



**Wambugu & another v Muchiri (Tribunal Case E152 of 2022)
[2024] KEBPRT 663 (KLR) (20 May 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 663 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E152 OF 2022
A MUMA, MEMBER
MAY 20, 2024**

BETWEEN

PRISCILLA MUTHONI WAMBUGU 1ST TENANT

JOSEPH WAMBUGU 2ND TENANT

AND

SAMUEL NGECHU MUCHIRI LANDLORD

RULING

A. Parties and their representatives

1. The Applicants, Priscilla Muthoni Wambugu and Joseph Wambugu (the “Tenants”), are the tenants of the premises that is the subject matter to the present suit.
2. The Firm of Mwikali & Associates Advocates represents the Tenants in this matter.
3. The Respondent, Samuel Ngechu Muchiri (the “Landlord”), is the proprietor of Plot No. Aguthu/Gatitu/667/165 located at Nyeri, Ruring’u Meeting Point upon which the suit premises that is the subject matter of this suit is erected.
4. The The Firm of Karanja Maina & Company Advocates represents the Landlord in this matter.

B. Dispute Background

5. The Landlord moved this Tribunal *vide* a reference and application evenly dated 15th December 2021 seeking among other orders that the court grants orders to terminate the tenancy as well as break in orders for purposes of levying distress for rent.



6. In response, the 2nd Applicant filed a replying affidavit dated 25th May 2023 and an application under certificate of urgency dated 1st August 2023. Consequently, the Tenants filed a replying affidavit dated 1st September 2023.
7. Upon hearing, the Tribunal *vide* a Ruling dated 25th October 2023 upheld the Landlord's reference and application evenly dated 15th December 2022 and ordered:
 - i. the tenant to pay Kshs.399,000 in rent arrears within 30 days failure to which the landlord shall be at liberty to break in and take over vacant possession of the suit premises;
 - ii. OCS Ruring'u to assist in compliance; and
 - iii. each party to bear its own costs.
8. Subsequently, the Tenants filed an application dated 1st November 2023 seeking orders inter alia:
 - i. the ruling dated 25th October 2023 be reviewed;
 - ii. stay of orders be made by the Honorable Tribunal pending the hearing and determination of the application;
 - iii. the Tenants be allowed to proceed with peaceful operations of the business without disturbance by the respondent pending the hearing and determination of the application
9. This Honorable Tribunal vide an order dated 16th November 2023 granted orders to stay the orders issued on the ruling dated 25th October 2023 and ordered the Tenants to pay in rent arrears of the undisputed Kshs.75,000 before the next hearing date.
10. This Honorable Tribunal gave further orders dated 14th December 2023 that ordered the Tenant to pay the rent arrears in 7 days failure to which the landlord shall be at liberty to distress and take vacant possession with the OCS Ruring'u Police Station without any further reference to the Tribunal.
11. It is on this order that the Tenants made a further application under a certificate of urgency dated 16th January 2024 seeking orders inter alia that:
 - i. a stay of execution of the orders issued on 14th December 2023 be granted pending the hearing and determination of the application;
 - ii. the orders issued on 14th December 2023 be reviewed and set aside;
 - iii. the Landlord, his servants and/or agents be restrained from selling the Tenant's attached business item and/or equipment valued at Kshs.1,575,220.
12. In response, the Landlord filed his replying affidavit dated 19th March 2024 and written submissions 26th March 2024.
13. The Tenants subsequently filed a further affidavit and written submissions evenly dated 29th March 2024 seeking the orders issued on 14th December 2023 be reviewed and set aside and the landlord, his servants and/or agents be compelled to release the Applicant's equipment and items unconditionally.
14. It is this application that forms the subject of this Ruling.

C. The tenants claim

15. The Tenant avers that her application is based on the fact that there is an error apparent on the face of the record.



16. She further avers that based on the order issued on 14th December 2023 the Landlord instructed auctioneers to levy distress for the sum of Kshs.381,000 which amount did not take into consideration payments she had already made.
17. She avers that the outstanding amount then was the sum of Kshs.100,000.
18. She further avers that the arrears due have been contested and the order made on 14th December 2023 did not indicate the arrears she ought to pay.

D. The Landlord's defence

19. The Landlord avers that the Tenant's application discloses no new and/or important matter or evidence to warrant review set out under Order 45 of the Civil Procedure Rules 2010.
20. He further avers that the Tenant's application has been overtaken by events as distress has already been levied lawfully.
21. Additionally, he avers that he was lawfully and duly executing the orders of the Honorable Tribunal issued on 14th December 2023 and as such the application herein is an abuse of the court process.

E. Issues for determination.

22. Having given full consideration to the Tenants' Notice of Motion Application dated 27th April 2023 and the Landlord's Preliminary Objection dated 1st March 2024, I find that the sole issue that falls for determination is:
 - a. Whether the Tenants have made out a good case to justify the grant of orders for review?

F. Analysis and determination

- A. Whether the Tenants have made out a good case to justify the grant of orders for review?
23. Section 80 of the Civil Procedure Act Cap 21 provides as follows: -

“ Any person who considers himself aggrieved—

 - a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”
24. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows: -

“ 1.

 - (1) Any person considering himself aggrieved—
 - a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or



- b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

25. In *Republic v Public Procurement Administrative Review Board & 2 others* [2018] e KLR it was held: -

“Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

26. From the above provisions, it is clear that while Section 80 of the *Civil Procedure Act* grants the court the power to make orders for review, Order 45 of the *Civil Procedure Rules* sets out the jurisdiction and scope of review by hinging review to discovery of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason.

27. The Tenant’s application is based on the ground of an error apparent on the face of the record.

28. The Court in *Zablon Mokua v Solomon M. Choti & 3 others* [2016] eKLR relied on the case of *Chandrakhant Joshibhai Patel -v- R* [2004] TLR, 218 where the court held that an error stated to be apparent on the face of the record:

“...must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which may conceivably be two opinions.”

29. In the instant case, the Tenant’s assertion that the Tribunal omitted the amount of rent arrears is factually incorrect in that the orders issued on 14th December 2023 ought to be inferred and interpreted in line with the Ruling dated 25th October 2023.

30. Furthermore, on the ground of discovery of new and important evidence, as aforementioned in Order 45 Rule 1 of the *Civil Procedure Rules*, 2010, new and important evidence is subject to the exercise of due diligence, which was not within one’s knowledge or could not have been presented at the time when the decree was issued or the order was made.

31. Despite the tenants having submitted new evidence in the form of rent payment statements, it is the Tribunal’s contention that these statements were endorsed on 26th October 2023, a day after the Ruling was issued.

32. In light of these, it is evident that the rent payment statements were within the Tenant’s knowledge and could therefore be presented before the Tribunal before the determination of this matter and cannot



not therefore be classified as new and important evidence, with a little due diligence this information would have been placed before the Tribunal.

G. Determination

33. In the upshot, the following orders shall abide:

- a. The Tenant's Applications for review dated 1st November 2023 and 16th January 2024 are hereby dismissed with costs to the landlord.

HON A. MUMA

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

Ruling dated, delivered and signed at Nairobi on this 20th day of May 2024 in the presence of Karanja M for the Landlord and Mwikali for the Tenant for the Tenants.

HON A. MUMA

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

