



**Mamboleo v Kangethe (Tribunal Case E740 of 2021)
[2023] KEBPRT 196 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 196 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E740 OF 2021
GAKUHI CHEGE, VICE CHAIR
MARCH 28, 2023**

BETWEEN

JAMES MAMBOLEO TENANT

AND

PAUL MBUGUA KANGETHE LANDLORD

RULING

1. Before me is a motion dated December 1, 2022 in which the tenant is seeking for setting aside of the *ex-parte* hearing and resultant judgment dated 2nd November 2022 and that the matter be heard *de novo* on merit. In the alternative, he seeks that the Tribunal be pleased to recall the landlord for purposes of being cross-examined by his counsel on his evidence tendered on October 5, 2022.
2. The tenant seeks that the tribunal allows him to tender his evidence and be cross examined by counsel for the landlord.
3. In his supporting affidavit, the tenant deposes that he was sick but instructed the firm of Nyamweya Mamboleo Advocates to act on his behalf. The said firm was yet to file notice of appointment on account of internet and technological failure.
4. The tenant was called by the said firm after it was unsuccessful in filing the notice of appointment and thus requested him to log into the virtual court session but he was under medication and yet to be reviewed by his doctor and could not proceed with the hearing. He however was able to join towards the end of the hearing but the court's call dropped and he was not able to address court.
5. As a result, he did not present his case and the same could not be deemed as closed. It is deposed that sickness on the tenant's part was a genuine and good cause for adjournment of the hearing in the interest of justice.



6. It is the tenant's case that the tribunal erred in law and fact by proceeding with hearing of the respondent in his absence thereby denying him the right to a fair trial in violation of article 50 of the Constitution. It was thus in the interest of justice that the application be granted as prayed.
7. The application is opposed through the replying affidavit of the landlord sworn on December 15, 2022 which narrates in minute details the history of the instant proceedings culminating with the impugned judgment of the tribunal delivered on November 2, 2022.
8. It is important to note that the tenant sent an advocate who was not on record and who has not since filed any appointment notice. The tenant is himself an advocate who failed to comply with directions to file documents in this matter and to attend court on several occasions in the past.
9. The tenant is accused of sleeping on his rights and has woken up from his slumber after the tribunal's judgment and being indolent ought not be aided. He failed to prosecute his case as demonstrated in the landlord's affidavit.
10. The tenant did not inform the Tribunal that he was sick on the hearing date and no evidence of such sickness has been tendered in support of his application. No notice of appointment of advocates including the current one has been filed in this matter and the advocate who attended on the hearing date lacked *locus standi* to address the Tribunal but the court was lenient by allowing him to do so. As such no rights of the tenant were breached by the matter proceeding ex-parte.
11. The application was directed to be disposed of by way of written submissions and both counsels obliged. I shall consider the submissions together with the issues for determination set out below.
12. Based on the pleadings, the following issues arise for determination in the application under consideration.
 - a. Whether the tenant is entitled to the reliefs sought in the application dated December 1, 2022.
 - b. Who is liable to pay costs of the application?
13. Section 15(1) of Cap. 301 Laws of Kenya requires a party to file the determination of this Tribunal in a Subordinate Court for purposes of execution. As such, this Tribunal has no power to execute its own orders or decrees and as such the power to stay execution is vested in the appellate court or in the Subordinate Court to which the determination is filed (see the decision in the case of *National Dry cleaners Ltd and another v Ndune* (1987) eKLR.
14. As such prayer 2 of the application does not fall for determination by this Tribunal as no execution proceedings have been instituted before it. In any event, the Tribunal lacks jurisdiction to stay its judgment as demonstrated in the foregoing paragraph.
15. Prayers 3,4,5,6 & 7 are all intertwined and their fate shall be determined through prayer 3 wherein the tenant seeks that the *ex-parte* hearing and resultant judgment dated November 2, 2022 be set aside and the matter be heard de novo on merit.
16. The principles considered by courts in an application for setting aside ex-parte judgments were long settled in the celebrated case of *Shah v Mbogo & another* (1967) EA 117 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*. The 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”.

17. In this matter, the tenant deposes that he was sick on the hearing date which explains his inability to attend court. He sent an advocate who was unable to file a notice of appointment due to internet and technological failure.
18. It is therefore submitted that the application should succeed on three fronts to wit:-
 - a. “the learned magistrate misdirected himself in proceeding with to hear the Respondent’s case contrary to order 12 rule 3 of the [Civil Procedure Rules](#).
 - b. The learned Magistrate’s action was in blatant violation of articles 10, 47 and 50 (1) of the [Constitution of Kenya](#) any points of law and/or challenged the grounds raised in the Applicant’s application”.
19. The tenant’s counsel cites the case of [George Masibayi Wafula v Richard Wafula Masinde](#) (2022) eKLR on the interpretation which ought to be given to order 12 rule 3(1) of the [Civil Procedure Rules](#) which defined what amounts to “good and sufficient cause” concluding that a suit where a party does not appear ought to be dismissed for non-attendance.
20. It is thus submitted that this court was misdirected on the applicable law on the basis that the defendant did not raise a counter-claim that would warrant the court to proceed and listen to his case under order 12 rule 3.
21. It is thus submitted on the authority of [George Kiarie Nganga v Samuel Waithaka Kariuki & 2 others](#) (2017) eKLR that entering judgement without hearing the plaintiff’s case regardless of other intervening circumstances amounts to unfair administration of justice. He proceeds to submit that hearing the landlord in a case filed by him amounted to a breach of his right to fair hearing and offends the rules of natural justice in line with the decisions in the cases of [MK v MWM & another](#) (2015) eKLR and [Johnson Mwaniki Nyagah v County Government of Embu & another](#) (2021) eKLR.
22. According to the tenant, the landlord has not demonstrated any prejudice if the court allows the application which cannot be ameliorated by an award of costs. He cites the case of [Victoria Naiyanoi Kiminta v Gladys Kiminta Prinsloo](#) (2019) eKLR on the question of prejudice.
23. According to the tenant there is sufficient cause established to warrant the orders sought and the court ought to exercise discretion in his favor in line with the decision in the case of [Odoyo Osodo v Rael Obara Ojuok & 4 others](#) (2017) eKLR.
24. The Landlord’s counsel reiterates the contents of his client’s replying affidavit and in reliance on Article 159 of [the Constitution](#) submits that it was the duty of the court, litigants as well as advocates to ensure that matters are concluded expeditiously without inexcusable delay. The landlord further relies on section 1A & 1B of the [Civil Procedure Act](#), cap. 21.
25. The tenant is accused of absence from court despite being always served with notices or of sending advocates who did not come on record on his behalf through filing of notices of appointment.
26. The tenant who is an advocate is accused of relying on excuses to delay the Respondent’s pursuit of justice and was guilty of abuse of court process which should not be tolerated.
27. Although the tenant avers that he was sick on the hearing date, the said reason was not raised in court at the time of allocation of hearing time for the case and no medical records have been provided to



- support the alleged sickness or hospital attendance neither have the tenant explained his absence on all previous occasions when the matter came up before court.
28. I have examined the court record and noted that on May 26, 2022, this matter came up for mention when parties were directed to comply with order 11 of the Civil Procedure Rules. The matter was slated for mention on July 4, 2022. The tenant was represented by Kirui advocate.
 29. On July 4, 2022, the matter came up for mention and It was set for further mention on August 15, 2022 to confirm availability of the replying affidavit and the tenancy agreement entered into between the parties. Both parties were directed to comply with order 11, Civil Procedure Rules by filing witnesses statements before then. On the said date, the tenant was not present.
 30. On 15th August 2022, the matter came up for mention on in absence of the tenant to confirm compliance with order 11 of the Civil Procedure Rules. Only the Landlord had complied and as a result, the matter was fixed for hearing on September 15, 2022.
 31. On September 15, 2022, the matter came up for hearing and the tenant was represented by Wangatia Advocate who applied for time to procure attendance of a witness who was in actual occupation of the premises and to further file a witness statement.
 32. The application being opposed by the Landlord's counsel on the basis that there was no notice of appointment of advocates was disallowed. The landlord had been waiting online for the hearing of the case from his location in Missouri, USA from midnight to about 5 a.m. owing to geographical times difference in order to give evidence in the matter. the matter was ordered to proceed notwithstanding the tenant's absence.
 33. It is therefore clear that at that point in time, the tenant was not to give evidence and instead intended to call another witness who was said to be in actual occupation of the premises and who was not available and had not recorded a witness statement. The tenant had also not filed any witness statement and was not present in court.
 34. It is also noteworthy that there was no mention of the tenant having been sick and attending any medical clinic for treatment on the hearing date neither is there any evidence to prove the same. He who alleges must prove in terms of section 107(1) of the Evidence Act, Cap. 80, Laws of Kenya which provides as follows:-

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”.
 35. In absence of any evidence that the tenant was indeed sick as alleged and given his previous history of non-attendance to court in this matter, I am unable to believe his story and/or to exercise my discretion in his favour. The reason is a mere afterthought intended to excite this this tribunal's sympathy towards the applicant.
 36. The applicant has attacked the procedure adopted by the Tribunal in this matter in disposing the case. It should be noted that Tribunal's are not strictly bound by rules of procedure and section 12(4) of Cap. 301, Laws of Kenya invoked by the tenant only enjoins this Tribunal to investigate “any complaint filed by a landlord or tenant”. The manner of doing so is not prescribed by the Act. Hearing a landlord who has opposed a complaint filed by a tenant based on a tenancy notice to terminate tenancy cannot be said to be against the rules of natural justice.



37. In any event, the issues raised by the tenant in his application to set aside judgment are for the appellate court and cannot be adjudicated before this Tribunal as doing so would amount to sitting on appeal against my own decision.
38. I am therefore not satisfied that the tenant has brought himself within the principles of setting aside and his application is a candidate for dismissal.
39. In regard to costs, the same are in the tribunal's discretion under section 12(1) (k) of cap. 301, Laws of Kenya but always follow the event unless for good reasons otherwise ordered. I have no reason to deny the landlord costs.
40. In conclusion, the final orders which commend to me in this matter are:-
- a. The tenant's application dated December 1, 2022 is hereby dismissed with costs to the landlord.
 - b. The judgment delivered herein on November 2, 2022 is hereby upheld.
 - c. The landlord's costs for the application are assessed at Kshs.10,000/- against the tenant.
- 41 It is so ordered.

RULING DATED, SIGNED & DELIVERED VIRTUALLY THIS 28TH DAY OF MARCH 2023.

HON. GAKUHI CHEGE

VICE CHAIR

BUSINESS PREMISES RENT TRIBUNAL

Ruling delivered in the presence of:-

Wangatia for the Tenant/Applicant

Miss Githinji holding brief for Miss Muchira for the Landlord

