



Kimotho v Njoki (Tribunal Case E042 of 2024) [2024] KEBPRT 871 (KLR) (1 July 2024) (Ruling)

Neutral citation: [2024] KEBPRT 871 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E042 OF 2024
A MUMA, MEMBER
JULY 1, 2024**

BETWEEN

FRANCIS MAINA KIMOTHO LANDLORD

AND

MARTIN MWANGI NJOKI TENANT

RULING

A. Parties And Their Representatives

1. The Landlord, Francis Maina Kimotho (the “Landlord”) is the registered proprietor of the business premises located at Mwiki Kasarani (the “suit premises”).
2. The firm of Wabomba Masinde & Associates represents the Landlord in this matter
3. The Tenant, Martin Mwangi Njoki (the “Tenant”) is the proprietor of a business known as Student Bookshop situate on the suit premises.
4. The firm of Triple N.W & Co. Advocates represents the Tenant in this matter.

B. Background Of The Dispute

5. Through a Reference and an Application dated 19th December, 2023 canvassed through Certificate of Urgency of even date, the Landlord moved this Honourable Tribunal seeking the following orders inter-alia: a break-in order to access the suit premises under supervision of the OCS Mwiki Police Station, to levy distress to the Tenant’s items to recover outstanding rent and to waive the 10% duty filing fee on distress
6. Upon perusal of the Application, this Honourable Tribunal on 16th January, 2024 directed for an inter-party hearing on 29th February, 2024.



7. Due to non-attendance by the Tenant, this Honourable Tribunal on 29th February, 2024 allowed the Landlord's Application dated 19th December, 2023 with costs of Kshs. 10,000.00 to the Landlord.
8. In response, the Tenant filed an Application dated 4th April, 2024 canvassed through Certificate of Urgency of even date, the Tenant moved this Honourable Tribunal seeking the following orders inter-alia: that this Honourable Tribunal be pleased to set aside and/or vacate the orders issued on 29th February, 2024.
9. Upon perusal of the Tenant's Application, this Honourable Tribunal on 9th April, 2024 directed for an inter-party hearing on 16th April, 2024. On the hearing date, the Tribunal directed that the Landlord be restrained; from breaking in to the Tenants shop and from auctioning and/or disposing off the Tenant's property pending hearing of the Tenant's Application.
10. In response, to the Tenant's Application, the Landlord filed a Replying Affidavit sworn on 22nd April, 2024 by the Landlord. Consequently, the Honourable Tribunal, on 2nd May, 2024, directed the parties to file Submissions and for the Tenant to file a further response if need be.
11. The Tenant filed a Further Affidavit dated 8th May, 2024 as response to the Landlord's Replying Affidavit.
12. The Tenant and Landlord complied with the Tribunal's directions issued on 2nd May, 2024 and filed Submissions on 13th May, 2024 and 23rd May, 2024 respectively.
13. Therefore, it is the Tenant's Application dated 4th April, 2024 which is subject of this Ruling.

C. Tenant's Case

14. The Tenant avers that he has been dutifully and diligently paying his rent. He further avers that the consideration for the monthly rent is Kshs. 8,000.00 and not Kshs. 9,000.00 as claimed by the Landlord.
15. The Tenants swears that he was unaware of the proceedings herein prior as the Landlord had not served him with the Reference and Application dated 19th December, 2023.

D. Landlords' Case

16. The Landlord avers that the Tenant was in arrears having defaulted to pay rent for a period of 9 months.
17. He further averred that the Tenant was aware of the proceedings herein having being served with the Landlord's Application dated 19th December, 2023.

E. Jurisdiction

18. The Jurisdiction of this Honourable Tribunal is not contested by either party and therefore is not in dispute.

F. List For Issues For Determination

19. Having carefully perused the Pleadings presented before this Honourable Tribunal by the parties, it is therefore my respectful finding that the sole issue for determination before this Honourable Tribunal is: Whether this Honourable Tribunal should set aside and/or vacate the Orders issued on 29th February, 2024



G. Analysis And Determination

20. The powers of the Business Premises Rent Tribunal are provided by the Landlord and Tenant Shops Hotels and Catering Establishments Act, Cap 301 Laws of Kenya (hereinafter the Act). Section 12(1) (i) of the Act provides that:

- “1. A Tribunal shall, in relation to its area of jurisdiction have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in addition to and without prejudice to the generality of the foregoing shall have power--
- i. to vary or rescind any order made by the Tribunal under the provisions of this Act;”

21. The Civil procedure Rules, 2010 empowers the Tribunal with the power to vary or set aside its Order. Under Order 12 Rule 7, the Civil Procedure provides that:

Where under this Order, judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.

22. Further, Order 51 Rule 15 of the Civil Procedure Rules allows this Honourable Tribunal to set aside any Orders delivered ex-parte.

23. The Honourable Court (Hon. Lady Justice L.A. Achode) in the case PMM v JNW (Misc. App. No. 18 of 2020 at Paragraph 25 highlighted the conditions for setting aside of ex-parte orders. The Court held that:

“In setting aside ex-parte orders, the court must be satisfied of one of two things, namely, either the Respondent was not served with summons or the Respondent failed to appear in Court at the hearing due to sufficient cause.”

24. It is the Tenant’s testimony that he was not aware of the suit herein until Auctioneers appeared at his premises brandishing a Court Order which allowed them to break into the Tenant’s premises for the purpose of distressing for rent. However, upon perusal of the documents filed herein, I note that there is an Affidavit of Service sworn by Affaxard Kiema, a Court process server, sworn on 19th February, 2024 and filed on the same day. The Process server, under Paragraph 3, avers that duly served the Tenant with the Landlord’s Application dated 19th December, 2023 and a Hearing Notice. The Tenant however, vide his Further Affidavit dated 8th May, 2024 contests the validity of the Affidavit.

25. This said, this Honourable Tribunal is of the considered view that the main issue is rent arrears. This Tribunal has power conferred to it under Section 12 (4) of Landlord and Tenant (Shops, Hotels and Catering Establishments), Cap 301, Laws of Kenya which empowers this Honourable Tribunal to investigate any complaint relating to controlled tenancy, as it provides that:

- 4) In addition to any other powers specifically conferred on it by or under this Act, a Tribunal may investigate any complaint relating to a controlled tenancy made to it by the landlord or the tenant, and may make such order thereon as it deems fit



26. The parties herein hold conflicting views with the Tenant swearing that it has been paying rent as and when due. He has furnished this Honourable Tribunal with records of M-Pesa and bank statements of payments to the Landlord. The Landlord, on the other hand, claims that the Tenant is in arrears to the tune of Kshs. 125,000.00.
27. This tribunal while giving a ruling date noted that the Tenant owed rent from January to date and has in addition closed the shop and has not given the landlord access and ordered the tenant to pay the rent arrears and in default distress to issue on 31st May 2024.
28. All the Mpesa messages produced by the tenant are for the months before 5th February 2024 when the last payment was made. The Tribunal also observes that the tenant was indeed very inconsistent in paying rent. In addition to failing to show whether they had paid rent prior to the ruling as this was their last chance to redeem themselves they choose to miss the ruling. Guided by this conduct the Tribunal has no option but to decline the request to review and or set aside the orders of 29/02/2024.

Orders

29. In the upshot the following orders shall abide;
- a. The Tenant's Application dated 4th April 2024 is dismissed.
 - b. The Landlords Reference and application dated 19/12/2023 stays allowed as prayed with costs at Ksh. 10,000/-

**RULING DATED, DELIVERED AND SIGNED AT NAIROBI ON THIS 1ST DAY OF JULY 2024
IN THE PRESENCE OF KEMUNTO FOR THE LANDLORD AND NO APPEARANCE FOR
THE FOR THE TENANT**

HON A. MUMA - MEMBER

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BUSINESS PREMISES RENT TRIBUNAL

