



**Munyoki v Mwamunye (Tribunal Case E094 of 2023)
[2023] KEBPRT 1142 (KLR) (Civ) (4 October 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 1142 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
CIVIL
TRIBUNAL CASE E094 OF 2023
CN MUGAMBI, CHAIR
OCTOBER 4, 2023**

BETWEEN

LYDIA MARY MUNYOKI APPLICANT

AND

PRISCILLAH MBAYU MWAMUNYE RESPONDENT

RULING

1. The tenant's application dated 16.6.2023 seeks orders that the orders issued on 30.5.2023 be set aside and the Applicant be granted an opportunity to be heard. The Applicant has also sought the costs of the application.

The Tenant's depositions

2. The affidavit sworn by the tenant in support of her application may be summarized as follows:-
 - a. That the tenant has never been served with the reference by the Respondent and she was therefore condemned un-heard.
 - b. That the deceased Philemon Machoka was the landlord of the Applicant.
 - c. That the Applicant had an agreement for the purchase of the suit premises pursuant to which he paid the said landlord Kshs. 4,300,000/= in various installments.
 - d. That the said deceased landlord passed on leaving two widows; Lucy Mokeira Nyarindo and Priscillah Mbayu Mwamunye.
 - e. That there is a pending succession cause in Kisii CMC, Succession Cause No. 531 of 2021 filed by Lucy Mokeira Nyarindo and her son Clinton Machoka.



- f. That the Respondent in this matter is the Objector in the Succession proceedings.
- g. That the Respondent misled the Tribunal that she was an administrator of the Estate of the deceased and therefore entitled to collect rent to the to the exclusion of the other beneficiaries.
- h. That the Respondent further misled the court that she was the landlady of the premises.
- i. That in the circumstances, the Respondent is intermeddling with the estate of the deceased.
- j. That Lucy Mokeira Nyarindo and Clinton Machoka have already entered into a sale agreement for the suit premises with the Applicant herein.
- k. That the orders issued by the court on 31.5.2023 were issued pursuant to material non-disclosure of facts.

The Respondent's depositions

- 3. The replying affidavit of Priscillah Mbayu Mwamunye sworn on 5.7.2023 may be summarized as follows hereunder:-
 - a. That she is one of the administrators to the Estate of the deceased Philimon Machoka Victor who was a landlord of the Applicant.
 - b. That the agreement allegedly entered into in 2019 between the deceased and the Applicant was a lease agreement and not an agreement for purchase of property.
 - c. That the alleged allegation of the payment of Kshs. 4,300,000/= by the Applicant for the purchase of the suit property is pure lies and without proof.
 - d. That the Applicant has since the demise of the Respondent's husband, been remitting the rent to the Respondent.
 - e. That the procedure in obtaining the orders was proper and legal.

Analysis and determination

- 4. The only issue I have to determine in this application is whether the Applicant is entitled to the orders sought in her application.
- 5. On 30.5.2023, the Tribunal allowed the landlord's application dated 19.3.2023 in terms of prayer (2) thereof. The effect of those orders is that the tenant was ordered to pay rent arrears amounting to Kshs. 260,000/= failing which the landlady was at liberty to levy distress for rent. It is these orders that the Applicant now desires to have set aside.
- 6. The Applicant's main and relevant ground for the setting aside of the said orders is that she has never been served with the reference by the Respondent. The tenant has also made heavy weather of the allegation that she is a purchaser of the property in question and was actively paying purchase installments and not rent. I have, though, not been shown any agreement for the purchase of the suit property from the deceased owner nor the evidence of the receipt of the purchase price installments by the deceased.



7. Was the Applicant served with the reference and application in this matter? At paragraph 3 of the affidavit of service sworn by one Festus Kyalo Mutinda, it is deponed as follows:-

“That on the same date as I was directed by the landlord/Applicant, I proceeded to Nyali area within Mombasa County where the tenant owns a residential home and on arrival, the gateman took me to the tenant’s house, I introduced myself to her and the purpose of my visit after which I managed to serve her with a copy of the order, the pleadings after I read and explained to her the contents therein.”

8. The Applicant has not in any material way challenged the deposition in the affidavit of service. It is clear from the said affidavit that indeed the tenant was served with the pleadings in this matter. Instead of concentrating on the issue of the actual service, the tenant has instead opted to involve herself in the succession cause pending in Kisii and seemingly discovering a split between the co-wives of the deceased. The Respondent’s exhibit PMM1 clearly shows that the letters of administration were on 31.3.2023 issued to the Respondent and her co-wife Lucy Mokeira Nyarindo. The said Lucy Mokeira Nyarindo has not raised any issues in this matter and neither has she sworn any affidavit and in any event, I have doubts whether Lucy and her son had the capacity to enter into a land sale agreement with the applicants. But I digress!
9. The Applicant has muddled the waters by his allegations that he purchased the property and that he has even paid the widows of the deceased some money as part of the purchase price. Whereas the tenant admits that there was not written agreement between himself and the deceased, I also noted above that I have not seen any evidence of payments to the deceased. I am not able to therefore conclude at this stage whether the Applicant is the owner of the suit property or tenant thereof.
10. In the circumstances, I do appreciate that the powers to set aside judgments is discretionary but must be exercised judicially to avoid injustice or hardship on the part of the Applicant. I have already observed that the Applicant was served with the application and pleadings herein BUT in view of the issues raised in her replying affidavit, I will make the following orders:-
- a. That the orders issued by the Tribunal on 30.5.2023 are hereby set aside on the condition that the tenant/Applicant deposits Kshs. 260,000/= in a joint interest earning account in the names of counsel for the parties within thirty (30) days.
 - b. That the Applicant will be at liberty to file her responses to the application dated 19.8.2023 within thirty (30) days.
 - c. That in default, the orders herein issued will be discharged and the tenant’s application dated 16.6.2023 will stand dismissed.
 - d. That the tenant will bear the costs of this application.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 4TH DAY OF OCTOBER 2023

HON. CYPRIAN MUGAMBI - CHAIRPERSON

4.10.2023

DELIVERED IN THE ABSENCE OF THE PARTIES.

