



**Rotich v Rose Jeptoo Tangwa t/a Waridi Store (Tribunal Case
E053 of 2023) [2023] KEBPRT 1167 (KLR) (30 August 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 1167 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E053 OF 2023
CN MUGAMBI, CHAIR
AUGUST 30, 2023**

BETWEEN

WINNIE JEPKOSGEI ROTICH LANDLORD

AND

ROSE JEPTOO TANGWA T/A WARIDI STORE TENANT

RULING

1. The tenants notice of preliminary objection dated 10.05.2023 is brought on the grounds;
 - a. That the application and complaint are res judicata.
 - b. That the tribunal has no jurisdiction over the complaint as matters after terminating a tenancy can only be the subject of a reference.
 - c. That the Tribunal has only jurisdiction to deal with the grant of lease to levy distress and which has not been sought by way of a specific prayer.
2. The landlord's application dated 31.3.2023 and against which the preliminary objection has been filed seeks orders that the landlord be at liberty to break into the suit premises, gain access therein and evict the tenant through an auctioneer. The landlord has also sought the help of the OCS Eldoret police station in enforcing the orders.

The landlord's depositions

3. The landlord's affidavit in support of her application sworn on 31.3.2023 may be summarized as follows:-
 - a. That the Respondent is the Applicant's tenant paying the rent of Kshs. 13,000/= per month.



- b. That the tenant is in rent arrears of Kshs. 166,000/= being rent arrears from March 2022 to March 2023, which the tenant has declined to pay.
- c. That the landlord has issued a notice to terminate tenancy dated 28.3.2023.

The Tenant's depositions

- 4. The tenant/Respondent's replying affidavit sworn on 10.5.2023 may be summarized as follows:-
 - a. That the tenant who carries on the business of a cereals and grocery shop on the demised premises pays her rent through the landlord's cell phone.
 - b. That on 8.3.2022, the tenant sent her rent money to the landlord who returned the same to the tenant on 9.3.2022.
 - c. That due to the continued harassment of the tenant by the landlord, the tenant filed a complaint in BPRT Case No. E069 of 2022 Eldoret, which complaint was determined on 17.1.2023 in favour of the tenant.
 - d. That the issue of rent arrears was a matter taken up in the said case and therefore it is not open for the landlord to bring up the same issue again.
 - e. That the landlord's suit is now *res judicata* and if the landlady was aggrieved by the findings of the Tribunal in case No. E069 of 2022. She ought to have lodged an appeal.
 - f. That the prayers for eviction cannot be granted in a miscellaneous application.
 - g. That the tribunal has no jurisdiction to evict a tenant on a miscellaneous application founded on a complaint.

Analysis and determination

- 5. The issues I have to determine in this matter are the following:-
 - a. Whether the complaint and the application filed by the landlord are *res judicata*.
 - b. Whether the landlord is entitled to the orders sought in the application.

Issue A

- 6. The ruling in BPRT Case No. E069 of 2022 restrained the landlord from interfering with the tenants' quiet occupation and use of lock up shop No. 026, the tenant was also ordered to pay monthly rent to the Respondent and if the Respondent declined to accept the rent, then the tenant was to pay the same to court.
- 7. The landlord in the instant application has sought the leave of the Tribunal to break into the suit premises and distress for rent. It is the landlord's case that the tenant has not paid rent from March 2022 to March 2023. In regard to this, I do note that the tenant has not addressed the issue of rent, the tenant has only repeated her old argument that the landlord declined to accept her rent, but that was in the year 2022 and before the ruling in Case No. E069 of 2022 was delivered.

The tenant does not state and there is no evidence that she complied with the court orders that she pays rent to the landlord or to the Tribunal in the event that the landlady declined to accept the said rent.
- 8. The payment of rent being a continuous affair, the demand of non-paid rent by the landlord cannot be deemed to be *res judicata*. I also do not understand the ruling by the tribunal to have found that



the tenant did not owe any rent arrears or that the tenant was no longer required to pay any rent to the landlord.

9. From the material placed before me, I am unable to find any response to the claim by the landlord that the tenant has not paid any rent since March 2022. I have also not found any records and the tenant has not suggested that any such records exist indicating that she has either paid rent to the Tribunal or to the landlady. On a balance of probabilities, I therefore find that the tenant is in arrears of rent from March 2022 to March 2023 as claimed by the landlord.
10. The claim for the payment of rent is not therefore *res judicata*.

Issue B

11. Ground (ii) and (iii) on which the landlord's application is based clearly state that the tenant is in rent arrears amounting to Kshs. 166,000/= and that the landlord has issued a termination notice to the tenant. The termination notice to the tenant is the one dated 28.3.2023 effective 1.6.2023 sought on account of non-payment of rent.
12. It is common ground that the tenant has lodged a reference against the landlord's notice to terminate tenancy. The reference is the one dated 15.4.2023.
13. Under Section 6(1) of [Cap 301](#), once a reference has been filed at the Tribunal in objection to the notice to terminate tenancy, "the notice shall be of no effect until and subject to the determination of the reference by the Tribunal."
14. The tenant having already filed a reference in objection to the landlord's notice to terminate tenancy, the tenancy between the parties cannot be terminated until the reference has been heard and determined. In those circumstances, the landlord's prayer for the eviction of the tenant cannot be granted at this stage.
15. I have however found that the tenant is in rent arrears. I have seen the letter written by Counsel for the landlord addressed to the Advocates for the tenant. It clearly shows the rent arrears to be Kshs. 166,000/= dating as far back as February 2022.

The landlord is entitled to levy distress for rent under Section 3(1) of the [distress for rent Act](#) which provides as follows:-

"Subject to the provisions of this Act and any other written law any person having any rent or rent service in arrears and due upon a grant, lease, demise or contract shall have the same remedy by distressing for the recovery of that rent or rent service as is given by the common law of England in a similar case."

I therefore do find that the landlord's right to distress for rent in this case has crystallized and the landlord is entitled to so levy.

16. In the circumstances, I do issue the following orders:-
 - a. That the landlord is granted leave to levy distress against the tenant for rent arrears.
 - b. That the landlord, through a licensed court bailiff/auctioneer is granted leave to break into the suit premises for the purposes of levying distress in the suit premises.
 - c. That the reference filed by the tenant in objection to the notice to terminate tenancy shall proceed to hearing.



d. That the tenant will bear the costs of the application assessed at Kshs. 20,000/=.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 30TH DAY OF AUGUST 2023.

HON. CYPRIAN MUGAMBI

CHAIRPERSON

30. 8.2023.

Delivered in the presence of Mr. Kigamwa for the Tenant

In the absence of Counsel for the landlord

