



**Witeithie Farmers Limited v Domm Studios Ltd (Tribunal Case
E301 of 2023) [2023] KEBPRT 1232 (KLR) (7 December 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 1232 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E301 OF 2023
N WAHOME, MEMBER
DECEMBER 7, 2023**

BETWEEN

WITEITHIE FARMERS LIMITED LANDLORD

AND

DOMM STUDIOS LTD TENANT

RULING

1. Pursuant to a Ruling of this court delivered on the 17.09.2023, the Applicant moved this court by his motion dated 9.10.2023 brought under certificate of urgency and sought that an order of stay of execution be issued against the said Ruling of this court together with all other resultant or consequential orders obtained against the Tenant.
2. The court was further requested to set aside the Ruling, the resultant orders and any other consequential orders thereto obtained against. It further sought that it be granted leave to file its response to the landlord/Respondent's motion. And that costs be in the cause.
3. The landlord filed grounds of opposition dated 27.10.2023 which asserted that the Tenant's Application was incurable, defective, misconceived, incompetent, unmerited and bad in law, that the Applicant had an opportunity to defend the Landlord's Application dated 9.3.2022 but failed to comply.
4. The landlord further stated that the Tenant was allowed to object to the notice to terminate dated 27.5.2022 but decided to ignore the same.
5. The landlord further stated that the Applicant's Application had no merit and was merely intended to deny the landlord his justice.
6. Paradoxically, the Respondent further alluded to a prayer for leave by the Tenant "for extension" of time to file an Appeal. I confess that I have not come across such a relief by the Tenant.



7. This matter has had a very checkered history. The matter first came to court on the 3.5.2023 and the Tenant sought for time to file a response. He was granted fourteen (14) days to comply as requested. He was to serve the responses and serve the same.
8. By 30.5.2023 when the matter came next to court, the Tenant had not filed any responses and sought for more time. The court directed that the parties were to file any pleadings they wished together with submissions and exchange the same within 28 days.
9. The matter was for mention on 28.6.2023 but the court was not sitting as the term of the chairman and the other members had lapsed. The matter went into limbo until 12.7.2023 when the same was mentioned again for compliance.
10. Still by this time, the Tenant had not complied with any directions as given by the court on the 3.5.2023 and 30.5.2023 and the counsel for the landlord who had complied did submit that the Application dated 9.3.2023 was unopposed and sought for a date for Ruling.
11. Eventually, the Ruling was delivered on the 17.9.2023 with orders upholding the Tenancy notice, eviction of the Tenant and award of costs at Kshs. 15,000/=. It is that Ruling that triggered this Application.
12. It is the Tenant's contention that when the matter came up on the 28.6.2023, it was to confirm compliance and take a Ruling date but that the same fell on a muslim Holiday known as *Idd Ul Adha* and the Thereafter, the Ruling was delivered without notice to the Tenant. He deemed that unlawful and unprocedural.
13. He further made averment to the effect that there was no landlord/Tenant relationship between him having been a sub tenant and that he therefore had a strong and cogent defence to the landlord's Application dated 9.3.2023.
14. I have perused the Applicant's Application and the submissions thereof, the landlord's grounds of opposition though no submissions were written on the same up to and under the time of writing this Ruling and it is my view that the following issues arise for determination;-
 - a: Whether the court should stay the Ruling dated 17.9.2023 and further set aside the same.
 - b: Whether the Tenant should be granted leave to defend the Application dated 9.3.2023.
 - c: Who should bear the costs of this Application.
15. On whether the Tenant should be granted orders of stay of the Ruling dated 17.9.2023 and whether the said order should be set aside, I would wish to rely on the case of; *Shah vs Mbogo & Another* [1967] EA 116 where the court held that;-

“That the decision whether or not to set aside ex parte Judgment is discretionary is not, in doubt, and that the discretion is intended so to be exercised to avoid injustice and 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.”
16. In *CMC Holdings Ltd vs Nziki* [2004] KLR 173, the court of Appeal held that:-

“Whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such discretion if the court turns its back to a litigant who clearly



demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle.”

17. In the case of; *David Gicheru vs Gicheba Farms Limited & Another* [2020] eKLR, the court held that:-
“The fundamental duty of the court is to do justice between the parties, it is in turn fundamental that to that duty, those parties should each be allowed a proper opportunity to put their cases upon the merits of the matter.”
18. Emerging from the foregoing, is that the Tenant in this matter was afforded limitless opportunities to set up a response to the landlord’s Application and to the reference thereof but he declined the invitation.
19. The Tenant’s indolence in this matter is inexcusable. The Application dated 9.3.2023 was coming up on the 28.6.2023 to confirm compliance and fix a date for Ruling. As earlier stated, the Tenant had not complied with the directions of the court initially issued on the 3.5.2023.
20. He only woke up from his comfort when served with the order pursuant to the Ruling delivered on the 17.9.2023. I cannot appreciate what justification the Tenant can have not to have an interest on the proceedings in his own case between the 5.6.2023 and 5.10.2023.
21. I have also noted that in the present Application, the Applicant has not attached any draft response to the landlord’s Application dated 9.3.2023 or to the reference thereof for the court to consider whether any triable issues were to arise to help in consideration of this Application.
22. From the foregoing, it is also my considered opinion that there are no good grounds to facilitate this court to issue orders of stay of the Ruling made on the 17.9.2023. Stay orders are meant to help in servicing the cause of justice but not to obstruct the same.
23. In all, I determined that no justice would be served in allowing the orders sought for stay and for setting aside and the same are declined.

B: Whether the Tenant should be granted leave to defend the Application dated 9.3.2023

24. I would wish to reiterate my earlier determination that without filing of a response to the Reference and Notice of motion both dated 9.3.2023, there is no knowing what purpose such leave would serve. If the Tenant had anything to say on the said Reference and Notice of Motion, he would have said it as the court afforded him sufficient time to do so.
25. It is noted that the Tenant has not in any way attempted to explain the reasons why he never filed any responses to both the Reference and Notice of Motion by the landlord. I therefore find that there would be no merit and justice in re-opening that window to the Tenant again and the same is declined.

Who should bear costs of the Application

26. The landlord merely filed the grounds of opposition dated 27.10.2023 and did not move. I therefore would in the circumstances direct that each party to bear own costs.
27. In the final disposal, I make the following orders;-
 - a. That the Tenant’s Application dated 9.10.2023 is dismissed in its entirety.
 - b. That in view of the orders made by the Ruling made on the 17.9.2023 the Reference thereof is also compromised in the same terms.



c. Each party to bear own costs of this Application.

Those are the orders of the court.

RULING, DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 7TH DAY OF DECEMBER 2023.

HON. NDEGWA WAHOME, MBS MEMBER

BUSINESS PREMISES RENT TRIBUNA

Delivered in the presence of;

Mr. Otieno for the Tenant/Applicant

Mr. Kinyua for the 1st landlord/Respondent

