



**Njagi & another v Mwaura & another (Tribunal Case
E1213 of 2023) [2024] KEBPRT 667 (KLR) (3 May 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 667 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E1213 OF 2023
A MUMA, MEMBER
MAY 3, 2024**

BETWEEN

AMOS MUGENDI NJAGI 1ST APPLICANT

EMMA KAMBURA NBUNGU 2ND APPLICANT

AND

FRANCIS NJUGUNA MWAURA 1ST RESPONDENT

MAKURI AUCTIONEERS 2ND RESPONDENT

RULING

A. Parties And Their Representatives

1. The Applicants, Amos Mugendi Njagi and Emma Kambura Nbungu (the “Tenants”) are the operators of business premises known as Highway Tents and Décor along Jogoo Road opposite Church Army adjacent to the property known as L.R No. 209/6829 (the “suit premises”).
2. The firm of Okumu, Miyawa & Wamwara Advocates LL.P represents the Tenants in this matter
3. The 1st Respondent is being sued as the registered owner of the property known as L.R No. 209/6829 (the “Landlord”).
4. The firm of Kiaritha, Mwenda & Associates represents the Respondents in this matter.

B. Background of The Dispute

5. Through a Reference and an Application dated 4th December, 2023 canvassed through Certificate of Urgency of even date, the Tenant moved this Honourable Tribunal seeking the following orders inter-alia: an injunctive order be issued restraining the Landlord from interfering with the quiet possession of the suit premises by the Tenants, a prohibitory order prohibiting the Landlord from evicting the



Tenants from the suit property and the Tenants be allowed to take vacant possession of the suit premises.

6. Upon perusal of the said Application, the Honourable Tribunal, on 6th December, 2023, issued Orders inter-alia: restraining the Landlord from interfering with the quiet possession of the suit premises by the Tenants, prohibited the Landlord from evicting the Applicants from the suit property and directed that the hearing be held on 27th December, 2023.
7. In response to the Application, the Respondents filed a Notice of Preliminary Objection dated 25th January, 2024 in which they contested the jurisdiction of this Honourable Tribunal on the ground that this matter was res judicata.
8. Therefore, it is the Respondents' Notice of Preliminary Objection dated 25th January, 2024 which is subject of this Ruling.

C. Jurisdiction

9. The Jurisdiction of this Honourable Court has been contested by the Respondents vide a Notice of Preliminary Objection dated 25th January, 2024.

It is the Respondents' contention that the matter herein is res judicata.

D. Tenants' Case

10. The 1st Applicant, vide a Supporting Affidavit sworn on 29th November, 2023, avers that the 1st Respondent levied distress for rent for Kenya Shillings Three Million Five Hundred and Forty Thousand (Kshs. 3,540,000.00) pursuant to the decision of this Honourable Tribunal in the case BPRT Case No. E535 of 2022.
11. He, however, swears that the decision was delivered against one Anthony Mugendi, who was the 5th Respondents in the aforesaid suit. As of consequence, the levy of distress was issued to a different person. Further, he pointed out that his name was Amos Mugendi Njagi.
12. He avers that there is no nexus between himself and the aforementioned Respondent.

E. Landlord's Case

13. The Landlord avers that the subject matter herein is res judicata as this Honourable Tribunal had rendered itself on the dispute herein in the suit Business Premises Rent Tribunal No. E535 of 2022; Francis Njuguna Mwaura v Kevin Momanyi Onsinyo & 4 others.
14. The Landlord further avers that the particular issue forming the necessary ingredient in the Applicants' cause of action has been litigated and decided in previous proceedings. Furthermore, that the said action was determined in previous proceedings between the same parties.

F. 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 is: Whether the subject matter of the instant suit is res judicata?



G. Analysis And Determination

16. The Black's Laws Dictionary, 10th edition defines the term "res judicata" as:

Latin 'a thing adjudicated'. An issue that has been definitively settled by judicial decision. An affirmative defence barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit. The three essential elements are:

- (1) an earlier decision on the issue
- (2) a final judgment on the merits, and
- (3) the involvement of the same parties, or parties in privity with the original parties." (Emphasis added)

17. The doctrine of res judicata is anchored on Section 7 of the [Civil Procedure Act](#), Cap 21, Laws of Kenya, which provides as follows:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court. (emphasis added)

18. This Honourable Tribunal is further guided by the holding of the Environment and Land Court's (Hon. Justice Boaz N. Olao) decision in [Onyango v Ochieno \(Environment & Land Case E008 of 2022\)](#) [2023] KEELC 18938 (KLR) where it set out the conditions a party invoking res judicata must satisfy, to include:

- i. The matter in dispute in the former suit must be directly and substantially in dispute in the subsequent suit.
- ii. The former suit must have been between the same parties or those under whom they claim litigating under the same title.
- iii. The former suit must have been heard and finally decided.
- iv. The Court or Tribunal which heard and determined the former suit must have been competent to do so.

19. A reading of Section 7 of the [Civil Procedure Act](#) and the holding of the Court in *Onyango v Ochieno* (supra) denote the well-founded conditions that a party must satisfy to prove res judicata as follows: the dispute in the former suit is directly and substantially in dispute in the present suit, the dispute must be between the same parties, the dispute was heard and determined on merits and the matter was heard by a Court of competent jurisdiction.

20. In the matter herein, the parties acknowledge the holding of the Honourable Tribunal in BPRT Case No. E535 of 2022; *Francis Njuguna Mwaura v Kevin Momanyi Onsinyo & 4 others*, where this Honourable Tribunal heard the dispute on merits and rendered itself and granted the orders as prayed on the 1st Respondent's Application dated 25th May, 2022.



21. This Honourable Tribunal, appreciates and concurs with the determination of the Tribunal in the case BPRT Case No. 535 of 2022. In the suit the Tribunal rendered itself comprehensively on the nature of tenancy relationship existing between the parties herein.
22. The Tenant, however, contests that parties in the two suits are not the same. In his Supporting Affidavit sworn on 29th November, 2023 he avers that his full name is Amos Mugendi Njagi, as opposed to Anthony Mugendi who is mentioned as the 5th Respondent in the said suit BPRT Case No. 535 of 2022. He annexed a copy of his National Identification as proof of the same.
23. This Honourable Tribunal, however, takes cognizance of an Affidavit sworn by the 1st Applicant on 8th February, 2023 in support of an Application of even date in the BPRT Case No. 535 of 2022. In the said Affidavit, the Tenant acknowledges to being the 5th Respondent. Further, this Honourable Tribunal appreciates the fact that the Tenant was afforded an opportunity to defend the suit to which this Tribunal rendered itself on 24th October, 2023 by dismissing the said Application.
24. From the foregoing, this Honourable Tribunal has established that the conditions in order to prove res judicata set forth under Section 7 of the Civil Procedure Act and further espoused in the holding of the Court in *Onyango v Ochieno* (supra) have been satisfied. As such this Honourable Tribunal does not have jurisdiction to hear and determine the present Tenant's Application and Reference for the reason that the same is res judicata.

H. Orders

25. In the upshot and having established that this Honourable Tribunal has no jurisdiction to hear and determine the present Application and Reference on account that the instant suit is res judicata, the following orders shall abide;
 - a. The Notice Preliminary Objection dated 25th January, 2024 is hereby upheld.
 - b. The Tenant's Reference and Application dated 4th December, 2023 are hereby dismissed for lack of jurisdiction on account that the instant suit is res judicata.
 - c. The landlord shall have costs.

HON A. MUMA

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

Ruling dated, delivered and signed at Nairobi on this 3rd day of May 2024 in the presence of Lokol holding brief for Dr Miyawa for the Tenant and Mwenda for the Landlord.

HON A. MUMA

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

