



**Mzee v Naku Modern Feeds Ltd; Julius Onyango t/a Agunja Traders Auctioneers (Agent)
(Tribunal Case E176 of 2023) [2024] KEBPRT 1729 (KLR) (22 November 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 1729 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E176 OF 2023
P MAY, MEMBER
NOVEMBER 22, 2024**

BETWEEN

AGNES WANGECI MZEE TENANT

AND

NAKU MODERN FEEDS LTD LANDLORD

AND

JULIUS ONYANGO T/A AGUNJA TRADERS AUCTIONEERS AGENT

RULING

1. The parties herein have had a checkered litigation history. The present application has been filed by the landlord on 11th September, 2024 seeking to review the ruling delivered on 19th July, 2024. The application is premised on the grounds set out on the face of the application and those enumerated in the supporting affidavit which shall be discussed shortly.
2. The application is opposed vehemently by the tenant who filed the replying affidavit sworn on 8th October, 2024. A cursory reading of the said response reveals that the tenant is opposed to the application as they believe that the landlord is using the present proceedings to frustrate compliance with the previous orders issued in her favour. The words ‘stealing a match’ and ‘sharp practice’ are prominent.
3. The parties elected to canvass the application by way of written submissions. Each party has complied by filing elaborate submissions in support of their respective positions. I have considered the application, the responses thereto, the affidavits on record and the submissions filed and would proceed as follows:
4. The crux of the present application is that the landlord is dissatisfied with the orders that were issued on 19th July, 2024. It is important that the orders are rehashed below:



- a. The tenant is allowed to remain in the demised premises pending the hearing and determination of the reference.
 - b. The parties to file and exchange paginated bundle of documents which they seek to rely on including updated statements of accounts within 7 days.
 - c. The tenant to pay the uncontested rent arrears within 21 days upon receipt of the statement of accounts.
 - d. Each party to bear their own costs.
5. Having set the above background, I will summarize each party's case as hereunder:

Landlord's case

6. It is the landlord's contention that the reference is moot as it has been overtaken by events by dint of the distress that was levied against the tenant. He states the impugned orders issued on 19th July, 2024 have the effect of evicting a tenant who is not party to the present proceedings hence bad in law. He states further that the tenant has been selective in complying with the orders of the tribunal as she has not paid rent as was directed.
7. The landlord also faulted the correctness and soundness of the impugned orders as he stated that the same were issued unprocedurally and erroneously. He maintained that the Tribunal issued orders which were not sought in the application. He therefore urged the Tribunal to allow the present application.

Tenant's case

8. It is the tenant's position that the present application is misplaced and an abuse of the court process as it is a ploy to deliberately obstruct the course of justice. The tenant maintained that the landlord had not taken any practical steps to enforce the impugned orders. The tenant further stated that there were live contempt proceedings emanating from the said orders before the High Court.

Analysis

9. The Tribunal has been invited to review its order. The Tribunal is clothed with this power by dint of the powers proscribed under section 12 of CAP 301. This power is to be exercised with reference to the relevant sections of the civil procedure rules.
10. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows:-

45 Rule 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 review of judgement to the court which passed the decree or made the order without unreasonable delay."



11. The rules above restrict the grounds for review. They lay down the jurisdiction and scope of review. They limit review 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 un reasonable delay.
12. The starting point is that a review may be granted whenever the Tribunal considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another member of the Tribunal could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.
13. There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterized as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. A review lies only for patent error where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out.
14. Review is impermissible without a glaring omission, evident mistake or similar ominous error. An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by an order or review.
15. For the avoidance of doubt, the power of review is available only when there is an error apparent on the face of the record. I emphasize that review proceedings are not an appeal. The review must be confined to error apparent on the face of the record and re-appraisal of the entire evidence or how the judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is not permissible.
16. Discussing the scope of review, the Supreme Court of India in the case of *Ajit Kumar Rath vs State of Orisa & Others* 9 Supreme Court Cases 596 at Page 608 had this to say:-

“the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified in the rule”
17. The landlord has advanced a plethora of reasons for the grant of orders sought. He has maintained that there is another tenant on the demised premises. He has stated that the 2 rooms leased by the tenant



were not both subject to the present proceedings. The Tribunal has followed the chronology of the applications filed by the parties and was conscious of the competing interests and the need to have the dispute resolved expeditiously. The parties have not complied with the order to have them file the documentary evidence that they seek to rely on during hearing. Respectfully, the landlord has invited the Tribunal to sit on its own appeal which is not tenable.

18. The existence of contempt proceedings before a superior court complicates the situation. The landlord has attacked the said proceedings for being premature. It is however not within the purview of this Tribunal to make a decision on the merits or otherwise of an application that is live before the superior court. Besides the parties having knowledge of the said proceedings, have an opportunity to urge the same.
19. Guided by the jurisprudence discussed above, it is my finding that the reasons cited by the applicant do not quality to be any of the grounds prescribed for an application for review.
20. In view of my above conclusions, I find that the grounds cited do not qualify to be grounds for review to bring the applicant's application within the ambit of the grounds specified in Order 45 Rule 1. It is my finding that this is not a proper case for the Tribunal to grant the review sought or even to exercise its discretion in favour of the landlord. Accordingly, the landlord's application dated 11th September, 2024 is dismissed with no orders as costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 22ND DAY OF NOVEMBER, 2024.

HON. PATRICIA MAY

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

Delivered in the presence of Muriithi for the Landlord and Abuya for the Tenant

