



Lee Owen Madara t/a First Sunshine Limited v James & 3 others (Tribunal Case E399 of 2021) [2024] KEBPRT 772 (KLR) (Commercial and Tax) (24 May 2024) (Ruling)

Neutral citation: [2024] KEBPRT 772 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
COMMERCIAL AND TAX
TRIBUNAL CASE E399 OF 2021
GAKUHI CHEGE, CHAIR & J OSODO, MEMBER
MAY 24, 2024**

BETWEEN

LEE OWEN MADARA T/A FIRST SUNSHINE LIMITED APPLICANT

AND

JACQUELYNE SAGIMO JAMES 1ST RESPONDENT

IRENE 2ND RESPONDENT

WENDY SAGIMO 3RD RESPONDENT

JOSIAH OUGI SAGIMO 4TH RESPONDENT

RULING

1. Through a motion dated 8th February 2024, the Applicant moved this Tribunal seeking for the following reliefs;
 - I. That this Honorable Court be pleased to certify this Application urgent and in view of the urgency thereof service be dispensed with in the first instance.
 - II. That this Honorable Court be pleased to issue orders of stay of Execution of the orders of the Honorable Gakuhi Chege dated 30th August 2023 pending hearing and determination of the Application.
 - III. That this Honorable Court be pleased to issue orders of stay of Execution of the orders of the Honorable Gakuhi Chege dated 30th August 2023 hearing and determination of the Reference filed herewith.
 - IV. That this Honorable Court be pleased to issue any other orders that it deems fit and just in the circumstances.



- V. That the costs of the Application provided for
1. The application is premised on the following grounds and supported by the affidavit sworn by Lee Owen Madara annexed thereto;
 - a. That there exists an imminent fear of execution on account of the Orders of this Honorable Court issued on the 30th day of August 2023.
 - b. That this Honorable Court made an order on admission for payment of rent arrears by the Applicant totaling a net sum of Kes. 420,000/- and costs of Kes.30,000/- to the Landlord.
 - c. That however, in its Reference, the Claimant seeks compensation for loss occasioned by the Respondents which loss exceeds the amounts due and owing to the respondent as rent arrears.
 - d. That unless this Honorable Court urgently intervenes and issues the orders sought, the Applicant's property will be attached on account of a debt it is willing to pay save for the reconciliation on the total amounts owing.
 - e. That while the applicant admits owing some monies to the respondent, the said applicant does however deny owing the total amounts being claimed since he has also made some payments to the respondent and which amounts have not been accounted for by the respondent.
 - f. That unless this Honorable Court urgently intervenes and issues the orders sought, the Applicant's property will be attached on account of a debt it is willing to pay save for the amounts which are contested as owing to the respondents as well as the amounts being claimed by the applicant as owing by the respondent.
 - g. That unless this Honorable Court urgently intervenes and issues the orders sought herein, the Applicant is bound to suffer substantial loss occasioned by execution of the debt on admission.
 - h. That this being a money debt, the applicant is deserving of this Honorable Court's discretion and the exercise of the equity of redemption.
 - i. That it is in the interest of justice that the application is certified urgent.
 - j. That the Respondent will not suffer any prejudice as the application has been brought timeously and in good faith.
 2. In his supporting affidavit, the Applicant deposes that the application was precipitated by the looming fear of execution on account of the Orders of this Court issued on the 30th day of August 2023.
 3. On the said date, he admitted being in rent arrears in the sum of Kshs 420,000/= and this Court made an order on admission for payment of rent arrears totaling to Kshs 420,000/= and costs of Kshs 30,000/- to the Landlord.
 4. He further deposes that he suffered damages occasioned by the respondent's negligent acts/omission on two separate dates that is on 11th August 2021 and 12th August 2021 which are contained in an assessment report on the loss amounting to Kshs 1,258,116 and Kshs 1,673,500 respectively. The assessment report is attached as annexure "LO-1".
 5. On 1st February 2024, the applicant was served with a demand letter by the respondents through the firm of S.B Otieno and Company Advocates, expressing their intention to levy distress against the applicant should he fail to pay the rent amounts being demanded by the respondent. Annexed to the affidavit is the demand letter marked "LO-2"



6. The applicant admits owing some monies to the respondent but deny owing the total amounts being claimed since he made some cash payments to the respondent which have not been accounted for by the respondent.
7. The Reference filed by the Respondent seeks compensation for the loss occasioned by the Respondents to his business to the tune of Kshs 2,936,616.00 and as such, seeks that this Court intervenes and stays the orders dated 30th August 2023 during the pendency and determination of the Reference.
8. According to the Applicant, his claim against the Respondent as detailed in the reference exceeds what is due and owing to the Respondents as rent arrears and as such, he seeks for this courts indulgence in forestalling any impending execution by the Respondents.
9. The application is opposed through the replying affidavit of Jacqueline Sagimo James sworn on 29th February 2024 in which he deposes that the application is mischievous and has been fashioned to pre-empt another application that was pending before the High Court Succession Division in High Court P&A Case No. E3149 of 2022-*In the Estate of Oliver Wagori Sagimo* in which the administrators of the deceased's estate are seeking, inter alia, to recover from the Applicant a sum of Kshs. 600,000/- which he owes as rent arrears. The application was scheduled for hearing on 9th April 2024. The application pending before the High Court is marked as annexure JSJ-2.
10. This Tribunal granted the Applicant an injunction restraining the Respondents, their family from intimidating the Applicant, his servants and/or agents on the rented premises, Plot No. 33, Rabai Road, Buruburu Estate, Nairobi. Annexed to the affidavit and Marked JSJ-3 is a copy of the said Order.
11. Upon being granted the said Order, the Applicant is accused of having interpreted the same as giving him exclusive possession of Plot No. 33 Rabai Road, Buruburu Estate, Nairobi to the exclusion of the beneficiaries of the estate of the deceased and stopped paying rent for the premises and insistently bragged to the Respondents that he had court orders insulating him from eviction and/or distress for rent.
12. On 28th May 2023, the Respondents approached this Tribunal vide a notice of motion application, praying for rescission of the injunction order issued to the Applicant on 29th March 2022. This being on the basis that the Applicant had stopped paying rent for the premises from the day he secured the injunction order. The Respondents also asked this Tribunal to order the Applicant to pay some Kshs. 420,000/= that he owed at the time as rent arrears.
13. The Applicant was served with the application and this Honorable Tribunal granted him several opportunities to file his response but he failed to do so. The Applicant was present before the Tribunal on the date the application was heard and he was granted an opportunity to address the Tribunal on the application.
14. On 30th August 2023, this Tribunal granted orders rescinding the injunction order made on 29th March 2022 and ordered the Applicant to pay the outstanding rent over the premises amounting to Kshs. 420,000/- as at 28th May 2023. Annexed to the affidavit and Marked "JSJ-4" is a copy of the said Order.
15. It is therefore the Respondents' case that the Applicant can now not be heard to claim that the Respondents are liable to him to the tune of Kshs. 2,936,616/- yet he did not file any response to the application dated 28th May 2023 despite being granted numerous opportunities to do so. The Applicant's claim that he is owed Kshs 2,936,616/- is therefore an afterthought and is barred by the doctrine of res judicata as it ought to have been raised during the hearing of the said application dated 28th May 2023.



16. In any event, the claim that the Respondents occasioned the Applicant loss in August 2021 had already been pleaded in Milimani Commercial Suit No. E1151 of 2021 before the Chief Magistrate's Court which was adjudicated upon and further determined upon on appeal before the High Court in Milimani HCCA E005 of 2022 which appeal was dismissed. Annexed to and marked JSJ-5 (a) and (b) is a copy of the Plaintiff in Milimani Commercial Suit No. E1151 of 2021 and the Memorandum of Appeal in Milimani HCCA E005 of 2022.
17. Despite the Applicant being served with the Orders issued by this Tribunal on 30th August 2023 and a demand letter, the Applicant failed to pay any part of the rent arrears of Kshs. 420,000/= and/or any part of the costs of Kshs 30,000/- granted to the Respondents. The Applicant also failed to pay any further rent for Plot No. 33 Rabai Road, Buruburu Estate, Nairobi despite the fact that he was still in occupation of the premises. The rent arrears outstanding as at the date of swearing the replying affidavit was Kshs. 630,000/-. Annexed to the affidavit and marked JSJ-6 is a copy of the demand letter served upon the Applicant.
18. The Applicant is accused of having approached this Honorable Tribunal with unclean hands since he is yet to comply with its last Orders issued on 30th August 2023. The Applicant is accused of blatant contempt of the Orders of this Tribunal but simultaneously requests for stay of execution of Orders made in favor of the Respondents, which is a contradiction of the maxim of equity that he who seeks equity must do equity.
19. According to the Respondents, he Applicant had sought the injunction Order of 29th March 2022 for the unlawful purpose of evading his responsibility to pay rent over the premises and intends to further frustrate the Respondents and unduly deter them from executing the Order issued in their favor on 30th August 2023. The Applicant's continued failure to pay rent for the premises is in violation of his obligation to pay rent under Section 66 (1) (a) of the Land Act and is thus unlawful.
20. It the Respondents' case that the prayers in the present application cannot be granted as there is no pending Reference to be pursued by the Applicant after granting of such prayers. The Applicant has not specified the date of his alleged pending Reference or why he has failed to prosecute the supposed Reference since 29th March 2022 when he was granted an injunction order. The Applicant has further not explained why it took him 8 months to approach this Tribunal for orders of stay of execution and why he feels execution is imminent now but was not imminent 8 months ago. In filing the current application, the Applicant therefore seems to be propelled by motivations other than those of meeting the ends of justice. The Applicant has not sufficiently shown that the principles for granting orders for stay of execution have been met in his case. In that, he has not shown that the present application has been made without unreasonable delay and that he is willing to tender such security as the Tribunal may require.
21. The application was directed to be disposed of by way of written submissions. The following issues emerge for determination in the matter;
 - a. Whether the Applicant is entitled to the reliefs sought in the application dated 8th February 2024.
 - b. Who is liable to pay costs of the application?
22. The Applicant is seeking for stay of execution of the orders of this Tribunal given on 30th August 2023 pending hearing and determination of the reference filed together with the application. We have noted that there is no such reference attached to the application or separately filed in this matter.



23. On 30th August 2023, this Tribunal rescinded its orders of 29th March 2022 on account of the tenant's non-payment of rent from the date he secured the orders of injunction. The tenant was also ordered to pay outstanding rent arrears then standing at Kshs 420,000/=. The landlord was in the alternative permitted to levy distress for rent against the tenant to recover the rent arrears and was also granted costs of kshs 30,000/=.
24. There was no appeal or application for review of the said orders and the tenant has now come back to this Tribunal seeking for stay of execution thereof.
25. The Applicant was served with the application and this Honorable Tribunal granted him several opportunities to file his response but he failed to do so. The Applicant was present before the Tribunal on the date the application was heard and he was granted an opportunity to address the Tribunal on the application.
26. On 30th August 2023, this Tribunal granted orders rescinding the injunction order made on 29th March 2022 and ordered the Applicant to pay the outstanding rent over the premises amounting to Kshs. 420,000/- as at 28th May 2023. Annexed to the affidavit and Marked "JSJ-4" is a copy of the said Order.
27. We agree with the Respondents that the Applicant cannot now be heard to claim that the Respondents are liable to him to the tune of Kshs. 2,936,616/- yet he did not file any response to the application dated 28th May 2023 despite being granted numerous opportunities to do so. The Applicant's claim that he is owed Kshs 2,936,616/- is an afterthought and is barred by the doctrine of res judicata as it ought to have been raised during the hearing of the said application dated 28th May 2023.
28. In any event, the claim that the Respondents occasioned the Applicant loss in August 2021 had already been pleaded in Milimani Commercial Suit No. E1151 of 2021 before the Chief Magistrate's Court which was adjudicated upon and further determined upon on appeal before the High Court in Milimani HCCA E005 of 2022 which appeal was dismissed. We have perused Annexure marked JSJ-5 (a) and (b) being a copy of the Plaint in Milimani Commercial Suit No. E1151 of 2021 and the Memorandum of Appeal in Milimani HCCA E005 of 2022 and have confirmed to the issues raised by the tenant herein.
29. Despite the Applicant being served with the Orders issued by this Tribunal on 30th August 2023 and a demand letter, the Applicant failed to pay any part of the rent arrears of Kshs. 420,000/= and/or any part of the costs of Kshs 30,000/- granted to the Respondents. The Applicant also failed to pay any further rent for Plot No. 33 Rabai Road, Buruburu Estate, Nairobi despite the fact that he was still in occupation of the premises. The rent arrears outstanding as at the date of swearing the replying affidavit was Kshs. 630,000/-. We have seen annexure marked JSJ-6 being a copy of the demand letter served upon the Applicant.
30. The Applicant approached this Tribunal with unclean hands since he failed to comply with the last Orders issued on 30th August 2023. We find and hold that the Applicant is in blatant contempt of the Orders of this Tribunal but is simultaneously requesting for stay of execution of the orders made in favor of the Respondents, which we agree with the Respondents is a contradiction of the maxim of equity that he who seeks equity must do equity.
31. We also find that the Applicant sought the injunction orders of 29th March 2022 for the unlawful purpose of evading his responsibility to pay rent over the premises and now intends to further frustrate the Respondents and unduly deter them from executing the order issued in their favor on 30th August 2023. We find and hold that the Applicant's continued failure to pay rent for the premises is in violation of his obligation to do so under Section 66 (1) (a) of the [Land Act](#) and is thus unlawful.



32. It the Respondents' case that the prayers in the present application cannot be granted as there is no pending Reference to be pursued by the Applicant after granting such prayers. The Applicant has not specified the date of his alleged pending Reference or why he has failed to prosecute the supposed Reference since 29th March 2022 when he was granted an injunction order. The Applicant has further not explained why it took him 8 months to approach this Tribunal for orders of stay of execution and why he feels execution is imminent now but was not imminent 8 months ago. In filing the current application, the Applicant therefore seems to be motivated by reasons other than those of meeting the ends of justice. The Applicant has not sufficiently shown that the principles for granting orders of stay of execution have been met in his case in that, he has not shown that the present application has been made without unreasonable delay and that he is willing to tender such security as the Tribunal may require.
33. We therefore find and hold that the application has no merit and proceed to dismiss the same with costs of Kshs 15,000/= to the Respondents. The application is an outright abuse of court process and ought not be entertained.

It is so ordered.

RULING DATED, SIGNED & VIRTUALLY DELIVERED THIS 24TH DAY OF MAY 2024

HON. GAKUHI CHEGE - PANEL CHAIRPERSON

BUSINESS PREMISES RENT TRIBUNAL

HON JOYCE OSODO - PANEL MEMBER

BUSINESS PREMISES RENT TRIBUNAL

In the presence of;

Okwach holding brief for Miss Nyongesa for the Applicant

No appearance for the Respondent

