



**Pascala Wa Wambua & Simon Njoroge t/a Flavours Pub v Nderitu (Tribunal  
Case E144 of 2023) [2024] KEBPRT 1129 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 1129 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E144 OF 2023  
M MAKORI, MEMBER  
APRIL 25, 2024**

**BETWEEN**

**PASCALA WA WAMBUA & SIMON NJOROGE T/A FLAVOURS  
PUB ..... APPLICANT**

**AND**

**SAMUEL NDERITU ..... RESPONDENT**

**RULING**

1. The matter before this court arises out of a Reference dated the 10<sup>th</sup> of August 2023 filed by the Tenants and accompanied by a Notice of Motion Application of even date.
2. The Tenants/Applicants claim that the Landlord illegally closed their business premises on the 13<sup>th</sup> of November, 2022 despite the Applicants having paid their rent in full, save for the months of July and August 2022.
3. The landlord did not file a response to the Reference, which led this Tribunal to give ex parte orders to the Tenant/Applicants.
4. The Landlord/ Respondent later filed a Notice of Motion Application Dated the 19<sup>th</sup> of December, 2023, claiming that he was never served with both the Reference and the Notice of Motion Application Dated the 10<sup>th</sup> of August 2023. He further claimed that he only came to learn about this matter when the Tenants served him with the orders issued by this Tribunal.
5. Additionally, the Respondent claims that he was caught by surprise as there was already a Ruling in his favour from the Rent restriction tribunal over the same subject matter and between these same parties.
6. The Landlord in his Application further avers that it was as a result of the Ruling that he (the Respondent) exercised his right to distress for rent, resulting in the Tenants filing this present Application in an attempt to forum shop.



7. There is an Affidavit of service on record filed by the Applicants herein, sworn by one Samuel N. Gekania. In the Affidavit, he avers that on the 15<sup>th</sup> of September, 2023, he left the Certificate of Urgency, Notice of Motion, and Supporting Affidavit with the Landlord's worker who declined to sign up on the principal copy.
8. Both parties did not file their respective submissions.
9. From the totality of the pleadings several issues arise for determination.
  - i. Whether the matter is res judicata?
  - ii. Whether the Tenant/Applicant is entitled to the reliefs sought?
10. On whether the matter is res judicata, I make reference to the case of Kennedy Mokua Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende [2022] eKLR where Justice Mugo Kamau in his wisdom stated that;

“The substantive law on Res Judicata is found in Section 7 of the [\*Civil Procedure Act\*](#) Cap 21 which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between 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”

The Black's law Dictionary 10<sup>th</sup> Edition defines “res judicata” as

“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”

A person may not commence more than one action in respect of the same or a substantially similar cause of action and the Court must attempt to resolve multiple actions involving a party and determine all matters in dispute in an action so as to avoid multiplicity of actions.

In order therefore to decide as to whether an issue in a subsequent Application is res judicata, a court of law should always look at the Decision claimed to have settled the issues in question and the entire Application and the instant Application to ascertain;

- I. What issues were really determined in the previous Application;
  - II whether they are the same in the subsequent Application and were covered by the Decision.
  - III. whether the parties are the same or are litigating under the same Title and that the previous Application was determined by a court of competent jurisdiction.”
11. The Respondent claims that there was a suit in the Rent Restriction Tribunal between this same parties over the same issues, but there are no pleadings filed as evidence of the same, neither is there a case number quoted on the documents filed. It is therefore apparent to this tribunal, that the Respondent has not tendered enough evidence to prove his assertions.



I rely on the analysis of the court in *M'Bita Ntiro v Mbae Mwirichia & another* civil appeal case 3 of 2017 [2018] eKLR where the court stated that;

“.... Obviously, in civil cases, the onus is on the plaintiff or any other claimant to prove the position he or she postulates on a balance of probabilities. This position is anchored in law. I reproduce here below sections 107,108 and 109 of the [Evidence Act](#) which provide erudite guidance in this area. They state as follows

Section 107: Burden of proof

1. 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 those facts exist.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Section 108: Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Section 109: Proof of particular fact

The burden of proof as to any particular fact lies in the person who wishes the court to believe in its existence unless it is provided by any law that the proof of fact shall lie on any particular person.”

12. It is my finding that based on the facts presented before this tribunal, there is no evidence showing that the matter was heard and determined before a court/tribunal of competent jurisdiction over the same subject matter.
13. I therefore proceed to make a finding on whether the Tenant/Applicants are entitled to the reliefs sought. On this issue, I note that the Landlord/Respondent avers that the Tenants owed him rent arrears and proceeds to attach a copy of a Settlement Agreement and a letter Dated 13<sup>th</sup> of November, 2022, indicating rent arrears of Kshs. 82,500/-. I am guided by the decision in:

*Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Ltd* (2017) eKLR where the Court of Appeal stated in part that: -

“We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, they are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved. “

14. This tribunal notes that on both copies, the Applicants have tendered their signatures and further accepted to clear the rent arrears by the 10<sup>th</sup> day of December, 2022. Since the Applicant did not file a response to the Landlord's Application, I'm inclined to believe that these arrears were not cleared.
15. I also note that on the 7<sup>th</sup> of March 2024, this honourable Tribunal gave directions to the Respondent to file an inventory of the items in the Tenants' shop together with the sale value of the items therein. The same is not on record.
16. In the upshot and based on the foregoing, I hereby issue the following orders; -



- a. That the Tenants' Reference and Notice of Motion Application Dated 10<sup>th</sup> of August 2023 is hereby partially allowed.
- b. That the Applicant/Tenant clears the rent arrears of Kshs. 82,500/- due and owing to the Respondent/Landlord within the next Forty-Five (45) days.
- c. That immediately upon fulfilment of order no (b) above, the Landlord reopens the Tenants' business premises situated on Plot No. 882 "Wanyororo 'B'".
- d. That upon reinstatement of the Tenant into the business premises, the Landlord is hereby restrained from interfering with the Tenant's quiet enjoyment of the property.
- e. That each party shall bear their own cost.

**HON. MIKE MAKORI - MEMBER**

**BUSINESS PREMISES RENT TRIBUNAL**

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY BY HON MIKE MAKORI THIS 25<sup>TH</sup> DAY OF APRIL, 2024 IN THE PRESENCE OF MS. ACHIENG FOR THE LANDLORD AND PASCALLIA WAMBUA THE TENANT.**

