



**Precision Diagnostics Clinics Limited v Sesame Limited & another (Tribunal
Case 274 of 2020) [2024] KEBPRT 787 (KLR) (13 May 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 787 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE 274 OF 2020
N WAHOME, CHAIR
MAY 13, 2024**

BETWEEN

PRECISION DIAGNOSTICS CLINICS LIMITED APPLICANT

AND

SESAME LIMITED 1ST RESPONDENT

READ DYNAMIC MANAGEMENT LIMITED 2ND RESPONDENT

RULING

1. At the onset, this court would wish to unreservedly apologize to the parties for the inordinately delayed delivery of this Ruling. It is appreciated that same was to be delivered on the 2.7.2020 which was never to be.
2. The Judicial officer who was to deliver the same namely; Hon. Mbichi Mboroki had his term of office expire and/or lapse before delivery of the same. It seems also that the parties herein and who have representation of Counsels did not pursue this matter. In plain language, the reality of this matter does not reflect the operations of this Tribunal and the same is deeply regretted.
3. Getting to the issues at hand, the proceedings herein were originated by the tenant under the Reference dated 9.03.2020. The Reference was founded on Section 12(4) of the *Landlord and Tenant (shops, Hotels and Catering Establishment) Act* (Cap 301) which I will refer to hereinafter as “the Act.”
4. The grievances by the Tenant in the Reference were that;-

“Closure and threats of eviction from the business premises known as EPZ Plaza situated on L.R. No. Kajiado/Kaputiei North/15573 and 15574. That on or about 29.2.2020, the agent of the Landlord closed the premises, locked, repossessed and/or re-entered the premises without any written notice.”



5. At this point, we wish to note, and also for the purposes of certainty in this Ruling that there are three Applications on record as follows;-
- i. The Applications by the Tenant dated 9.3.2020 and 8.4.2020; and
 - ii. The Landlord's Application dated 26.03.2020
- However, the orders made on the 11.6.2020 for delivery of the Ruling on the 2.7.2020 did not clarify on which Application the Ruling would relate to if not to all the three (3) Applications as listed hereinabove.
6. Having perused all the three (3) Applications, we have appreciated that they are substantially related in all the material areas. We would therefore accommodate all the three in this Ruling.
7. The 1st Application by the Tenant principally sought for the re-instatement of the Tenant back into the demised premises and further for orders restraining the Landlords from interfering with its quiet possession of the demised premises. The orders were requested to be enforced by the OCS Kitengela police station.
8. The Landlord in its Application dated 26.03.2020, the following orders were sought;-
- i. spent
 - ii. That the Landlord/Applicant is hereby granted permission to levy distress for rent for the sum of Kshs. 1,329,677.60/=.
 - iii. That upon grant of prayer (ii) above, a certificate of permission to levy distress issues forthwith.
 - iv. That the Tribunal grants compensation to the Landlord against the Tenant pursuant to Section 13 of the Act as appears sufficient.
- The Landlord also sought for costs of the Application.
9. Finally, the Tenant filed its 2nd Application dated 8.04.2020 which sought to restrain the Landlord from levying distress, offering for sale, selling by public auction or private treaty the goods distrained vide proclamation dated 3.4.2020 pending the hearing of the Application inter partes and eventually the main suit.
10. By orders of the court made on various dates including 16.04.2020, 23.04.2020 and 28.05.2020, the parties were allowed to file further affidavits for purposes of addressing the highly contested issues.
- The main issue being the actual quantum of rent arrears. In compliance with the directions, the landlord filed the following;-
- i. Affidavit on payment of rent sworn on 29.04.2020.
 - ii. Replying affidavit sworn on 29.4.2020; and
 - iii. Replying affidavit sworn on the 15.04.2020.
11. On its part, the Tenant filed the Replying affidavit sworn on the 22.04.2020 and the further affidavit sworn on the 3.06.2020.
12. Having recognized all the pleadings filed by the respective parties, we would now wish to proceed and briefly state the respective cases for the parties.



A: Case for the Tenant

13. The Tenant's grievances against the Landlord were that:-
- i. The Respondent has closed down his shop which was a health facility.
 - ii. It never owed the Landlord the rent claimed and what he owed was much less.
 - iii. It had showed goodwill by making huge payments in liquidating the rents in arrears just before the lock down and even after filing the suit in court.
 - iv. The rent arrears were occasioned by the covid pandemic which brought its business almost to its knees.
 - v. The rents in arrears were yet to be ascertained and an account of the same needed to be taken.
 - vi. Its eviction, lock down of its premises and the attempted levy of distress on its tools of trade were illegal.

B: The Case for the Landlord

- i. The Applicant was a serial rent defaulter who owed it Kshs. 1,512,799.30 by June, 2020.
 - ii. Some errors or problems on accounting were occasioned by the Tenant who on several instances issued cheques that were dishonoured.
 - iii. The Tenant was in rent arrears even before the covid 19 pandemic set in.
 - iv. It has financial obligations which were dependent on this rental income and thus their interests were being compromised by the none payment of rent.
 - v. Should be allowed to levy distress in recovery of the rents in arrears.
14. Having perused the Reference and the three (3) Applications and on considering all the materials placed before the court by the respective parties, we are of the view that the issues for determination are the following:-
- A: Whether the Tenant's Applications dated 9.03.2020 and 8.04.2020 have merit.
- B: Whether the Landlord's Application dated 26.03.2020 is merited.
- C: Who should bear the costs of the suit.

Issue No. A: Whether the Tenant's Applications dated 9.03.2020 and 8.04.2020 are merited.

15. The Tenant approached the court on the grounds that the Landlord had irregularly locked up his premises. He therefore sought the intervention of the court to have it restored to the premises. That the Landlord also be restrained from interfering with its quiet possession.
16. The Landlord admitted to having closed down the premises through its agents. It also confirmed to having allowed the Tenant back to the premises pursuant to the orders of this court.
17. It is apparent that in locking up the premises, the Landlord had no authority under the Act or of this court to deny the Tenant quiet possession of the premises. If aggrieved with the conduct of the Tenant, the Act has laid down very clear and elaborate protocols to terminate or severe such a relationship.



Locking up the same was not one of them. A Landlord can only deny a Tenant quiet possession by putting into operation Section 4(2) of the Act. The same provides that;-

“A Landlord who wishes to terminate a controlled tenancy, or to alter to the detriment of the Tenant, any term or condition in, or right or service enjoyed by the Tenant under, such a tenancy, shall give notice in that behalf to the tenant in the prescribed form.”

18. There is no dispute that in locking up the premises, the landlord was in conflict with the Act and that the Tenant was entitled to move this court for the appropriate reliefs. I would therefore determine that the Applicant has satisfied the pre-requisites in the grant of the orders sought as laid down in the case of *Giella vs Cassman Brown* [1973] EA.
19. By that, we mean that the Applicant was able to establish a prima facie case which in the totality of this suit was likely to succeed. We also hold the opinion that damages may not normally be the best remedy when there is a clear breach of the law like in this case. We would therefore determine that orders of restoration of the Tenant to the premises as earlier issued and further orders restraining the landlord from interfering with the Tenant's quiet possession of the demised premises should issue. Finally, the balances of convenience in our view tilt in favour of the Applicant. This is for the reason that granting of the orders herein is far much less prejudicial than failure to grant the same.
20. On the 2nd limb of this issue, we are of the view that the landlord had a right to levy distress as at the time it sought for this court's intervention to be permitted to effect the same. According to the landlord, the amount owed to it by the Tenant as at June, 2020, was Kshs. 1,512,799.30/=. According to the Tenant, it owed some rents in arrears which it claimed could not be ascertained and needed an account on the same be taken.
21. We however note that all the issues raised in the Tenant's Further affidavit sworn on the 22.4.2020 and in particular at paragraph 7 and 8 thereof, were exhaustively responded to by the Affidavit Titled "Affidavit on payment of Rent" sworn by Veronica Chirchir on the 4.6.2020 and the Replying affidavit by Richard Chirchir sworn on the 29.4.2020.
22. We therefore do not entertain any doubts that as at June, 2020, the Tenant owed the Landlord Kshs. 1,512,799.30/= in rent arrears as ably demonstrated in the "statement of payment for Precision Diagnostic Clinics Limited, Unit G2" attached to the affidavit of Veronica Chirchir aforesaid.
23. There is in our view no apparent dispute on the rent payable by the Tenant to the Landlord and we would therefore dismiss the Tenant's Application dated 8.4.2020 as lacking in any merit.

Issue No. B: Whether the Landlord's Application dated 26.03.2020 is merited

24. It has been determined that the Tenant owes the Landlord rent in arrears at Kshs. 1,512,799.30/= as at June, 2020. This therefore authorizes and permits the Landlord to levy distress without any recourse to anyone. Section 3(1) of the Distress for Rent Act provides that;-

“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.”



25. In the case of; Joseph Nthumbi Kamwithi vs Asha Akumu Juma HCCA No. 7A of 2016 at Embu the court held that;-

“The right to distress serves the purpose of a remedy for the landlord to recover rent that may be in arrears. For this right to be enforced, there must be rent in arrears.”

26. The court further clarified that;-

“I have perused the Act but I find no provision to the effect that such permission be sought. I find that the Appellant had no obligation to seek permission from the Tribunal to levy distress. The fact that the tenancy is controlled does not mean that the landlord applies to the Tribunal to levy distress. Distress is a right the landlord is entitled to for recovery of rent.”

27. The upshot of all these is that, the Landlord was entitled to levy distress without applying for a license or permission from this court. We would therefore allow the landlord’s Application dated 26.3.2020.

Issue No. C: Who should bear the costs of this court

28. The Tenant/Applicant moved this court after the Landlord/Respondent had irregularly and without the authority of the law or this court closed down the demised premises. The Applicant has succeeded in having the premises unlocked and also in restraining the Respondent from interfering with its quiet possession thereof.

29. On the other hand, the Respondent has succeeded in demonstrating that indeed the Applicant owed it substantial amounts of money in rent arrears. This court has indeed confirmed that the Respondent was within its rights to effect distress in recovery of the rents in arrears.

30. We would therefore in the circumstances of this case determine that each party should bear own costs of this matter.

31. Looking at the Reference herein, we find that the same has been fully compromised by the determination on the Applications herein and the same is determined in the same terms.

32. In the final analysis, the orders that commend to us are the following;-

- a. That the Tenant’s Application dated 9.03.2020 is allowed in terms that it will be allowed quiet possession of the demised premises unless otherwise disturbed in strict compliance with the law ([Cap 301](#)).
- b. The Landlord’s Application dated 26.03.2020 is allowed and the Tenant’s Application dated 8.04.2020 is dismissed. The Tenant has thirty (30) days from the date hereof to settle all the rents in arrears including those accrued as at June, 2020 at Kshs. 1,512,799.30/= and in default, the Landlord is at liberty to effect levy of distress in recovery of the same.
- c. That the Reference dated 9.03.2020 is settled in the same terms as in order (1) and (2) herein above.
- d. That each party do bear own costs of this suit.

Those are the orders of the court.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF MAY, 2024.

HON. NDEGWA WAHOME, MBS - PANEL CHAIRPERSON



BUSINESS PREMISES RENT TRIBUNAL

HON. JOYCE MURIGI - MEMBER

BUSINESS PREMISES RENT TRIBUNAL

Delivered in the absence of the parties though duly notified. The court shall notify the parties accordingly.

