



Muriithi & another v Nderitu; Kaburi & another (Interested Parties) (Tribunal Case E002 of 2022) [2023] KEBPRT 235 (KLR) (25 April 2023) (Ruling)

Neutral citation: [2023] KEBPRT 235 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E002 OF 2022
A MUMA, VICE CHAIR
APRIL 25, 2023**

BETWEEN

KAREN WAWIRA MURIITHI 1ST APPLICANT

EDITH GATURI KANAMBIU 2ND APPLICANT

AND

SAMUEL NDERITU TENANT

AND

FAITH WANJIRA K KABURI INTERESTED PARTY

TOM MUNENE KANAMBIU INTERESTED PARTY

RULING

1. The 1st & 2nd Applicants claim that they have been Landlords of the Respondent in Bus Park Stores No 71A & 71B in Embu town (hereinafter referred to as the “suit premises”).
2. The Tenant/Respondent, has been a Tenant in the suit premises in Embu town.
3. The 1st and 2nd Interested Parties became joint owners of the suit premises vide a Certificate of Confirmation of Grant that was issued in EMBU CMC Succession Cause No 301 of 2017 on January 25, 2021.
4. All parties appeared in person in the course of these proceedings.

Dispute Background

5. After considering all the pleadings filed and evidence produced, this Honorable delivered a ruling dated November 11, 2022 which inter alia dismissed the Applicants Reference and Application dated January 11, 2022.



6. The 1st Applicant subsequently filed an application dated November 16, 2022 under Certificate of Urgency seeking to arrest the ruling of this Tribunal delivered on November 11, 2022 on the basis that the Chief Magistrate Court in Embu had ordered stay of execution of the Certificate of Confirmation of Grant issued on January 25, 2021.
7. On December 14, 2022 when the matter was scheduled hearing, the Applicants failed to appear before the Tribunal prompting the Tribunal to dismiss the application for want of prosecution.
8. Thereafter, the 1st Applicant filed another Application dated December 15, 2022 under Certificate of Urgency seeking reinstatement of the Application dated November 16, 2022 on the main ground that she was engaged in other matters before the Chief Magistrate Criminal Court.
9. This Application was opposed vide the 2nd Interested Party's Grounds of Opposition dated February 16, 2022.

The Applicants' Case

10. The 1st Applicant contends that the December 14, 2022 was not a convenient hearing date for her as the 2nd Applicant had two separate criminal matters at the Embu Law Courts.
11. Her claim is that despite the circumstances she had logged in to the Tribunal via link <https://bit.ly/36thjze> and was registered as attendee G while still attending other matters at the Embu Law Court.
12. She further claims that the matter was called while she was testifying and that she had requested her relative to request the Tribunal to set the matter aside as she was engaged.
13. The 1st Applicant claims that if the application is not reinstated, she will suffer irreparable loss as the Certificate of Confirmation of Grant issued on November 16, 2022 was stayed vide an order issued by Hon Nyakweba in EMBU CMC Succession Cause No 301 of 2017.
14. The 2nd Applicant filed an undated Replying Affidavit to the 2nd Interested Party's Grounds of Opposition inviting this Tribunal to strike it out for being defective in substance.

The Respondent's Case

15. The Respondent swore a Replying Affidavit dated December 13, 2022 stating that he had already paid one-year's rent to the 1st Interested Party after this Tribunal's ruling dated November 11, 2022.

The Interested Parties' Case

16. The 2nd Interested Party filed Grounds of Opposition dated February 16, 2022 opposing the grounds put forth by the 1st Applicant in her Application dated December 15, 2022.
17. The main argument of the Interested Parties was that the grounds for non-attendance were unsatisfactory and that the stay of execution of the grant was not a sufficient ground to seek setting aside of this Tribunal's ruling dated December 14, 2022.

Analysis and Determination

18. I have given full consideration to the 1st Applicant's, Notice of Motion Application and the responses thereto and it is my considered view that there is one sole issue that is ripe for determination:



- i. Whether the reason provided by the Applicants for reinstatement of the application dated November 16, 2022 satisfactory?
19. Before I delve into the analysis of the above cited issue this Tribunal has various powers granted to it under the *Landlord and Tenants (Hotels, Shops and Catering Establishments) Act* Cap 301 (“the Act”). I wish to refer the parties herein to section 12 (e) & (i) of the Act which provides as follows:
- "A Tribunal shall, in relation to its area of jurisdiction have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in addition to and without prejudice to the generality of the foregoing shall have power—
- e) to make orders, upon such terms and conditions as it thinks fit, for the recovery of possession and for the payment of arrears of rent and mesne profits, which orders may be applicable to any person, whether or not he is a tenant, being at any material time in occupation of the premises comprised in a controlled tenancy;
 - i) to vary or rescind any order made by the Tribunal under the provisions of this Act;"
20. The Applicants have claimed that they were engaged in criminal matters at the Embu Law Courts hence the reason for their non-attendance.
21. Be that as it may, the Applicants have failed to adduce evidence to support their allegation that they were logged on to the virtual link for the Tribunal on December 14, 2022.
22. The 1st Applicant in paragraph 8 of her Supporting Affidavit claims that her cousin informed the Tribunal that the Applicants were engaged and the response she got was that she could not be assisted.
23. I find that there is no cogent evidence to support this allegation and as such, it remains to be an unsubstantiated allegation. I wish to point out to the Applicants that as per the Tribunal proceedings on December 14, 2022, this Tribunal recorded that there was no appearance by the Applicant’s.
24. I have perused the Notice of Motion dated November 16, 2022 and the Supporting Affidavit thereto and I consequently find that the pending dispute currently before the High Court at Embu warrant granting of the orders sought in that application.
25. However, in light of the developments in EMBU CMC Succession Cause No 301 of 2017 and specifically the order directing stay of execution of the Certificate of Confirmation of Grant issued on January 25, 2021, I am of the considered view that the application dated November 16, 2022 ought to be reinstated.
26. I have noted that there is a pending appeal serialized as HCCA No 29 of 2022 before the High Court at Embu challenging the trial court’s ruling delivered on January 25, 2021 in relation to the confirmation of the impugned grant.
27. This Tribunal finds that the Interested Parties derived their interest in the suit premises from the Certificate of Confirmation of Grant that was issued on January 25, 2021 which Certificate has been stayed by the Magistrates’ Court at Embu.
28. “Stay of execution” is defined in the *Black’s Law Dictionary* (8th ed 2004) as “the postponement or halting of a proceeding, judgment resulting from that proceeding.”



29. In the case of *RWW v EKW* [2019] eKLR the High Court noted as follows;

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

30. I therefore find that the effect of the Magistrate’s order is that the rent payable from the suit premises herein should be preserved until the parties agree on a suitable distribution schedule and the grant is either upheld or a new grant issued by Appellate Court in HCCA No 29 of 2022.

31. The Respondent and the Interested Parties have alleged that the Respondent has paid one-year’s rent to the 1st Interested Party after the ruling of this Tribunal dated November 11, 2022. However, they have not provided evidence to support this allegation.

Determination

In the upshot:

- a. I find that the Applicants have proven their case on a balance of probability and proceed to allow their application dated December 15, 2022.
- b. The Application dated November 16, 2022 be and is hereby reinstated.
- c. The matter shall be fixed for hearing on June 12, 2023.
- d. Parties at liberty to file responses to the application dated November 16, 2022 together with submissions 14 days each party. Interested Parties and Tenant to Commence.

HON A. MUMA

VICE CHAIR

BUSINESS PREMISES RENT TRIBUNAL

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY BY HON A. MUMA THIS 25TH DAY OF APRIL 2023 IN THE PRESENCE OF EDITH KANAMBIU – LANDLORD IN PERSON, TOM MUNENE 2ND IP IN PERSON AND SAMUEL NDERITU TENANT IN PERSON.

HON A. MUMA

VICE CHAIR

BUSINESS PREMISES RENT TRIBUNAL

