



**Gichuru v Ndung'u & another (Tribunal Case E618 of 2024)
[2024] KEBPRT 1203 (KLR) (23 August 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 1203 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E618 OF 2024
J OSODO, CHAIR
AUGUST 23, 2024**

BETWEEN

GITAU GICHURU APPLICANT

AND

LUCIA NJERI NDUNG'U 1ST RESPONDENT

KANDE AUCTIONEERS 2ND RESPONDENT

RULING

A. Dispute background

1. The tenant/applicant moved this Tribunal vide a Reference dated 29th May 2024 under Section 12(4) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* Cap 301 with a complaint that the respondent instructed Kande Auctioneers to attach and auction his properties for wrong rent arrears. The applicant/tenant admits owing the landlord KES. 59,000 and not KES. 127,112 as indicated in the proclamation notice and that there was no notice served upon him to clear the said rent arrears.
2. The tenant/applicant simultaneously filed a notice of motion under a certificate of urgency dated 29th May 2024 in which he sought for the following orders; -
 - i. That the application be heard ex-parte in the first instance and service of the same be dispensed with.
 - ii. That the tribunal do issue an order restraining the respondents from attaching the applicant's properties pursuant to the proclamation notice dated 9th May 2024.
 - iii. That the tribunal do calculate the rent arrears to be paid by the applicant/tenant.



- iv. That the landlord be ordered to open the suit premises so that he can collect the items locked therein.
 - v. That the landlord/respondent do pay the tenant/applicant KES. 27,000 which was paid by him as deposit.
 - vi. That costs of the application be borne by the respondent/landlord.
3. The application is supported by the tenant's affidavit of even date in which he deposes as follows; -
- i. That the landlord/1st respondent rented out the suit premises to him in 2023 for purposes of operating a bar.
 - ii. That this year, the tenant fell into economic turbulence and was not able to pay his rent on time but has cleared most of it.
 - iii. That the landlord has the tenant's deposit of KES. 27,000 which she has refused to refund.
 - iv. That the landlord has not issued the tenant with a notice to vacate the suit premises.
 - v. That the landlord has instructed the 2nd respondent to attach the applicant's properties for purposes of realizing her rent arrears. A copy of the said notice for proclamation of distress is annexed as "GG-1".
 - vi. That as per the notice of proclamation of distress, the tenant has KES. 127,112 as rent arrears which is false as he only has KES. 59,000 as rent arrears exclusive of deposit of KES. 27,000.
 - vii. That the landlord/respondent has locked the suit premises and the tenant cannot operate his business as usual.
 - viii. That no notice was issued to the tenant to vacate the suit premises and that the landlord has violated his rights.
4. The application was served for hearing inter-partes on 5th June 2024 where the court granted interim orders restraining the respondents from attaching the applicant's properties pending hearing of the application. The court also ordered the parties to file and exchange their written submissions among other orders.
5. The application is opposed vide a replying affidavit dated 19th June 2024 in which the landlord/1st respondent deposes as follows; -
- i. That the tenant/applicant has been leasing 2 premises at the landlord's building in Machakos County where he operates a bar business at a rent of KES. 10,000 per month and also resides at an apartment within a neighboring building which the landlord also owns at a rent of KES. 7,000.
 - ii. That sometime late last year, the tenant/applicant began defaulting on rent for both his business and house but would pay small amounts.
 - iii. That the landlord instructed her caretaker to constantly remind the tenant/applicant to settle the rent owed for both the bar business and house but the tenant kept ignoring the requests.
 - iv. That sometime in March 2024, the applicant/tenant wrote to the respondent's advocates seeking 60 days to settle the rent owed. An email dated 14th March 2024 from 'Gold Logistics' is annexed as "LNN-1".



- v. That the applicant continued defaulting and as of 24th May 2024, the applicant owed KES. 99,000 as rent for both the business premises and house and has not paid an electricity bill of KES. 5,056.
 - vi. That on 24th May 2024 the applicant/tenant wrote to the landlord's advocate apologizing for the delay in settling the rent arrears. An email dated 24th May 2024 from 'Gold Logistics' is annexed as "LNN-2".
 - vii. That it was upon being served with the proclamation for distress of rent that the applicant paid KES. 40,000 into the landlord's account on 25th May 2024.
 - viii. That the applicant still occupies the business premises and house to date.
 - ix. That the applicant now owes the landlord KES. 76,000 as rent for the month of June 2024 for both premises that he occupies.
 - x. That at the commencement of the lease, the applicant paid KES. 20,000 as 2 months deposit for the business premises and KES. 7,000 for the house he occupies.
 - xi. That the tenant/applicant is aware that the deposit of KES. 27,000 is only refundable once the landlord has inspected the premises and confirmed that they are in good and tenantable repair.
 - xii. That the costs of restoring the premises to the condition they were before occupation would be recovered from the said rent deposit should need arise.
 - xiii. That the proclamation was lawfully done and the tenant/applicant has not come to the tribunal with clean hands and that this tribunal should dismiss the application with costs and the tenant be ordered to pay the outstanding rent arrears in 2 installments.
6. Both parties complied by filing their written submissions with the tenant/applicant filing his dated 27th June 2024 and the landlord filing hers dated 2nd July 2024. We shall consider both submissions as we deal with the issues for determination.

B. Issues for determination

7. The following are the issues for determination; -
- a. Whether the tribunal has jurisdiction to hear and determine this matter.
 - b. Whether the tenant is entitled to the orders sought in the application dated 29th May 2024.
 - c. Who shall bear the costs of the application?

Issue (a) Whether the tribunal has jurisdiction to hear and determine this matter.

8. Both parties in their affidavits and written submissions have indicated that the issue of rent arrears which is in dispute is for both the business premises and the residential house occupied by the applicant/tenant.



9. The Tribunal's jurisdiction is conferred by the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* Cap. 301, Laws of Kenya in respect of controlled tenancies which defines the premises in Section 2(1) as follows; -

“catering establishment” means any premises on which is carried out the business of supplying food or drink for consumption on such premises, by persons other than those who reside and are boarded on such premises;

“hotel” means any premises in which accommodation or accommodation and meals are supplied or are available for supply to five or more adult persons in exchange for money or other valuable consideration;

“shop” means premises occupied wholly or mainly for the purposes of a retail or wholesale trade or business or for the purpose of rendering services for money or money's worth;

10. A residential house therefore is neither “a shop, hotel nor catering establishment” within the meaning and interpretation of Section 2(1) of Cap. 301, Laws of Kenya and this Tribunal lacks jurisdiction to adjudicate over the rental dispute or any dispute with regard to a residential house that was/is occupied by the applicant/tenant and shall only deal with the business premises herein.

Issue (b) Whether the tenant is entitled to the orders sought in the application dated 29th May 2024.

11. The tenant/applicant approached this tribunal seeking for orders restraining the respondents from distressing for rent, that the tribunal calculates the rent arrears payable, that the respondents be ordered to open the suit premises for the applicant to collect his items and that the landlord be ordered to pay the tenant rent deposit of KES. 27,000.
12. The tenant in his written submissions states that the amount claimed in the proclamation notice for distress of KES. 127,112 is false as the landlord has not indicated how she arrived at the said figures.
13. The landlord on the other hand in her written submissions has stated that the tenant owes her KES. 61,000 for the business premises as of 2nd July 2024. The same has been exhibited in the rent statements submitted by the landlord. The tenant on the other hand has submitted that he does not owe the landlord any rent and that the landlord is to refund him KES. 8,000 upon calculating the rent paid and the tenant's deposit of KES. 27,000.
14. We have analyzed the rent statements by both parties and having found that the tribunal has no jurisdiction to determine the rent dispute involving the residential house, this tribunal is unable to determine the amount of rent arrears owed by the tenant if any to the landlord as the two rent accounts have been lumped up together. The issue shall therefore require to be interrogated by way of viva voce hearing of the case.
15. On the prayer for reopening of the suit premises, the landlord submits that the premises have been locked by the tenant while the tenant denies the allegation in her written submissions and states that it is the landlord who has locked the premises.
16. The tribunal is unable to determine who has locked the business premises and shall therefore order that the tribunal's rent inspector visits the business premises to determine the status of closure of the said premises and file a report on the same.



17. Based on the analysis above, the tribunal shall order that the status quo at the business premises be maintained until the hearing and determination of the main reference.

Issue (c) Who shall bear the costs of the application?

18. As regards costs, the same are in the tribunal's discretion under Section 12(1)(k) of Cap. 301, but always follow the event unless for good reasons otherwise ordered. We shall order the costs of the application to abide the outcome of the hearing.

C. Orders

19. In conclusion, the following orders commend to us; -
- a. Prayer 2 of the application is hereby granted pending the hearing and determination of the reference.
 - b. Parties shall file and exchange rent account statements together with evidence of rent payment for the business premises only within the next 14 days hereof.
 - c. Parties shall file and exchange any other documents in support of their cases for the business premises only.
 - d. The tribunal's rent inspector shall visit the business premises to determine the person behind the closure thereof and file a report within 30 days hereof.
 - e. Upon compliance with the foregoing directions, this matter shall be set down for viva voce hearing.
 - f. The tenant is at liberty to file the matter of the residential house in the appropriate forum.
 - g. Costs of the application shall abide the outcome of the hearing.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 23RD DAY OF AUGUST 2024.

HON. JOYCE AKINYI OSODO - (PANEL CHAIRPERSON)

BUSINESS PREMISES RENT TRIBUNAL

HON. GAKUHI CHEG - (PANEL MEMBER)

In the presence of:

Mutinda for the tenant/applicant.

Mwawuda for respondents.

