



Zavery v Maluki (Tribunal Case E484 of 2024)
[2024] KEBPRT 1566 (KLR) (8 November 2024) (Ruling)

Neutral citation: [2024] KEBPRT 1566 (KLR)

REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E484 OF 2024
GAKUHI CHEGE, CHAIR & J OSODO, MEMBER
NOVEMBER 8, 2024

BETWEEN

MAAD ZAVERY LANDLORD

AND

KENNY MUTHOKA MALUKI TENANT

RULING

1. The landlord moved this Tribunal vide a Reference dated 24th April 2024 through which he complained that the tenant had failed or ignored to honour the decision of this Tribunal in case No. E1189 of 2022 in which he was ordered to pay outstanding and accruing rent for a period of 24 months thereby infringing on his rights over the leased property.
2. The landlord therefore sought for leave to levy distress for rent against the tenant and that the tenancy between them be deemed to have ceased. He also sought for legal costs of Kshs 50,000/=.
3. The landlord simultaneously filed a motion of even date seeking in material part for a temporary injunction stopping the tenant, his agents, servants or assigns from carting away, stowing away or removing the assets currently located on all that property known as Plot 2/Kitui Municipality.
4. According to the landlord, the tenant has been in rent arrears for a period of 24 months to his detriment. A notice to vacate issued on the tenant was set aside by this Tribunal in Case No. 1189 of 2022 on March, 2023 with orders that the Landlord should not issue another notice for 12 months as a result of which the tenant took advantage and failed to pay rent which had accrued to Kenya Shillings Five Hundred and Eighty-Five Thousand (Kshs.585,000/-) as at the date of filing the Reference.
5. The landlord being apprehensive that the tenant was intent on carting away his goods from the premises without paying the rent amounts due and owing moved to this Tribunal to seek a remedy.



6. The landlord contends that he stood to suffer substantial loss as he was not earning rent from the premises and the tenant on account of the tenant withholding payment of the substantial accrued rent arrears. It is for that reason that he seeks for leave to distress for rent as a self-help remedy to ensure that he benefits from his property.
7. The application is supported by the landlord's affidavit of even date and the grounds on the face thereof.
8. The application is opposed through the tenant's replying affidavit sworn on 27th May 2024 wherein he deposes that he had done the best to co-operate with the landlord and comply with the directions of the court issued in Tribunal Case No. E1189 of 2022 (KENNY MUTHOKA VS MAAD ZAVERY).
9. According to the tenant, it is the Landlord who had failed to comply because he was yet to supply him with a rent book and a statement of account as directed by the tribunal. He further deposes that the arrears claimed are highly contested and distress for rent should not be allowed to proceed on doubtful grounds. That from the year 2014 to 2022, he had paid a total amount of Kshs.1,937,740/= as rent to the landlord.
10. From the year 2014 to 2022, the amount of rent that was due to the landlord was Kshs. 1,052,200/= as per the tenant's calculations. He therefore complains that he had paid an excess amount of rent in the sum of Kshs 885,540/=. The tenant contends that since the landlord was claiming Kshs. 585,000/=: he had paid an excess of Kshs. 300,540/= and therefore had no accrued rent arrears as alleged by the landlord. As such, there is no basis to allow for blanket distress whereas he had sought for the landlord to provide receipts and a rent book to enable both parties to calculate any arrears which he had declined and unless the landlord presents a clear rent record with all payments made by him as the duly reflected in the schedule while giving him a chance to interrogate the said record, he will not be able to ascertain any arrears.
11. He claims to have made colossal investments on the property which cannot be casually terminated. He further claims to have previously issued a cheque to the Landlord for rent but he returned it. It will therefore be unfair to grant the landlord leave for distress for rent when his rent has been paid in excess.
12. The landlord filed a supplementary affidavit sworn on 10th October 2024 in which he deposes that the tenant has defaulted in remitting his monthly rent which has since accrued from the year 2022 to date. The Agreement entered into between him and the tenant stipulate that the monthly rent to be remitted was Kshs. 25,000/= with Clause 4 stipulating a 10% increment after the lapse of every two years.
13. The landlord disputes the figures given in paragraph 6 of the replying affidavit stating that the computation of the monthly rent for the period between 2014 and 2022 factoring in the 10% increment after every Two years does not amount to the sum of Kshs. 1,937,740/= alluded to by the tenant as the actual rent payable for the period in question is actually Kshs.3,187,200/=. He has annexed a copy of the rent book.
14. It is further deposed that the tenant has not adduced before this Tribunal evidence in support of the excess amount that he claims is owed to him. It should follow that the difference the tenant alludes to should be proven to enable the Tribunal effectively adjudicate on the matters before it but as it stands they remain mere assertions.
15. Pursuant to the Tribunal orders of 16th July 2024, the landlord filed a rent account statement and analysis dated 13th August 2024 showing a debit balance of Kshs 1,504,700/=. The tenant did not file any rent payment records despite claiming to have paid rent in excess of what was owing to the landlord.



16. Both parties were directed to file written submissions but only the landlord filed submissions dated 13th September 2024. We shall consider the submissions together with the issues for determination.

Issues for determination

17. The following issues arise for determination.
- a. Whether the landlord is entitled to the reliefs sought in his reference and application dated 24th April 2024.
 - b. Who shall bear the costs of the case?

Issue (a) Whether the landlord is entitled to the reliefs sought in his reference and application dated 24th April 2024.

18. The landlord moved this Tribunal vide a Reference dated 24th April 2024 through which he complains that the tenant had failed or ignored to honour the decision of this Tribunal in case No. E1189 of 2022 in which he was ordered to pay outstanding and accruing rent for a period of 24 months thereby infringing on his rights over the leased property.
19. The landlord therefore sought for leave to levy distress for rent against the tenant and that the tenancy between them be deemed to have ceased. He also sought for legal costs in the sum of Kshs 50,000/=.
20. The landlord simultaneously filed a motion of even date seeking in material part for a temporary injunction stopping the tenant, his agents, servants or assigns from carting away, stowing away or removing the assets currently located on all that property known as Plot 2/Kitui Municipality.
21. According to the landlord, the tenant has been in rent arrears for a period of 24 months to his detriment. A notice to vacate issued on the tenant was set aside by this Tribunal in Case No. 1189 of 2022 on March, 2023 with orders that the Landlord should not issue another notice for 12 months as a result of which the tenant took advantage and failed to pay rent which had accrued to Kenya Shillings Five Hundred and Eighty-Five Thousand (Kshs.585,000/-) as at the date of filing the Reference.
22. According to the landlord, the tenant has defaulted in remitting his monthly rent which has since accrued from the year 2022 to date. The agreement entered into between him and the tenant stipulate that the monthly rent to be remitted was Kshs. 25,000/= with Clause 4 stipulating a 10% increment after the lapse of every two years.
23. The landlord disputes the figures given in paragraph 6 of the replying affidavit stating that the computation of the monthly rent for the period between 2014 and 2022 factoring in the 10% increment after every Two years does not amount to the sum of Kshs. 1,937,740/= alluded to by the tenant as the actual rent payable for the period in question is actually Kshs.3,187,200/=. He has annexed a copy of the rent book.
24. It is further deposed that the tenant has not adduced before this Tribunal evidence in support of the excess amount that he claims is owed to him. It is therefore argued that the difference the tenant alludes to should be proven to enable the Tribunal effectively adjudicate on the matters before it but as matters stand they remain mere assertions.
25. According to the tenant, it is the Landlord who had failed to comply because he was yet to supply him with a rent book and a statement of account as directed by the tribunal. He further deposes that the arrears claimed are highly contested and distress for rent should not be allowed to proceed on doubtful



- grounds. That from the year 2014 to 2022, he had paid a total amount of Kshs.1,937,740/= as rent to the landlord.
26. From the year 2014 to 2022, the amount of rent that was due to the landlord was Kshs. 1,052,200/=as per the tenant’s calculations. He therefore complains that he had paid an excess amount of rent in the sum of Kshs 885,540/=. The tenant contends that since the landlord was claiming Kshs. 585,000/=: he had paid an excess of Kshs. 300,540/= and therefore had no accrued rent arrears as alleged by the landlord. As such, there is no basis to allow for blanket distress whereas he had sought for the landlord to provide receipts and a rent book to enable both parties to calculate any arrears which he had declined and unless the landlord presents a clear rent record with all payments made by him as the duly reflected in the schedule while giving him a chance to interrogate the said record, he will not be able to ascertain any arrears.
27. The landlord submits that Section 107 of the Evidence Act on the burden of proof provides that;
- “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
28. The tenant alludes to paying an excess amount in rent to the landlord in the sum of Kshs. 885,420/=. It is trite law that he who asserts must prove yet the tenant has not placed before this Tribunal evidence of the computation of the aforementioned amount or payments leading to the amount in question. We agree with the landlord’s submission that the assertion ought to be treated as mere allegations and find that the tenant fails to meet the threshold set out in Section 107 of the Evidence Act.
29. We are urged to be guided by Mativo J. as he then was in RAJAN SHAH T/A RAJAN S. SHAH & PARTNERS VS BIPIN P. SHAH [2016] eKLR, viz.:
- “Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajab JA in Britestone Pte Ltd vs Smith & Associates Far East Ltd.”
30. The parties herein entered into an agreement for lease in respect of Plot No. 2/Kitui Municipality dated the 1st October 2015. Clause 2 and 3 thereof stipulated as follows;
- “Thereafter the Tenant shall continue paying a monthly sum of Kenya Shillings Twenty-Five Thousand (Kshs. 25,000/=) payable quarterly in advance on the 1st day and not later than the 5th day of every month. The rent shall escalate at a rate of Ten Percent (10%) per annum after every completion of two years till the termination of this agreement.”
31. Having considered all the materials placed before us, it is clear beyond peradventure that the landlord has managed to prove on a balance of probabilities that the tenant owes rent arrears to him and that he is therefore entitled to the reliefs sought.
32. The tenant has not provided any single payment receipt or document to demonstrate that the amount claimed by the landlord is not owing. He does not show how the alleged overpayment of rent is made up. We are not convinced that the tenant had made such an overpayment.
33. In the instant case, the landlord has sworn an affidavit and presented a rent account statement showing that the tenant was indeed indebted to him in the sum of Kshs 1,504,700/= as at 13th August 2024. The tenant did not dispute the said tabulation neither has he provided any evidence to contradict the same.



34. Having failed to pay rent as and when the same fell due and payable, the landlord is entitled to distress for the rent arrears against the tenant.

Issue (b) Who shall bear the costs of the case?

35. As regards costs, the same are in the Tribunal's discretion under Section 12(1)(k) of Cap. 301, but always follow the event unless for good reasons otherwise ordered. We shall award costs to the landlord being the successful party.

C. Orders

36. Given the above analysis, the following final orders commend to us; -

- a. The landlord's application and reference dated 24th April 2024 are hereby allowed.
- b. The landlord is allowed to levy distress against the tenant in recovery of the rent due in the sum of Kshs 1,504,700/= as at May 2024 together with any further accrued rent using a Licensed Auctioneer without paying further court fees.
- c. The OCS, Kitui Central Police Station shall provide security during the distress.
- d. The orders of 24th April 2024 are hereby extended during the period of the distress for rent.
- e. The landlord is entitled to costs assessed at Kshs 50,000/= as prayed in the Reference.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 8TH DAY OF NOVEMBER 2024.

HON. GAKUHI CHEGE

(PANEL CHAIRPERSON)

BUSINESS PREMISES RENT TRIBUNAL

HON JOYCE AKINYI OSODO

(MEMBER)

In the presence of:

MISS Mwikali holding brief for Mwalim for the Tenant

Miss Muthoni holding brief for Michuki for the Landlord

