



Charles Karanja t/a Pecka Memorial Enterprises v Waithaka (Tribunal Case E1037 of 2022) [2023] KEBPRT 724 (KLR) (Civ) (24 November 2023) (Ruling)

Neutral citation: [2023] KEBPRT 724 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
CIVIL
TRIBUNAL CASE E1037 OF 2022
A MUMA, AG. CHAIR
NOVEMBER 24, 2023**

BETWEEN

CHARLES KARANJA T/A PECKA MEMORIAL ENTERPRISES ... APPLICANT

AND

ELIZABETH NJERI WAITHAKA RESPONDENT

RULING

a. Parties & their Representatives

1. The Applicant, Charles Karanja (hereinafter “the tenant”) is the Tenant of the rented business space at a property known as L.R. No. Ndumberi/Ndumberi/1494.
2. The firm of M/S Wanjiru S. Advocates represents the Tenant/Applicant.
3. The Respondent Elizabeth Njeri Waithaka is the Landlord of the premise situate at Kiambu erected on all that Property known as Ndumberi/ndumberi/1494.
4. The firm of M/S Wanjiru Waithaka & Company Advocates represents the Landlady/Respondent.

B. Dispute Background

5. The Tenant filed a reference and an application both dated 7th November 2022 seeking orders certifying the matter urgent, and restraining the landlady from evicting, harassing intimidating and in any way interfering with his quiet possession and peaceful enjoyment of the suit premises pending the hearing and determination of the Reference and the Application.
6. The Tenant also sought orders declaring the tenancy as controlled and invalidating the notice of eviction dated 20th September 2023.



7. The Court, having considered the Tenant's reference and Application, issued interim orders dated 10th October 2023 directing that the tenant's Application be served for inter partes hearing on 25th November 2023.
8. On 13th December 2022, this Honorable Tribunal issued Orders in respect of the Tenant's application dated 7th November 2022 declaring the tenancy relationship between the parties herein as a controlled tenancy and that the Landlady's notice of termination dated 20th September 2022 invalid for the reason that it did not meet the legal threshold required under Section 4 (4) of Cap 301. The Tribunal also awarded the costs of KShs. 15,000.00 which was to be offset against the rent account.
9. Subsequently, the Landlady filed a Notice of Motion Application dated 14th June 2023 seeking to have the tenancy terminated and to set aside Orders made by this Tribunal on 13th December 2022.

c. Claim and Defence

10. In the application dated 14th June 2023, the Landlady claims that the Orders in Court Order dated 13th December 2022 were issued in her absence and that she was not afforded a chance to defend herself by being properly served with the Application.
11. The Landlady claims that she issued another Notice of Termination dated 21st December 2022 in line with Section 4 of Cap 301. She further claims that the Tenant is in arrears of October 2022 to December 2022 and did not pay despite being issued with the termination notice.
12. It is the Landlady's case that the Tenant opposed the said notice of termination by filing a reference in Tribunal Case No. E064 of 2023 in which she was required to attend a hearing on 6th March 2023 but the matter was heard in her absence for the reason that she did not know the location of the Tribunal.
13. The Landlady claims that the Orders in both this case and in Tribunal Case No. E064 were issued in her absence and therefore, she did not have a chance to plead her case.
14. In a Replying Affidavit dated 30th August 2023, the tenant claims that the Landlord was properly served with the Application dated 7th November 2022 and that if the same had been misplaced, she should have asked for another copy given that his business and her place of residence are in the same compound.
15. The Tenant further avers that the Landlady has been interfering with his tenancy and upon interrogation by the Deputy OCS Kiambu Police Station, she noted her intention to increase the rent.
16. In his Supporting Affidavit, the Tenant depones that the premises are in a good condition and without a need for renovation and that the Landlady's intention to terminate their relationship arose out of a personal dispute over a malfunctioned wheelbarrow that the Tenant had given to the Landlady.

d. Issues for Determination

17. I have carefully analyzed all the Pleadings filed and the relevant evidence adduced before honorable Court. I considerably find that the issues that fall for determination are:
 - i. Whether this Court should consolidate Tribunal Case E1037 and Tribunal Case No. E064;
 - ii. Whether this Court should set aside the Orders issued in both cases.



E. Analysis of the Law

i. Whether this Court should consolidate Tribunal Case E1037 and Tribunal Case No. E064

18. On whether the Court should consolidate Tribunal Case E1037 and Tribunal Case No. E064, I am guided by the case of *Stumblers & Another –v- Potgeiter* (1970) EA 323, where it was held as follows:

“Where there are common questions of law or facts in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time, consolidation should be ordered.”

19. I am further guided by the case of [*Korean United Church of Kenya & 3 Others v Seng Ha Sang*](#) (2014) eKLR where the Court noted that:

The situations in which consolidation can be ordered include where there are two or more suits or matters pending in the same court where: -

1. some common question of law or fact arises in both or all of them; or
2. the rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions, or
3. for some other reason it is desirable to make an order for consolidating them.”

20. In [*Kinani Waweru & 28 others v Law Society of Kenya & 12 others*](#) [2014] eKLR the Court noted that;

unlike the principles of sub judice and res judicata, consolidation of suits does not depend on the parties in the different suits being the same or litigating in the same capacity. It only requires that the same or similar questions of law and fact be present in the two or more suits to be consolidated.

21. In light of the above decisions, it is my considered opinion that the subject matter in both cases is termination though with different reasons- While the subject matter in this case relates to the notice of termination dated 21st September 2022, the subject matter in Tribunal case No. E064 of 2023 relates to the notice of termination dated 21st December 2022. Both requiring the tenant to vacate premises.

ii. Whether this Court should set aside the Orders issued in both cases.

22. Pursuant to Section 12 (1) (i) of [*Cap 301*](#), this Tribunal has power to vary or rescind any order made by the Tribunal under the provisions of the Act.

23. I am further guided by the principles upon which an application for setting aside an ex-parte judgment is considered were long settled in the locus classicus Case of *Shah – vs- Mbogo* (1967) EA 116 at page 123 as follows: -

“I have carefully considered in relation to the present application the principles governing the exercise of the court’s discretion to set aside a judgment obtained ex-parte. This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice”.



24. These are the principles that I am going to apply in this case in order to determine whether to grant or deny the application.
25. The main contention by the landlady in this case is that she was not served with the Application dated 7th November 2023. She states that the same was served upon her through her mentally ill sister who misplaced it and therefore, she was not in a position to plead her case.
26. She further contends that in Tribunal Case No. E064 of 2023, her non-appearance for the hearing was inadvertent and as such she should not be punished for non-attendance.
27. The affidavit of service by one Collins Obinda indicates that the Court order dated 10th November 2022 and Application dated 7th November 2022 showing that the case was coming upon on 25th November 2022 was served upon the landlady at through her sister- in- law at her residence on 10th November 2022 at about 9.00am.
28. In the case of *Secretary and Another -vs- Lucia Ndinda Musyoka T/a Jocia Stores* (2019) eKLR, the superior court at paragraph 22 cited with approval the treatise, 'The code of Civil Procedure' vol.11- page 1670 by Chitaley and Annaj Rao as follows: -

“There is a presumption of service as stated in the process server’s report and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server is put in the witness box and opportunity of cross examination given to those who deny service”.
29. It is my considered opinion that the Landlady acknowledges service through her sister-in-law but contents that as proper service as her sister-in-law is mentally ill which caused her to misplace the said documents.
30. I am guided by the rules of service under order 5 rule 12 of the *Civil Procedure Rules*, 2010 which allow service through an adult residing with the Defendant.
31. It is my considered opinion that the landlady was properly served for the reason that she has not produced before this Court any evidence of her sister-in -law’s mental illness. Moreover, if the service had come to her knowledge, she should have requested the Tenant to furnish her with copies of the documents given that her residence and the Tenant’s business premises are situate on the same property.
32. I have also found that 064 having been determined this suit ought to follow having found that they both deal with termination of tenancy. The Act requires that once a Notice has been issued and found irregular unless by this courts orders the landlord is allowed to issue a fresh notice earlier they have to wait for a period of one year as such an order for setting aside and or review cannot issue where the second notice lacks a legal leg to stand upon.

f. Determination

33. The upshot is that the Landlady’s Application dated 25th August 2023 is hereby dismissed with no order as to costs. Both reference stand settled in the circumstances.

HON A. MUMA

Ag Chair/Member



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RULING DATED, SIGNED AND DELIVERED VIRTUALLY BY HON. MUMA THIS 24TH DAY OF NOVEMBER 2023 IN THE PRESENCE OF WANJIRU FOR THE TENANT AND NA FOR THE LANDLORD

HON A. MUMA

Ag Chair/Member

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