



**Kanini v Nyangetha & another (Tribunal Case E869 of 2022)
[2023] KEBPRT 718 (KLR) (8 December 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 718 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E869 OF 2022
A MUMA, AG. CHAIR
DECEMBER 8, 2023**

BETWEEN

ANGELA KANINI APPLICANT

AND

MISS NYANGETHA 1ST RESPONDENT

VERONICA T/A KIMWANGO AGENCIES 2ND RESPONDENT

RULING

A. Parties & Their Representatives

1. The Applicant, Angela Kanini, (hereinafter “the tenant”) is the Tenant of the rented business space at a property known as Wambui Plaza, Shop No. 5 (hereinafter “the suit premises”).
2. The firm of M/S Kamau Kinga & Company Advocates represents the Tenant/Applicant.
3. The 1st Respondent Miss Nyangetha is the Landlord and owner of the suit premises.
4. The Agent/2nd Respondent is a duly authorized agent of the Landlord and has been placed in charge of the suit premises.
5. The firm of M/S Khaduli & Asa Associates represents the Agent and the Landlord.

B. Dispute Background

6. On 31st August 2023, this Court delivered a Ruling dismissing the Tenant’s Reference and Application both dated 28th September 2022 and issued Orders:
 - I. The Tenant pays to the Landlord a sum of KShs. 88,100.00 being arrears owed within 30 days
 - II. The Tenant continues to pay the agreed rent being KShs. 15,000.00 as and when it falls due



- III. Failure to comply with Orders I & II shall accord the landlord the liberty to levy distress for rent
- IV. The landlord is at liberty to issue a fresh notice that adheres to the provisions of the Act.
7. Consequently, the Tenant filed an application dated 29th September 2023 seeking orders; certifying the matter urgent, setting aside the Ruling of the Court delivered on 31st August 2023, staying the execution of Orders of the Court from the aforementioned Ruling and orders as to costs.
8. The Court, having considered the Tenant's and Application, issued interim orders dated 4th October 2023 certifying the matter urgent and directing that the tenant's Application be served for inter parties hearing on 6th October 2023.
9. Subsequently, the Landlord filed a Notice of Preliminary Objection dated 9th October 2023 seeking to have the matter dismissed with costs on grounds of resjudicata.

C. Claim And Defence

10. The Tenant's Application dated 29th September 2023 is based on the grounds that; there is an error apparent on the face of the record since the Tenant is not in rent arrears, the applicant discovered new and importance evidence that came to her knowledge when the Ruling had been delivered and that the application was brought without undue delay.
11. The Landlord claims in that this honorable Court lacks jurisdiction to deal with the matter as the same is res judicata and that the Tenant's application does not meet the threshold of grounds for review required under the law.

D. Issues For Determination

12. I have carefully analyzed all the Pleadings filed and the relevant evidence adduced before honorable Court. I considerately find that the issues that fall for determination are:
- Whether the matter is resjudicata?
 - Whether the orders of review and setting aside can issue?

E. Analysis Of The Law

i. Whether The Matter Is Resjudicata?.

13. This Honourable Tribunal has the duty to interrogate the question of jurisdiction on grounds of resjudicata, and satisfy itself before making any further step in line with the celebrated case of Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited [1989] eKLR where the Court of Appeal held as follows:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”



14. As was stated by the Supreme Court in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. ...”

15. The law on resjudicata is now well settled same parties, same issue and conclusive determination of the issues. I note that in this matter there has been no previous application for review and/or setting aside of the Orders of the Court issued in the Ruling delivered on 31st August 2023. Accordingly, this Court is not convinced that this matter is res judicata. I have not seen any previous application for review and or setting aside in this matter indeed an application for review revisits the issues conclusively determined but its anchored in law and cannot deprive this court its jurisdiction on ground of resjudicata unless it was a second attempt at reviewing.
16. In light of the above, I am satisfied that this Court has jurisdiction to hear and determine this application to vary its Orders granted in the Ruling dated 31st August 2023.

ii. Whether The Court Should Grant The Review And Or Setting Aside Orders As Sought?

17. Although the Act grants the Tribunal power to vary or rescind its orders being a subordinate court in the constitution, it does not provide a criterion to be applied when determining an application to set aside the said Orders. This Court therefore falls back to the rules of civil procedure, and in particular, order 45 (Rule 1) of the *Civil Procedures Rules*, 2010 which provides:

“Any person considering himself aggrieved—

a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b. by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

18. Having analyzed the statements filed by the Tenant, I am convinced the same are similar to the ones filed by the Tenant on 30th May 2023 and which the Court considered when making a determination on the matter of rent arrears as indicated in the Ruling dated 31st August 2023.
19. Therefore, it is my considered opinion that these statements do not amount to new and important evidence for the reason that it was within the knowledge of the Tenant at the time when the determination was made.
20. In light of the foregoing, I find that the Application does not meet the legal threshold for an application for review required under the Law.



F. Determination

21. The upshot is that the Landlord's Notice of Preliminary Objection dated 9th October 2023 is dismissed.
22. The Tenant's Application dated 29th September 2023 is hereby dismissed.
23. Costs awarded to the Landlord assessed at 15,000.00.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY BY HON. MUMA THIS 8TH DAY OF DECEMBER 2023

HON A. MUMA

AG CHAIR/MEMBER

BUSINESS PREMISES RENT TRIBUNAL

In the Presence of Haduli for the Landlord and Waweru for the Tenant.

