



**Wambugu & another v Tonui & another (Tribunal Case
E043 of 2024) [2024] KEBPRT 1103 (KLR) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 1103 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E043 OF 2024
J OSODO, CHAIR & GAKUHI CHEGE, MEMBER
JULY 31, 2024**

BETWEEN

JAMES MWANGI WAMBUGU 1ST APPLICANT

ANTONY NJOROGE KURIA 2ND APPLICANT

AND

LUCY CHEROTICH TONUI 1ST RESPONDENT

GILLETE TRADERS 2ND RESPONDENT

RULING

A. Dispute Background

1. The tenants/applicants moved this Tribunal vide a Reference under Section 12(4) of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act Cap 301 dated 27th March 2024 with a Complaint that the landlord/1st respondent through his auctioneers herein issued a notification of sale of property dated 19th March 2024 and took away the tenant's goods of trade contrary to Cap 301, Laws of Kenya.
2. The tenants/applicants filed a notice of motion under a certificate of urgency dated 27th March 2024 in which they sought for the following orders; -
 - I. That the application be certified urgent.
 - II. That the tribunal issues orders restraining the 2nd respondent/auctioneers from selling the applicants' goods and tools of trade attached to the notification of sale pending hearing inter-partes.
 - III. That the tribunal compels the 2nd respondent/auctioneers to return the goods/tools of trade taken from the suit premises pending hearing inter-partes.



- IV. That the 1st respondent be restrained from interfering with the tenancy at the suit premises pending hearing inter-partes.
 - V. That the O.C.S Njoro Police Station do ensure compliance.
 - VI. That the costs of the application be provided for.
3. The tenants simultaneously filed a supporting affidavit of even date in which they depose as follows; -
 - i. That they have been in the suit premises for more than 1 year paying monthly rent of KES. 22,500 cumulatively and are in occupation of 3 rooms. A copy of the agreement is annexed as "JMW 01".
 - ii. That the 1st respondent on 19th March 2024 issued a notification of sale of movable properties within 14 days and took away the applicants' tools of trade. Copies of the notifications issued by auctioneers are annexed as "JMW 002".
 - iii. That the tenants have been paying rent when due from the time of occupation and have invested in their businesses. A copy of rent payments from January 2023 is annexed as "JMW 003".
 4. On 28th March 2024, the tribunal issued ex-parte orders restraining the selling of the applicants' goods as well as restraining the respondents from interfering with the tenants at the suit premises pending the hearing of the application.
 5. At the hearing of the application on 22nd April 2024, only the tenant was present and the court issued orders that the 2nd respondent/auctioneers return the tenant's goods.
 6. The respondents filed an application dated 30th April 2024 seeking the stay of execution of the ex-parte orders issued on the 22nd April 2024 on grounds that they were not able to log into court due to an error in the link.
 7. At the court hearing of the application dated 30th April 2024, which was conducted on 8th May 2024, Counsel for the respondents stated that the said application had been overtaken by events as the tenants' goods had been returned. The court issued orders that the original application be canvassed by way of written submissions.
 8. The 1st respondent filed a further replying affidavit dated 4th May 2024 in which she deposes as follows; -
 - i. That the 1st applicant is in rent arrears amounting to KES. 105,100 while the 2nd Applicant is in arrears amounting to KES.144,500, making a total of KES.249,600. Copies of the rent breakdown from 1st January 2022 to April 2024 are annexed as "LCT 1(a) and (b)"
 - ii. That the 2nd applicant has never been the 1st respondent's tenant and there is no agreement between them.
 9. The respondents filed their supplementary affidavit dated 23rd May 2024 in which they depose that the applicants filed Nakuru CM MISC E332 of 2023 which is res-judicata on account of this suit and it is upon realizing that the court in Nakuru could not give them ex-parte orders that the applicants filed a notice to withdraw the application.
 10. The applicants filed a further affidavit dated 3rd June 2024 in which they depose as follows; -



- i. That on 22nd April 2024, the tribunal ordered that the respondents return the tenants' goods, however, the respondents failed to comply with the said orders until 7th May 2024 when they returned some assorted goods whereas some were missing and damaged.
 - ii. That the value of the items which were either damaged, missing or exchanged illegally by the respondents from the barber shop and the electronic shop is KES. 108,000 and KES. 248,500 respectively. Copies of documents showing returned goods stamped and signed by O.C.S Njoro Police Station are annexed as "J&T-1a and 1b".
 - iii. That the conduct of the respondents has caused loss and inconvenience to the business.
 - iv. That Nakuru CM MISC E332 of 2023 was filed by the second respondent and therefore the respondents are misleading by stating that the applicants are the ones who instituted the same.
11. The 2nd respondent filed a replying affidavit dated 11th June 2024 in which he deposes as follows in response to the applicants' further affidavit; -
- i. That the items/goods were legally attached due to non-payment of rent in arrears pursuant to a letter of instructions from the landlady's advocate dated 6th July 2023 and subsequently pursuant to court orders from Nakuru Law court. A copy of the instructions and court order is annexed as "PM 1".
 - ii. That the goods were returned as per the notification of sale and none were exchanged or damaged as alleged. That the applicants and the O.C.S Njoro Police Station were present on the date of returning the goods.
 - iii. That the applicants have a similar suit filed in Nakuru CM MISC E332 of 2023 which touches on the issues raised in the application herein hence the instant suit is res judicata. A copy of the court's directions is annexed as "PM".
12. Only the respondents filed their written submissions dated 24th May 2024 which we shall consider while dealing with the issues for determination.

B. Issues for determination

13. The following are the issues for determination;
- a. Whether the applicants/tenants are entitled to the orders sought in the application dated 27th March 2024.
 - b. Who shall bear the costs of the application?
- Issue (a) Whether the applicants/tenants are entitled to the orders sought in the application dated 27th March 2024
14. The applicants/tenants approached this tribunal seeking that the 2nd respondent be restrained from selling the goods of trade attached in their notification of sale, that the 2nd respondent return the said goods back to the suit premises and that the 1st respondent be restrained from interfering with the tenants' tenancy at the suit premises in Njoro-posta.
15. The tribunal granted orders restraining the sale of goods and also ordered the 2nd respondent to return the said goods back to the suit premises.
16. The tenants in their supporting affidavit dated 27th March 2024 depose that they have been paying rent whenever due and have no rent arrears to warrant the attachment of their goods by the auctioneers.



17. The 1st respondent/landlord on the other hand in a further replying affidavit dated 4th May 2024 deposes that the 1st applicant is in rent arrears amounting to KES. 105,100 while the 2nd Applicant is in arrears amounting to KES.144,500, making a total of KES.249,600. Copies of the rent breakdown from 1st January 2022 to April 2024 are annexed as “LCT 1(a) and (b)”
18. The tribunal at a court hearing on 8th May 2024 ordered that parties file and exchange rent account statements together with evidence of rent payment but only the 1st respondent complied by filing her rent account statements annexed to the further replying affidavit dated 4th May 2024 which we have perused.
19. We have compared the same with the tenants’ evidence of rent payment which are in the form of receipts and Mpesa statements annexed to their supporting affidavit dated 27th March 2024. We note that the same are inconclusive as there are missing receipts or evidence of payment for certain months.
20. In the case of Samuel Kipkori Ngeno and Another – vs- Local Authorities Pension Trust (Registered Trustees) & Another (2013) eKLR at paragraphs 9 and 12, the court held as follows: -
 9. A tenant’s first and main obligation is to pay rent as and when it becomes due for the landlord has the right to an income from his investment. Why would a tenant allow himself to fall into such huge arrears of rent”?
 12. The temporary injunction sought in the present application is an equitable remedy at the court’s discretion. He who comes to equity must come with clean hands. A tenant who is in huge arrears of rent is underserving of the court’s discretion. The court cannot be refuge of a tenant who fails to meet his principal obligation of paying rent as and when it becomes due”.
21. The foregoing case provides sufficient guidance in directing that the tenant pays the outstanding rent arrears, failure to which the tribunal shall order that the landlord/1st respondent proceeds to recover the same using lawful means.
22. Based on the foregoing analysis, we find that the tenants are not entitled to the orders sought in the application dated 27th March 2024 and we shall order that the same be dismissed with costs.

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

23. Under section 12(1) (k) of Cap. 301, Laws of Kenya, costs of any suit before this tribunal are in its discretion but always follow the event unless for good reasons otherwise ordered. We shall order costs to the respondents.

C. Orders

24. In conclusion, the following final orders commend to us; -
 - a. The application dated 27th March, 2024 is dismissed with costs.
 - b. Interim orders are hereby discharged.
 - c. The reference dated 27th March 2024 is settled in terms.
 - d. The tenants shall pay all outstanding rent arrears owing to the landlord within 14 days hereof failure to which the landlord shall be at liberty to recover the same using lawful means.
 - e. Costs of Ksh. 35,000 to the respondents.

It is so ordered.



RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 31ST DAY of JULY 2024.

HON. JOYCE AKINYI OSODO

(PANEL CHAIRPERSON)

BUSINESS PREMISES RENT TRIBUNAL

HON GAKUHI CHEGE

(PANEL MEMBER)

In the presence of:

Tenants present

Kamau holding brief for Ono for Respondents

