



**Okemwa v Bagha & another (Tribunal Case E231 of 2022)  
[2023] KEBPRT 79 (KLR) (17 February 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 79 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E231 OF 2022  
GAKUHI CHEGE, VICE CHAIR  
FEBRUARY 17, 2023**

**BETWEEN**

**COLLINS OKEMWA ..... TENANT**

**AND**

**MOHAMED MUNIR A BAGHA ..... 1<sup>ST</sup> LANDLORD**

**MOHAMED ZAHIR A BAGHA ..... 2<sup>ND</sup> LANDLORD**

**RULING**

1. The tenant moved this Tribunal vide a complaint made pursuant to Section 12(4) of Cap 301, Laws of Kenya against the Landlords to the effect that they were constantly harassing him with distress for rent arrears through Nottingham Edga Auctioneers who had issued a proclamation dated November 10, 2022. The Landlords are further accused of failure to supply accounts for the proceeds of sale of items previously distrained by the same Auctioneers.
2. The tenant therefore prays for a declaration that the distress for rent herein is unlawful, illegal, null and void. A declaration that no rent is owed capable of application of the Distress for Rent Act, An order to compel the landlord to furnish proper and accurate accounts of the proceeds of sale of previous distress and a restraining order from taking away the proclaimed goods and/or in any other manner interfering with the tenant's peaceful occupation of the demised premises.
3. The tenant contemporaneously filed a motion dated November 10, 2022 seeking temporary orders of injunction against the landlords by themselves, agents (including Nottingham Edga Auctioneers), employees, servants and/or hirelings from removing and/or carrying away his goods or in any other manner howsoever interfering with his quiet enjoyment of the tenancy pending hearing and determination of the complaint.
4. The application is supported by the affidavit of the tenant sworn on even date wherein it is deposed that he runs a hospital in the suit premises at a monthly rent of Kshs 32,000/-.



5. On November 1, 2022, the tenant was served with a proclamation of attachment by Nottingham Edga Auctioneers seeking to recover a sum of Kshs 128,000/- pursuant to the landlords' instructions.
6. The tenant deposes that towards the end of last year ie December 2021, he became overburdened by his father's hospital bills resulting into financial constraints which made him unable to pay rent for December 2021 to June 2022 totaling Kshs 223,000/-.
7. He was issued with a proclamation by Nottingham Edga Auctioneers on June 15, 2022 and subsequently, the items were carted away and sold. The tenant was not supplied with accounts of the sold items. He only saw the same Auctioneer visiting the same premises again to proclaim for rent arrears. This was despite the tenant continuing to pay rent totaling to Kshs 122,000/-.
8. The tenant contends that he did not owe any rent arrears in the foregoing circumstances. He states that the amounts claimed by the landlord as advocates' and Auctioneers' charges were meant to frustrate and exploit him.
9. The tenant has attached the proclamation dated June 15, 2022, November 1, 2022 cheque no 002xxx and Mpesa message in support of the application.
10. The application is opposed through the 1<sup>st</sup> Landlord's replying affidavit sworn on December 7, 2022. It is confirmed that the tenant pays Kshs 32,000/- per month as rent. Between December 2021 and June 2022, the tenant was in rent arrears of Kshs 223,000/-. Despite several reminders, the tenant failed to pay the said rent leaving the landlords with no alternative than to levy distress. The demand letter is attached as annexure "MMB-2" dated June 2, 2022.
11. On June 14, 2022, the landlord's advocates instructed auctioneers to levy distress for rent vide annexure 'MMB-3'. The tenant had prior to the initial distress paid Kshs 18,000/- via Mpesa to the 2<sup>nd</sup> Respondent.
12. In an attempt to stop the distress, the tenant is accused of barricading the premises as reported to the landlord by the Auctioneers vide annexure marked 'MMB-4' dated 6<sup>th</sup> and July 25, 2022. Eventually, the Auctioneers succeeded to distress for rent as evidenced by annexure 'MMB-5'. The second schedule properties were however not seized in the initial visit but in a subsequent visit as can be discerned from the Auctioneers' letter dated September 2, 2022 marked 'MMB-6'.
13. The attached goods were eventually advertised for sale and were actually sold on September 23, 2022 in a public auction which realized Kshs 21,300/- which added to Kshs 18,000/- and Kshs 60,000/- paid in cash and cheque by the tenant totalled to Kshs 99,300/-. The Auctioneers deducted a sum of Kshs 75,500/- leaving a balance of Kshs 23,800/- which was paid to the landlords as evidenced by a letter dated September 28, 2022 marked 'MMB-8'.
14. The tenant continued to occupy the suit premises without paying rent to date. As at the date of the second proclamation, rent for July, August September and October 2022 amounting to Kshs 128,000/- was owing as evidenced by annexure 'MMB-9'. As such the application is made in bad faith as the tenant has occupied the suit premises for over one (1) year without paying rent.
15. I am required to determine the following issues:-
  - a. Whether the tenant's complaint and application dated November 10, 2022 ought to be allowed or dismissed.
  - b. Who is liable to pay costs of the case?.



16. Section 12(4) of [Cap 301](#), pursuant to which this case was filed mandates this Tribunal to investigate any complaint relating to a controlled tenancy made to it by the landlord or the tenant and to make such order thereon as it deems fit.
17. There is no dispute that the tenant pays a monthly rent of Kshs 32,000/-. The Tenant admits that towards December 2021, he became overburdened by his father's hospital bills as a result of which he experienced financial constraints which culminated into his falling into rent arrears of Kshs 223,000/- for the period December 2021 to June 2022.
18. As a consequence, the landlords instructed Nottingham Edga Auctioneers who proclaimed the tenant's goods and subsequently sold them. The tenant contends that there was no account given after the sale on the amount realized and that he had in the meantime paid Kshs 122,000/-. Although the tenant contends that he owed no rent arrears, he has not explained how the total sum of Kshs 233,000/- admitted in his own affidavit as owing was settled. No evidence of how he has been paying accruing rent from the time he filed suit has either been tendered.
19. The landlords on their part have given a blow by blow account on the chronology of events leading to the filing of this case. They have supplied documentary evidence on how the amount claimed against the tenant is made up and in particular that only a sum of Kshs 23,800/- was realized by way of distress for rent levied against the tenant's goods.
20. The tenant was duty bound to bring himself within the principles set out in the case of *Giella- vs- Cassman Brown & Co Ltd* (1973) EA 358. Having failed to pay rent, the tenant came to this Tribunal to seek for a discretionary remedy of injunction against the landlords. He has failed to demonstrate that he has a *prima facie* case with a probability of success and that unless the orders sought are granted, he stands to suffer irreparable injury which cannot be atoned by way of damages. He has not demonstrated that the landlords have committed any wrong against him which evinces a genuine and arguable case that warrants an equitable remedy in line with the court of appeal decision in *Mrao Ltd – vs- First American Bank of Kenya Ltd & 2 Others* (2003) eKLR.
21. Section 3(1) of the [Distress for Rent Act](#) Cap 293, Laws of Kenya provides as follows:-
 

“(1)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”.
22. The tenant owed the landlords rent arrears by the time of coming to this Tribunal which he has not bothered to clear in the pendency of the case. He is thus underserving of any equitable remedy of injunction in line with the maxim that “he who comes to equity must come with clean hands”. His hands are dirty and no injunction order can insure in his favour in line with the dicta in the case of *Samuel Kipkori Ngeno & Another – vs- Local Authorities Pension Trust (Registered Trustees) & Another* (2013) eKLR at paragraphs 9 & 12 where it was held as follows:-
  - “ 9. A tenant's first and main obligation is to pay rent as and when it becomes due, for the Landlord has the right to an income from his investment. Why would a tenant allow himself to fall into such huge arrears of rent?”.
  12. The temporary injunction sought in the present application is an equitable remedy at the court's discretion. He who comes to equity must come with clean hands. A tenant who is in huge arrears of rent is underserving of the



court's discretion. The court cannot be the refuge of a tenant who fails to meet his principle obligation of paying rent as and when it becomes due".

23. On the basis of the foregoing superior court's decisions, I am afraid that the application and complaint by the Tenant must fail.
24. As regards costs, the same are at 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 costs to the landlords.
25. In conclusion therefore, the final orders which commend to me in this case are:-
  - a. The tenants complaint and application dated November 10, 2022 are hereby dismissed with costs to the landlords.
  - b. The interim orders given on November 11, 2022 are hereby discharged/vacated forthwith.
  - c. The landlords' costs are assessed at Kshs 25,000/- against the tenant.

It is so ordered.

**RULING DATED, SIGNED & DELIVERED VIRTUALLY THIS 17<sup>TH</sup> DAY OF FEBRUARY 2023.**

**HON. GAKUHI CHEGE**

**VICE CHAIR**

**BUSINESS PREMISES RENT TRIBUNAL**

Ruling delivered in the presence of:

Mutugi for the Respondents

Tenant present in person

