



Isadia v Kawira & 2 others; Nairobi City County (Interested Party) (Tribunal Case E360 of 2020) [2024] KEBPRT 325 (KLR) (Civ) (25 March 2024) (Ruling)

Neutral citation: [2024] KEBPRT 325 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
CIVIL
TRIBUNAL CASE E360 OF 2020
A MUMA, CHAIR & J ROP, MEMBER
MARCH 25, 2024**

BETWEEN

JOYCE ANDIA ISADIA APPLICANT

AND

CATHERINE KAWIRA 1ST RESPONDENT

FURAHA BOUTIQUE 2ND RESPONDENT

PATRICK MUNGARA MULI 3RD RESPONDENT

AND

NAIROBI CITY COUNTY INTERESTED PARTY

RULING

A. Parties and Their Representatives

1. The Applicant, Joyce Andia Isadia, is the tenant and had rented space on the suit property located at Adams Arcade for business. (the “Tenant”)
2. The firm of Terry King’anyi & Co. Advocates represent the Tenant in this matter.
3. The 3rd Respondent, Patrick Mungara Muli, is the Landlord who rented out space for business in the suit property to the Tenant. (the “Landlord”)
4. The firm of Orwa Seda & Co. Advocates represent the Landlord in this matter.
5. The Interested Party, Nairobi City County, is one of the 47 Counties established under [the Constitution](#) of Kenya, 2010. (the “Interested Party”)



6. The Firm of Bare & Associates Advocates represent the Interested Party in this matter.

B. Background of The Dispute

7. This Honourable Tribunal delivered a Ruling dated 17th January, 2023 where it upheld the Tenant's reference dated 2nd April, 2020 and Application of even date in the following terms; the Tenant to keep paying rent as and when due to the Landlord, the Tenant not to be removed from the premises, the Tenant to be refunded Kshs. 35,000.00 spent on building the stall, the 2nd Defendant to be refunded the amount of Kshs. 37,000.00 being the purchase price for the stall, release of any outstanding amounts to the Landlord and the O.C.S Kilimani Police station to assist in compliance and maintaining peace.
8. The Tenant, consequently, through a Notice of Motion Application dated 14th June, 2023 canvassed by way of Certificate of Urgency sought orders inter alia that the Tribunal joins Nairobi City County as an Interested Party, issue a stay of execution of the Ruling dated 17th January, 2023, review and set aside the said Ruling and the Tenant be allowed to continue depositing her daily cess fees/rent to the Interested Party.
9. Upon perusal of the Tenant's Application, the Tribunal vide an Order dated 19th June, 2023 certified the Application as Urgent, joined the Interested Party to the proceedings herein and directed the Tenant to effect service on the other parties to the suit for hearing on 24th July, 2023.
10. The parties however did not appear for hearing on the date set and consequently, the Tribunal dismissed the said Application for want of prosecution.
11. The Tenant vide a Notice of Motion Application dated 25th July, 2023 canvassed by way of Certificate of Urgency sought to reinstate this Honourable Tribunal's Orders issued on 19th June, 2023 and for status quo to be maintained.
12. The Tribunal, after perusal of the Tenant's Application dated 25th July, 2023, vide an Order issued on 27th July, 2023 certified the Application as urgent and ordered the matter be heard on 9th August, 2023.
13. On 9th August, 2023, the Tribunal reinstated the Tenant's Application dated 25th July, 2023. Consequently, the Order of this Honourable Tribunal dated 19th June, 2023 stood.
14. Therefore, it is the Tenant's Application dated 14th June, 2023 which is subject of this ruling.

C. Tenant's Case

15. The Tenant, vide her Supporting Affidavit sworn on 14th June, 2023, averred that on 6th June, 2023 she was served with a letter from the Interested Party ordering her to pay daily cess fees of Kshs. 50.00. The amount was to be remitted through the Interested Party's pay bill account.
16. The Tenant further averred that the suit property was built on a road reserve and as such the 3rd Respondent could not be the lawful Landlord of the suit property. She claimed that she has erroneously been paying monthly rent to the said Landlord/3rd Respondent.
17. The Tenant contends that the cess fees paid by her constitutes as rent.

D. Interested Party's Case

18. The Interested Party informed this Honourable Tribunal that cess by definition is a form of tax collected by it, as stipulated in the Nairobi City Finance Act.



19. The Interested Party pointed out that there were distinct differences between the cess fees imposed by it and rent charged by the County. Further, it highlighted does not charge rent for illegal structure erected on road reserves but they collect cess fees only.

E. List of Issues for Determination

20. It is the contention of this Tribunal that the issue raised for determination is as follows:

SUBPARA - i. Whether the Tenant is entitled to the Orders to stop payment of rent sought in the Application dated 14th June, 2023

F. Analysis And Dertemination

21. This Tribunal notes that the Tenant vide the Application dated 14th June, 2023 sought a review and an order setting aside of the Ruling dated 17th January, 2023 and all subsequent proceedings, decisions and/or orders.
22. 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;”

23. Section 80 of the [Civil Procedure Act](#) Cap 21 provides as follows: -

“ Any person who considers himself aggrieved—by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

24. Further, Order 45 Rule 1 of the Civil Procedure Rules, 2010 sets forth three grounds from which an Application for review of a Court’s orders could be founded, including: the discovery of new and important matter or evidence, mistake or error apparent on the face of the record and any other sufficient reason.

25. The Court in the case of Republic v Public Procurement Administrative Review Board & 2 others [2018] e KLR held that: -

“Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it 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 unreasonable delay.”



26. In light of the above, I find it necessary to establish whether the reasons highlighted by the Tenant in her Application, and further espoused in her Submissions dated 31st January, 2024, constitute a sufficient reason to review and set aside the Ruling issued on 17th January, 2023. On this matter I am guided by the Court decision in *Tokesi Mambili and others v Simion Litsanga* [2004] eKLR where the court noted that:

“....ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.”

27. In the said Ruling, this Honourable Tribunal established the 3rd Respondent as the rightful owner of the suit premises hence the Landlord of the suit premises. Consequently, the Tribunal directed the Tenant to keep remitting rent as and when it falls due to the 3rd Respondent. The Tenant, however, disputes this holding and prays that it be reviewed. Her Application is founded on the ground that the suit property is built on a road reserve as such the 3rd Respondent cannot be the rightful owner as it is public land. The Tenant further averred that since she had been paying cess fees/rent to the Interested Party, it is the Interested Party who is the lawful Landlord.

28. This Honourable Tribunal has to establish; whether there is a difference between cess fees and rent, who is the rightful owner of the suit premises and who should remit the cess fees to the Interested Party.

29. The Interested Party, vide its Submissions dated 28th November, 2023, highlighted cess fees as a form of tax imposed by the Interested Party as authorized by Article 209 of *the Constitution* of Kenya, 2010 and as stipulated under the Nairobi City Finance Act. Moreover, the Interested Party pointed out that its County Cess Officers are only mandated to collect cess fees and could not impose rent charges on an illegal structure built on road reserves.

30. With the foregoing in mind, it is safe to assume that there is a clear distinction between cess fees and rent that is remitted to the Interested Party.

31. It is worth noting that cess fees taxed by the Interested Party are charges imposed for the utilization of the space on the road reserve and not for the structure erected by the 3rd Respondent. While rent is defined under Section 2 of the Landlord and Tenant Shops Hotels and Catering Establishments Act, Cap 301 Laws of Kenya as:

“rent” includes any sum paid as valuable consideration for the occupation of any premises, and any sum paid as rent or hire for the use of furniture or as a service charge where premises are let furnished or where premises are let and furniture therein is hired by the landlord to the tenant or where premises, furnished or unfurnished are let with services;”

32. Therefore, and with the above in mind, I find that having established there is a key distinction between cess fees and rent AS above and having established the Lawful owner in my earlier Ruling delivered on 17th January, 2023 I find no reason to vary or set aside my earlier ruling as cess has nothing to do with rent and cannot therefore form a basis for review or setting aside. Further more this Tribunal has no jurisdiction to entertain a dispute arising from a claim for cess between a Tenant and a Third Party who is not a Landlord

33. After careful consideration of the facts and pleadings presented to this Tribunal, I find that the Tenant’s Application fails to raise a sufficient reason within the meaning of Section 80 of the *Civil Procedure Act*, Cap 21 and Order 45 Rule 1 of the Civil Procedure Rules to warrant a review of the subject Ruling.



G. Determination

34. In the upshot, the following orders shall abide:

- a. The Tenant's Application dated 14th June, 2023 is dismissed with no orders as to costs.

HON A. MUMA

AG CHAIR/MEMBER

HON. JACKSON ROP

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

RULING DATED, DELIVERED, AND SIGNED AT NAIROBI ON THIS 25TH DAY OF MARCH, 2024 IN THE ABSENCE OF THE PARTIES.

HON A. MUMA

AG CHAIR/MEMBER

HON. JACKSON ROP

MEMBER

