



**Mutisya v Muindu & another (Tribunal Case E191 of 2022)
[2023] KEBPRT 686 (KLR) (6 November 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 686 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E191 OF 2022
N WAHOME, MEMBER
NOVEMBER 6, 2023**

BETWEEN

SWABRA MUMBUA MUTISYA APPLICANT

AND

DICKSON MUEMA MUINDU 1ST RESPONDENT

WILSON MWAVISHA 2ND RESPONDENT

RULING

1. This matter was initiated by the Tenant/Applicant through a reference said to be filed under Section 12 of the [Landlord and Tenant shops, Hotels and Catering Establishments Act](#) Cap. 301 of the Laws of Kenya.
2. The said reference dated 20th September 2022 sought for the following reliefs,
 - i. That honourable Tribunal to direct the 1st and 2nd Respondent /Landlord by himself agents and/or servants to stop harassing/threatening and, or evicting the Applicant.
 - ii. That pending interpartes hearing the Landlord/Respondent by themselves, its agents, and/or assigns be ordered to reopen the Tenant's business premises failure to which the Tenant be at liberty to break in and the breaking to be supervised by OCS Kadzandani/Mwatamba Police Station.
 - iii. That the Honourable Tribunal to please orders restraining the Respondent by himself, agents, employees or servants from victimizing, harassing or in anyway whatsoever, interfering with the Applicant's quiet enjoyment of the Tenancy in the stated premises pending hearing and determination of this suit.
 - iv. That honourable Tribunal to direct the 1st and 2nd Respondent/Landlord by himself, agents and/or servants to stop harassing/threatening and or evicting the Applicant.



- v. That the honourable Tribunal to please issue orders restraining the Respondent by himself, agents, employees or servants from victimizing, harassing or in anyway whatsoever interfering with the applicant's quiet enjoyment of the Tenancy in the demised premises pending hearing and determination of this suit.
 - vi. That it is in the interest of justice and fairness that this application be allowed as prayed for.
 - vii. That the costs of the reference be borne by the 1st and 2nd Respondents.
3. Accompanying the reference was an undated Notice of Motion which was however founded on a certificate of urgency dated the 20th September 2022. The motion sought for the following orders:-
- i. That this application be certified as urgent and be heard ex-parte in the first instance.
 - ii. That pending inter-partes hearing the landlord/Respondent by themselves, its agents and/or assigns be ordered to reopen the Tenants Business premises, failure to which the Tenant be at liberty to break in and the breaking to be supervised by the OCS Kandzandani/Mwatamba Police Station.
 - iii. That this Honourable Tribunal be pleased to restrain the 1st and 2nd Respondents by themselves, their servants and/or agents from evicting and/or in any other manner interfering with the Tenant's quiet and peaceful occupation of the premises pending hearing and determination of the reference.
 - iv. That costs of this application be provided for.
4. In her supporting affidavit deponed on the 20/9/2022, the Applicant's main grievances were that the Tenancy herein was her only means to draw her livelihood from, that the Respondents had locked up the demised premises without following due process of the law. She therefore sought for orders to have the Respondents re-open the demised premises or in the alternative she be allowed to break in and assume possession and use thereof.
5. This Tribunal on hearing the application ex-parte on the 3/10/2022 did grant prayers 2 and 3 as ennumerated herein above, the orders ensuing therefrom were to be enforced by the OCS Kandzandani/Mwatamba Police Station.
6. The matter came up for the interpartes hearing of the said notice of motion application on the 25/10/2022 and on hearing preliminary issues that were raised by the parties, the Tribunal directed as follows:
- i. That the Tenant and the Landlord to avail themselves on Thursday the 27/10/2022 at 2.00p.m. for re-opening of the premises in the presence of a Rent assessor and OCS Kandzandani/Mwataimba Police Station to ensure compliance and peace.
 - ii. Parties are at liberty to bring experts (Valuers) to assess damages and the Tenant can pick what is usable. Parties to share court charges and/or opening charges.
 - iii. Tenant to file damages report and valuations in 21 days.
 - iv. Landlord to respond in 21 days to both.
 - v. Landlord to take vacant possession of the premises and re-let the same pending determination on the issue of damages.



7. In supposed compliance with the orders herein above, the Tenant filed what she titled “Plaintiff’s list of documents for Goods/Assets forcefully seized and disposed off by Landlord/1st Respondent. The document is dated 6/3/2023. The total claimed in the document is Kshs.3,232,811.
8. On their part, the Respondents filed the Notice of Preliminary objection dated 26/4/2023 and raised the following questions for determination.
 - i. That the Tribunal lacks jurisdiction to hear the matter since the Tenant/Landlord relationship has already expired pursuant to order issued on the 26/10/2022 and there is a new Tenant in place pursuant to Section 2 of Cap. 301.
 - ii. That there is an existing matter namely Mombasa Civil Cause No. 152 of 2020 *Swabra Mumbua Mutisya – vs- Dickson Muindi* filed in the Chief Magistrate’s court. Hence the matter herein is *Res judicata*.
9. In response to the preliminary objection, the Tenant filed the replying affidavit sworn on the 14/9/2023. The upshot of the same was that:
 - i. When she lodged this reference and the application thereof she was a Tenant in the demised premises,
 - ii. She was issued with orders to regain access to the demised premises which orders the Respondents complied with only to blockade the premises thereafter merely after a week.
 - iii. The Respondents then broke into the premises, carted away her goods and proceeded to illegally sell the same.
 - iv. Through historical records, she was able to tabulate all the items lost or damaged.
 - v. The CMCC No. 152 of 2020 was not related to the reference herein and that in any event, the same was still pending in court.
 - vi. She therefore needed the Tribunal to assess the loss and damages suffered by the irregular sale of her goods.
10. The Tenant also annexed in the replying affidavit the order in Mombasa CMCC No. 152/2023, stocksheet/inventory report dated 5/9/2020 cash sale receipts, local purchase order and an agreement.
11. On their part the Respondent’s filed a replying affidavit by the 1st Respondent Dickson Mwema Muindu sworn on the 2/10/2023. In the same he stated that:
 - i. Having gone through the list of lost goods and damages by the Tenant, he concluded that she wanted to reap from where she had not sowed.
 - ii. He had incurred a lot of expenses in putting back the premises into habitable condition. He annexed a valuation report to support that assertion.
 - iii. There was need for receipts to support the Tenant’s claims also need to provide invoices, receipts and inventory for the goods claimed.
 - iv. The claim of loss from her purported Mpesa business were fictitious as the allegedly lost airtime, mpesa phone and mpesa deposit should be in her mpesa account if at all she run an mpesa business.



- v. The Tenant had carted away all her goods from the demised premises leaving behind only a fridge and soda crates which could not fit in the vehicle that she ferried the other goods in. That the said items were still with him and the Tenant could them at her pleasure.
12. By directions given on the 7/8/2023 and 2/10/2023, both parties agreed to canvass their respective cases by way of written submissions. Indeed the Tenant filed her submissions dated 11/9/2023 whereas the landlord's submissions are dated 10/7/2023.
13. In his submissions, the Tenant reiterated all her averments in her filings as enumerated herein before. She also addressed the following issues, which to her, were important to help determine the justice of this matter,
- a. Whether the Tribunal has jurisdiction to hear the matter after the tenant has been (a) effected (evicted).
- b. Whether the case is Res Judicata.
14. The Tenant cited the following case law in her submissions,
1. *C.K. Bett Traders Ltd & Others vs. Kennedy Mwangi & Another* (2021) eKLR.
2. *Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors* (1969) E.A 696
3. *Rajabali Kassam T/A Giraffe Snack Bar vs. Total Kenya Ltd* NRB HCCC NO. 289/2003 and
4. *Ngomeni Swimmers Ltd vs. Katana Chara Suleiman* (2014) eKLR.
15. The Respondents on their part also reiterated their position as espoused in the preliminary objection dated 26/4/2023 and the replying affidavit sworn on the 2/10/2023. The issue thought critical for determination of this matter by the Respondents are:
- a. Whether the Tribunal has jurisdiction to hear this matter and
- b. Whether the suit is *Res judicata*.
16. The Respondents finally sought that the Applicant's claim be dismissed with costs.
17. Having looked at the parties filings and their respective opinions on the law, I am satisfied that the issues to help determine this matter are the following:
- a. Whether this Tribunal has jurisdiction.
- b. Whether this matter is *Res judicata*.
- c. Whether the Tenant has proved her case for special damages as claimed.
- d. What reliefs are available to the parties if at all.
- e. Who should bear the costs of this suit.

A. Whether This Tribunal Has Jurisdiction

18. This court had initially and by an order made on the 3/10/2022 allowed the Tenant unhindered access to the demised premises and which the landlord allowed, only to lockup the premises a second time. When the said orders giving possession of the demised premises to the landlord were made, the Tenant had given up on the Tenancy.



19. The 2nd ground raised on the question of jurisdiction is that there exists Mombasa CMCC case No. 152 of 2020 between the parties on the same issues. I am not persuaded that filing various suits in several forums can divert a courts jurisdiction as arrogated and conferred to it by the constitution, the law or charter.
20. The jurisdiction of the Tribunal is provided under Section 12 of the Act which is informed by qualification of the parties relationship as that of a landlord and Tenant under Section 2 of the Act.
21. I would therefore determine that the preliminary objection lacks in any merit and the same is dismissed. This is to say that this Tribunal has the jurisdiction to deal with all the issues before hand and between the parties herein.

B. Whether The Matter Is Res Judicata

22. Section 7 of the civil Procedure act on res judicata reads as follows:

“No court shall try any suit in which any matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court”.

22. In civil appeal no. 7 of 2020 in the High court of Kenya at Kajiado *Jane Naishulu Ndinda & 2 Others vs. Kennedy Mwangi & Another*,

The court had this to say on *Res judicata*:-

“The rationale for the doctrine of res judicata exists to protect public interest so that a party should not endlessly be dragged into litigation over the same issue or subject matter that has otherwise been conclusively determined by a court of competent jurisdiction”.

23. The court went further to state that:

“*Res judicata* will be successfully raised as a defence if the issue(s) in dispute in the previous litigation or suit were between the same parties as those in the current suit. The issues were directly or substantially in issue in the previous suit as in the current suit and they were conclusively determined by a court of competent jurisdiction”.

24. In the independent electoral and *Boundaries commission vs. Maina Kiai & 5 Others* (2017) eKLR the court of Appeal stated the following on Res- judicata:-

“For the Bar of resjudicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied as they are rendered not in disjunctive but conjunctive terms:

- a. The suit or issue was directly or substantially in issue in the former suit,
- b. That former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title,
- d. The issue was heard and finally determined in the former suit,



- e. The court that formerly heard and determined the issue was competent to try the subsequent suit in which the issue is raised.
25. From the foregoing it is plainly clear that the filing of Mombasa CMCC case no. 152 of 2020 Swabra Mumbua Mutisya – vs- Dickson Muindu does not in anyway make the present suit res-judicata however remotely you look into the same.
26. The Mombasa suit is not a former suit, evidence on record is that it is still pending. It has therefore not been conclusively determined, from the record it is also not clear what were the issues in the said suit as no pleadings were availed to this court by either of the parties. I also highly doubt that the Mombasa chief magistrate’s court has the requisite jurisdiction to hear and determine the issues at had which fall under the exclusive jurisdiction of this Tribunal.
27. In a nutshell is that the suit before me is not res judicata and will proceed to be determined on the materials before the court as placed by the respective parties.

C. Whether The Tenant Has Proved Her Case For Special Damages as claimed

28. The law of special damages and their prove is well settled. I have looked at the reference dated 20/9/2022 and the undated notice of motion application supported by a certificate of urgency of even date. In both there is no claim for special damages that is pleaded.
29. The only filings by the Tenant on her alleged losses and damages that she has offered are the stock sheets, receipts for purchases and an agreement to deal with Safaricom products. These are annexed to her replying affidavit sworn on the 14/9/2023. The Tenant had also filed what she referred to as “plaintiff’s list of documents for goods/assets forcefully seized and disposed off by the landlord/1st Respondent”.
30. The Tenant’s aforesaid documents which were filed to support her claim for damages and loss were informed by directions given by this Tribunal on the 8/2/2023 and 10/7/2023 where both parties were directed to canvass the issues of the alleged loss and damages.
31. In my view I highly doubt that the documents filed by the Tenant amounted to a plea for special damages as known to the law. The least that the Tenant should have done on receiving the court’s directions were to amend the reference and her notice of motion to reflect her new claim for loss and damages. This is after she had abandoned her pursuit for reinstatement into the suit premises.
32. In the case of Hahn – vs- Singh KLR 716 the court of appeal held as follows:
- “special damages must not only be specifically claimed (pleaded) but also strictly proved....for they are not the direct natural or probable consequence of the Act complained of and may not be inferred from the Act. The degree of certainty and particularly of proof required depends on the circumstances and nature of the acts themselves”.
33. In the case of *Guards Ltd* (2000) 2 E.A 385 the court of Appeal held that,
- “The issues for determination in a suit flowed from the pleadings and that a trial court could only pronounce judgment on the issues arising from the pleadings and that unless pleadings were amended parties were confined to their pleadings. (The court also associated itself with the case of *(IEBC & Another – Vs- Stephen Mutinda Mule & Others* C.a No. 219 Of 2013) on the issue.



34. I also appreciate the decision in *ODD Jobs – vs- Mubia* (1970) E.A 476 where the court held that:-

“A court may base its decision on an unpleaded issue, if it appears during the trial that the issue was pursued by the parties and left for the court to determine”.

35. In looking at all the matters herein, before as discoursed on into account, and also noting the completely different positions taken by the parties, it would be not just to find for the Tenant that she had suffered the special damages and loss as alleged.
36. The position of the landlord was that the Tenant carted away all her belongings from the demised premises and only left behind a fridge and some crates which could not fit in her vehicle. He asserted that the said items were available for collection by the Tenant. This position was not controverted and indeed the Tenant admitted that the fridge and crates had remained at the demised premises.
37. The upshot of this is that the Tenant did not plead, and there was also no attempt to prove the alleged loss at Kshs.3,232,811 or at all.

D. What Reliefs Are Available To The Parties If At All

38. From the evidence on record, this court issued orders on the 3/10/2022 directing the landlord to unlock/unweld the doors to the demised premises and allow the Tenant free access thereto and to enjoy her tenancy as per the law established. The landlord opened up the premises but then closed the same down after a week. This is evidence that has not been controverted.
39. That due to the obtaining hostile environment, the Tenant decided to vacate the premises and the court recorded that position by its order made on the 25/10/2022. The parties were to pursue other remedies outside the pursuit of the Tenant/Landlord relationship.
40. There is no dispute that this was a controlled Tenancy. It is also not in dispute that the landlord had no authority of the law when he sealed and/or closed the demised premises thereto. Indeed there is no denial on the part of the Landlord that despite a court order, he kept the premises in accessible to the Tenant until the time she, according to him, collected all her items from the premises except for the fridge and crates.
41. What is clear from the material on record is that the landlord had no regard to the provisions of Section 4 of the Act when he closed when the demised premises after initially having complied with the same.
42. It is therefore apparent that the landlord used unorthodox means to take possession of the demised premises without regard to the law or the court orders. It therefore follows that any purported losses and damages suffered by him cannot suffice as he denied this this court the opportunity to address the issues between the parties herein as per the law. He simply was not equitable in his actions and also in his conduct and cannot therefore find shelter under equity.
43. On the part of the Tenant, it is not in doubt that she lost her Tenancy on the demised premises. That the loss was not informed by the law and that the same was through the illegal and defiant actions of the landlord.
44. It therefore follows that the Tenant would be available to be compensated for the loss of her tenancy and for the termination of the tenancy without regard to the law.



45. The Act at Section 12(1) (L) gives jurisdiction to this Tribunal to:-
- “Award compensation for any loss incurred by a Tenant on termination of a controlled tenancy in respect of goodwill, and improvements carried out by the tenant with the landlord’s consent”.
46. In ELC Appeal of 12 of 2019 A Kisii [*Lena Sarange -vs- Robert Ayieko Angoi*](#) Justice J.M. Onyango had this to say at paragraph 27 of his judgement:-
- “Having said that, it would not be practical to set aside the order issued on 12th April 2019 and reinstate the Appellant in the premises as the owners of the premises have already leased the premises to the Respondent. The Appellant’s only recourse is in damages for loss of tenancy. The Appellant’s only recourse is in damages for loss of tenancy. The appellant is also at liberty to sue the owners of the demised premises for a refund of the unutilized rent and general damages for breach of the lease Agreement”.
47. In the case of *Manne Management Association & Another – vs- National Maritime authority* (2012) 18 NWLR 504 it was stated that:-
- “Whereas the general principle is that courts do not normally award damages for breach of contract, there are exceptions such as when the conduct of the Respondent is shown to be oppressive, high handed, outrageous, insolvent and vindictive”.
48. The Acts of the landlord herein of locking up the demised premises without regard to the Act and the failure to comply with very clear and plain court orders were oppressive, high handed, outrageous, indolent and vindictive and the Tenant is therefore entitled to general damages for the loss of Tenancy.
49. In the case of [*Rose Wangui Gathoni – vs- Nancy Nyambura Maina*](#) (2017) eKLR, Justice T. Matheka had this to say on the issue of compensation for breach of contract.
- “In the judgment, the learned trial magistrate correctly declined to grant special damages because though they were pleaded, they were not specifically proven”
50. The court in awarding general damages for loss of Tenancy had also noted that:-
- “The evidence on record shows that the defendant/appellant, without any provocation, double padlocked the plaintiff’s shop when she had already received the rent for that month. She refused to comply with court orders to re-open and the shop and she put in a new Tenant without giving the Tenant the requisite notice.
51. The court proceeded to uphold the magistrate’s court award of general damages at Kshs.300,000/-.
52. That through the said award was by a magistrate’s court, this Tribunal is also defined as a subordinate court and has therefore jurisdiction to award the same.
53. Article 159 of the [*constitution*](#) provides that:
- “Judicial authority is derived from the people and rests in and shall be exercised by the courts and tribunals established by or under the [*constitution*](#)”.
54. Article 169(1) of the [*constitution*](#) further provides that the subordinate courts are;



- a) The magistrates' courts
- b) The Kadhi courts
- c) The court martial, and
- d) Any other court or local Tribunal as may be established by an Act of Parliament as required by Article 162 (2) of the constitution.

E Who Should Bear The Costs Of The Suit

55. In my considered opinion, there is no reason whatsoever from the circumstances of this matter to divert from the provisions of Section 27 of the Civil Procedure Act. The Tenant therefore having established a case against the landlord, it follows that she is awarded the costs.

F. Final Disposition

56. I therefore, and noting that neither of the part's disclosed the rent payable monthly on the demised premises enter judgment for the Tenant and against the landlord as follows:

- (a) To pay an amount equivalent to two (2) months rent in lieu of notice to terminate the Tenancy.
- (b) General damages of Kshs.100,000/- for loss of Tenancy.
- (c) Costs assessed at Kshs.30,000/-.

RULING DATED SIGNED & VIRTUALLY DELIVERED IN NAIROBI THIS 6TH DAY OF NOVEMBER, 2023.

HON. JAMES NDEGWA (MBS)

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

Ruling delivered in the presence of:-

M/S Swabra Mutisya the Tenant/Applicant present in person

Mr. Molla holding brief for Mr. Ogembo for the landlord/Respondent

HON. JAMES NDEGWA (MBS)

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

6/11/2023

Court: 1. That from the input of this Ruling, the reference herein is fully compensated and also settled by this Ruling

The parties will be supplied with the Ruling on payment of the requisite fees.

The file may be marked as settled and closed.

HON. JAMES NDEGWA (MBS)

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

