



**Kamau v Ngoya (Tribunal Case E761 of 2023)  
[2024] KEBPRT 1140 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 1140 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E761 OF 2023  
M MAKORI, MEMBER  
MAY 9, 2024**

**BETWEEN**

**GEORGE MAINA KAMAU ..... APPLICANT**

**AND**

**ODONGO IBRAHIM NGOYA ..... RESPONDENT**

**RULING**

1. The present claim was filed vide a reference and an application dated 10<sup>th</sup> August 2023 by the Applicant and a further affidavit dated 15<sup>th</sup> September 2023 and a second further affidavit dated 18<sup>th</sup> of October 2023 as was ordered by the court on the 16<sup>th</sup> of October 2023 which application was opposed vide an untitled and undated document by the Respondent.
2. That later the Respondent/Tenant through the firm of Belinda Otieno & Co Advocates filed a notice of preliminary objection dated the 10<sup>th</sup> of August 2023 and where the Landlord filed a further affidavit in response to the preliminary objection dated 13<sup>th</sup> February 2024.
3. Subsequently parties consented that the application and the preliminary objection be disposed of by way of written submissions.
4. From the totality of the pleadings filed by parties and made, only two issues emerge for determination:
  - I. Whether the Preliminary objection is merited.
  - II. Whether the Landlord is entitled to the orders sought?

**a. Whether the Preliminary objection is merited.**

5. The Respondent/Tenant raises the preliminary objection on the basis that the application is fatally defective because the persons who commissioned the applicant's supporting affidavit and further affidavit are not advocates of the High court of Kenya as required under the [Advocates Act](#) Cap 16. The



purported commissioners for Oaths are not in the Law society of Kenya data base found in the Law of Kenya website and that the affidavits are incompetent before this court and fatally defective.

6. In analyzing the objection raised this tribunal notes that the most important question that arises from the preliminary objection is -Do the Grounds of Objections raised by the Proposed defendant qualify to be a Preliminary Objection as was described in the case of *Mukisa Biscuit Manufacturing Co. Ltd ...Vs... West End Distributors Ltd* (1969) EA 696, where Law J A stated that;

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which objection point may dispose the suit”.

Further the Court stated;

“A preliminary objection raises a pure point to law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

7. The 10<sup>th</sup> Edition Black's Law Dictionary at page 68 defines an affidavit as follows: -"A voluntary declaration of facts written down and sworn to by a declarant before an officer authorized to administer oaths."
8. The making of affidavits is governed by the Oaths and Declaration Act Chapter 15 Laws of Kenya. Section 5 which outlines what particulars will be stated in the jurat or attestation clause. It provides: -"Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made."
9. Further, Section 8 states: -"A magistrate or commissioner for oaths may take the declaration of any person voluntarily making and subscribing it before him in the form in the Schedule."
10. From the above provisions, it can be deduced that an affidavit must state the place and date the oath is taken and it should be in the presence of a Magistrate or Commissioner for Oaths.
11. The Court of Appeal in Josephat Kipchirchir Sigilai v Gotab Sanik Enterprises Ltd & 4 others [2007] eKLR as follows:

“An affidavit, as a general rule, is evidence. It would appear to us that the affidavit is intended to make the plaintiff own every averment in his plaint. It was intended to change the averments in the plaint from being mere averments or pleadings into evidence as is true in other modes of instituting suits and to pin down the plaintiff to them and thus make them part of evidence in support of his case; and possibly to limit room for manoeuvre... A verifying affidavit as envisaged by the rule, is meant to assert or vouch to the truth of what is stated therein.”

The Court further expressed itself as follows –

“We think an omission to fully comply with the provision is a mere irregularity which, except in very clear cases, may be cured. We agree with Mr. Onyinkwa for the appellant that striking out a suit is a draconian and extreme measure which should only be resorted to in the clearest of cases, where the court, after considering all the facts and circumstances of the case comes to the inescapable conclusion that the plaintiff is abusing the court process or his claim is frivolous or vexatious or scandalous or does not lie.”



12. Finally, the Court was emphatic that “The power of the court to strike out a plaint for non-compliance with the requirement of a verifying affidavit is discretionary”. It was then noted that the Court may strike out the plaint or statement of claim or give the party at fault an opportunity to file a proper verifying affidavit.
13. Applying the above principles to the instant application, the tribunal is far from convinced that substantive justice will be served by striking out the Application. More significantly, the Respondent/ Tenant has not demonstrated that the Application is frivolous or vexatious, or scandalous or discloses reasonable cause of action.
14. Further it is noted that the Commissioners for oaths are appointed by the Chief Justice and must be practicing advocates (see section 2 of the [Oaths and Statutory Declaration Act](#)). Under section 9 of the [Advocate’s Act](#), an advocate is any person who is admitted as an advocate, whose name is listed on the roll and holds a valid practicing certificate.
15. The evidence provided which are screenshots of the law of the society of Kenya search portal is not sufficient evidence to show that the person who stamped the documents is neither an Advocate nor a Commissioner of Oaths. As envisaged above the tribunal believes that the evidentiary evidence to be provided would have been a sample of the roll of advocates to show that indeed the advocate was not in the roll and as such the tribunal is inclined to find that the preliminary objection lacks merit.

### **III. Whether the tenant is entitled to the orders sought?\***

16. In determining the question whether the applicant is entitled to the orders sought the pertinent question is whether there exist any rent arrears and whether the repairs have been made.
17. The Landlord in the application dated 10<sup>th</sup> August 2023 makes claim of an amount of Kenya shillings Forty thousand (Kshs 40,000) being accrued rent arrears, subsequently in his further affidavit on the 15<sup>th</sup> of September 2023, he makes claim of an amount of Kenya shillings Eighty-three Thousand Six hundred and thirty-six (Ksh 83,636) which includes 11 days before vacating plus an amount of One hundred and forty-seven thousand nine hundred for the repairs to be undertaken at the premise.
18. Additionally, in paragraph 4 of the further affidavit the Landlord confirms that he indeed holds a deposit of Kenya shillings Eighty thousand (Ksh 80,000).
19. On the other hand, the tenant under paragraphs 16 to 22 alleges to have paid the rent arrears owed to the landlord and asserts that he paid a deposit of 2 months when he entered the suit property and that they had agreed that the said deposit would be utilized as rent when he vacated the property. He then attaches photos of the premises which he claims that he undertook repairs before leaving the property.
20. The tribunal notes that despite both parties making claims of arrears or rent payment, neither of the parties has submitted a statement of payment account nor receipts of payment to guide this tribunal in accessing the rent arrears if any.
21. This tribunal therefore makes the assessment based on the facts and evidence deduced in the pleadings. After analyzing all the evidences presented by both parties the tribunal is persuaded by the fact that rent payment was made to the landlord and the repairs undertaken on the premises.
22. Further to the photos submitted by the tenant, he has attached an annexure OIN 4 which shows that he sent a message to the landlord informing him that he had made the repairs in the house and sought that the case be withdrawn.



23. Both evidences as presented remains uncontroverted by the Landlord and there has been no objection or queries raised as to the falsehood or inaccuracies of the based messages and photos attached showing the outlook after the repairs and as such there is reasonable cause to find that there exist no rent arrears and repairs to be made.
24. Based on the foregoing, the Tribunal makes the following orders; -
- a. That the Landlord shall retain the rent deposit of Kenya shillings Eighty thousand as had been agreed by parties.
  - b. The Applicant's reference and notice of motion Application dated 10<sup>th</sup> August 2023 is hereby dismissed.
  - c. Each party shall bear their own costs.

**HON. MIKE MAKORI**

**MEMBER**

**BUSINESS PREMISES RENT TRIBUNAL**

Ruling dated, signed and delivered virtually by Hon Mike Makori this 9<sup>th</sup> May, 2024 in the presence of Mrs. Gichela for the Tenant and in the absence of the landlord/.

**HON. MIKE MAKORI**

**MEMBER**

**BUSINESS PREMISES RENT TRIBUNAL**

