to the landlord. At the time of prosecuting the matter before the tribunal, the interested party stated unequivocally that the landlord had locked the premises. There is evidence that those premises were empty. It would seem therefore that the Applicant had completely dispossessed the interested party. The tenancy had been terminated and there was no tenancy capable of being prescribed by the Tribunal. There was no longer a Tenant- Landlord relationship so the Tribunal acted without jurisdiction. The proper forum for the 1<sup>st</sup> respondents' grievance was a civil court. That is where it should have sought intervention. The order made by the Tribunal is therefore amenable to an order of certiorari and any further proceedings pending before it can be stopped by a prohibitory order”.

46. The court in the same case of chairman Business Premises Tribunal supra further held that:-

“That said, on the evidence presented, the court cannot say with certainty that the auctioneers and/or the Applicant acted in disregard of the law. The break in seems to have been sanctioned by a court order. Then there was evidence that the premises were indeed empty. It may not have been unreasonable for the auctioneer to handover possession of these empty premises to its owners, the Applicant. If however the interested party is of the strong view that the conduct of the Applicant was unlawful, it is not without a remedy. The interested party can invoke the civil process”.

47. I should have with finality determined this case at this point but for the clearance of any doubts or any of the issues herein, I would wish to address the 2<sup>nd</sup> issue which is:-

## **B. Whether The Landlord Was Entitled To Levy Distress Against The Applicant**

48. Section 3 of the [Distress for rent Act](#) Cap. 293 provides that:-

“subject to the provisions of this Act and any other written law, any person having ANY RENT Arrears or rent service in arrears 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”.

49. Section 15 of the Act further provides that:-

“Where distress is made for any kind of rent justly due, and any irregularity or unlawful act is afterwards done by the party distraining, or by his agents the distress itself shall not be therefore deemed to be unlawful nor the party making it be deemed a trespasser ab initio,





but the party aggrieved by the unlawful act or irregularity may recover full satisfaction for the special damage he has sustained thereby in a suit for that purposes”.

50. It therefore follows, and I so determine that the distress for rent effected herein was lawful and followed the expected due process. The same was also fortified by a court order which allowed the respondent’s to break-in into the demised premises and collect the goods already distrained.
51. In the event that the Tenant still feels aggrieved, then those grievances may be addressed in the province of the civil or commercial courts.

### **C. Whether The Tenant Is Deserving Of The Reliefs Sought**

52. From the determinations and findings herein above it then follows that the reliefs sought by the Tenant are not available to him in the realm of merit as supported by law and neither does this tribunal have the where withal to address the same.

### **D. Who Should Bear The Costs Of This Suit**

53. Section 27 of the [Civil Procedure Act](#) is clear and plain on this issue. I do not see any compelling reason to make me depart from it’s provisions and conventional wisdom. And for the reasons that costs follow the event, I would award costs to the respondents.
54. In conclusion, and from the analysis and findings herein before the orders that commend themselves to me are the following:-
- i. That the reference and notice of motion application dated 6/10/2023 are both dismissed as this Tribunal lacks the requisite jurisdiction to attend to the same.
  - ii. The Respondents are awarded the costs of both the reference and the application assessed at Kshs.30,000/-.

Those are the orders of the court.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22<sup>ND</sup> DAY OF DECEMBER 2023.**

**HON. NDEGWA WAHOME, MBS**

**MEMBER**

**BUSINESS PREMISES RENT TRIBUNAL**

Ruling delivered in the presence of the Tenant and in the absence of the counsel for the Landlord.

**HON. NDEGWA WAHOME, MBS**

**MEMBER**

**BUSINESS PREMISES RENT TRIBUNAL**

