



**Minage v Namulala (Tribunal Case E128 of 2022)
[2024] KEBPRT 1353 (KLR) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 1353 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E128 OF 2022
A MUMA, MEMBER
SEPTEMBER 19, 2024**

BETWEEN

EUNICE MINAGE APPLICANT

AND

NAOMI NAMULALA RESPONDENT

RULING

A. Parties and their Representatives

1. The Applicant, Eunice Minage is the Tenant in the suit premises located at Bungoma Town, opposite the Governor's office.
2. The firm of M/S Ateya & Company Advocates represents the Applicant in this matter.
3. The Respondent, Naomi Namulala, is the lawful owner of the suit premises and hence the Landlady.
4. The firm of J.B Otsiula & Associates represents the Respondent in this matter.

B. Back Ground of the Dispute

5. On 12th January 2024, this Honourable Court delivered a ruling dismissing the Tenant's Reference and Application dated 5th December 2022 and ordered the Tenant to pay rent arrears of KShs. 140,000.00 by 31st January 2024, failure to which the Landlady shall distress for rent and take back vacant possession and that each party bears their own costs.
6. Aggrieved by the decision of this Court, the Tenant filed an Application dated 1st February 2024 seeking Orders staying, reviewing and setting aside the ruling of the Court dated 12th January 2024.
7. The Landlady filed Grounds of Opposition dated 12th February 2024 opposing the Tenant's Application for review.



8. It is the Tenant's Application dated 1st February 2024 that is the subject of this Ruling.

C. Tenant's Case

9. The Tenant's Application is based on the grounds that proceedings of the subject matter was undertaken and the matter scheduled for ruling on 12th January 2024. However, the ruling was not delivered on the said date as expected and after making several inquests, her advocate advised her to exercise patience and wait for an official communication on the date the ruling would be delivered.
10. The Tenant avers that on 31st January 2024, she received a notification that the ruling had been delivered despite her advocate being unaware of the same as they had not received prior communication relating to the delivery of the ruling.
11. The Tenant prays that this Court stays execution, varies and sets aside its Ruling dated 12th January 2024 and all consequential Orders thereto as she stands to suffer irreparable loss if the said Orders are allowed to abide.

D. Landlady's Case

12. In his Grounds of Opposition dated 12th February 2024, the Landlady indicates that the Tenant has been part of the proceedings and was in Court when the Court issued a ruling date of 12th January 2024.
13. Further, it is the Landlady's case that the Tenant has not demonstrated the requirements in an application for review as there is no error apparent on the face of the record or any sufficient reason why the Ruling of this Court should be set aside.

E. Jurisdiction

14. The jurisdiction of this Court has not been contested by either party. This Court is convinced that it is clothed with the requisite jurisdiction to hear and determine the matter.

F. Analysis

15. Pursuant to Section 12 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Cap 301 Laws of Kenya, this Court has power to vary, rescind or set aside any order made under the provisions of Cap 301. It provides that:

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;
16. Further, the power of Courts to review their own decisions is provided for under Section 80 of the [Civil Procedure Act](#), Cap 21 Laws of Kenya. It provides that:
- Any person who considers himself aggrieved—
- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or



- b. 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.
17. In exercise of this power, this Tribunal is guided by the requirements to be met in an Application for review under Order 45 of the Civil Procedure Rules, 2010 as Amended in 2020 which provides that:
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 a review of judgment to the court which passed the decree or made the order without unreasonable delay."
18. Having established this, the Tribunal makes reference to the decision in *Patel vs E.A Cargo Handling Services Ltd* [1974] EA 75 at 76 where Duffus P held:
- ".... the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. "
19. Similarly, the court in *Shah vs Mbogo & another* (1967) EA 116 stated that:
- "...the court's discretion to set aside a judgement is intended to be exercised to avoid injustice or hardship, resulting from accident, inadvertence or excusable mistake or error but not to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice." light of the above, the Tribunal is satisfied that it has the power
20. In light of the above and having carefully perused the Tenant's Application, I am convinced that the said Application falls short of the requirements to be met in an application for review.
21. I note that the Tenant's argument that she will suffer irreparable loss if the Orders form the Ruling dated 12th January 2024 is insufficient as she has not demonstrated how. I find it unjustifiable that despite this Court severally ordering her to pay rent in the course of the proceedings, the Tenant has continued to be in default while still in occupation of the suit premises.
22. Additionally, the Tenant has failed to demonstrate exactly why she seeks stay of execution yet she has remained in occupation of the suit premises without paying rent as required. Does she intend to appeal this Court's ruling? If so, why hasn't the Tenant indicated the same or provided proof of payment of rent to demonstrate compliance with the Orders of this Court?
23. I note that the Tenant indicates that the Ruling was delivered on 31st January 2024. On the contrary, the Ruling was delivered on 12th January 2024 and a notification sent to the Tenant on 31st January 2024. As per the Court's records, the ruling date was taken in the presence of Mr. Ateya, Advocate on record for the Tenant and therefore, the Tenant or her Advocates should have attended Court on the said date for the ruling.



24. Besides, it is my considered opinion that the ruling delivered by this court on 12th January 2024 and all consequential orders thereto would not have changed due to the presence of the Tenant or her advocate. Further, it is not mandatory requirement that a party be present when a ruling is being delivered save for criminal cases.
25. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of their judgment. In the circumstances, I am convinced that the Tenant's application for review is meant to impede the execution of the Orders of this Court dated 12th January 2024 as the same does not meet any of the grounds for review under Order 45 of the Civil Procedure Rules.
26. Therefore, granting Orders of stay, review and or setting aside the ruling of this Court would be denying a successful litigant of the fruits of her judgement as well as a return on their investment thereby violating their right to property protected under Article 40 of the Constitution of Kenya, 2010.

G. Orders

27. In the upshot, the Tenant's Application dated 1st February 2024 is hereby dismissed. For the avoidance of doubt, it is further ordered that:
- a. The Tenant shall pay rent arrears of KShs. 196,000.00 by 30th September 2024 failure to which the Landlady shall distress for rent and take back vacant possession.
 - b. The OCS Bungoma Police Station ensure compliance of this Orders.
 - c. Landlady shall have costs assessed at KShs. 20,000.00.

HON A. MUMA - MEMBER

BUSINESS PREMISES RENT TRIBUNAL

RULING DATED, DELIVERED AND SIGNED AT NAIROBI ON THIS 19TH DAY OF SEPTEMBER 2024 IN THE PRESENCE OF NAOMI NAMULALA FOR THE LANDLADY/RESPONDENT AND IN THE ABSENCE OF THE TENANT/APPLICANT.

HON A. MUMA - MEMBER

BUSINESS PREMISES RENT TRIBUNAL

