



**Kathure v Sarah Hersi Ali c/o Bungoma Muslim Association & another (Tribunal
Case E187 of 2023) [2024] KEBPRT 774 (KLR) (9 April 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 774 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E187 OF 2023
N WAHOME, MEMBER
APRIL 9, 2024**

BETWEEN

LENITY KATHURE APPLICANT

AND

**SARAH HERSI ALI C/O BUNGOMA MUSLIM ASSOCIATION 1ST
RESPONDENT**

**ARNOLD OMBONYA OKUTOYI T/A ARMOK AUCTIONEERS 2ND
RESPONDENT**

RULING

1. The Landlord in this matter namely Sarah Hersi Ali C/O Bungoma Muslim Association issued a termination notice dated September 15, 2023 to and/or against the Applicant Lenity Kathure. The same was to take effect on the December 1, 2023 and was said to be founded on Section 4(2) of the Landlord and Tenant (shops, Hotels and Catering Establishments Act) Cap. 301 hereinafter referred to as “the Act”.
2. The termination was said to be founded on the following ground:-

“tenant has refused to pay rent. He has a rent arrears of Kshs.21,000/-. Effort to recover the arrears has failed. I request the rent Tribunal Court and OCS Bungoma Police Station to order the Tenant to pay all rent arrears and vacate the Business premises”.
3. In answer to the Notice of Termination, the Tenant filed the reference dated 28th November 2023. The same was said to be founded on Section 12(4) of the Act. The Applicant’s grievance was that:-

“The Landlord has been harassing, intimidating me with threats of eviction by sending Auctioneers in my Business Premises to proclaim my business goods without an order from



the rent Tribunal court or any other court of law contrary to Cap. 301 Laws of Kenya. I request the Rent Tribunal court and OCS Bungoma Police Station to order the landlord to stop harassing me with threats of eviction”.

4. Coupled with the reference was the Notice of Motion application dated 27th November 2023. It was accompanied by a certificate of urgency of the even date. In principal, the Applicant sought for injunctive orders against the Respondents from attaching her movable goods and selling off the same pending the hearing and determination of the reference and Application herein.
5. The Applicant also sought to have the warrants of attachment of and proclamation of her property issued to ARMOK Auctioneers set aside or lifted unconditionally. She also sought for costs.
6. In support of the application was an affidavit by the Applicant and another by M/S Abdulhamid Mukanda Buyela M. Wanjala and Mohamed J. Wepukulu said to be the officials of Bungoma Muslim Association. The same were sworn on the 22nd November 2023.
7. The Applicant further filed the supplementary affidavit sworn by herself on the 22nd December, 2023 and filed the submissions dated 4th January 2024 by her advocates.
8. In essence, the case for the Applicant is that:-
 - i. The 1st Respondent is not an official of Bungoma Muslim Association and had no authority to let the premises on its behalf.
 - ii. She did not owe the Association any rent in arrears.
 - iii. The association had through its duly elected officials sworn an affidavit and disowned the 1st Respondent M/S Hersi.
 - iv. The attached goods were her tools of trade and if attachment is allowed her business could be brought down and she would therefore suffer irreparable loss and damage.
 - v. She had only entered into the lease agreement with M/S Hersi dated 4th July 2023 on the belief that she was a trustee of the Association.
 - vi. Thereafter she realized that M/S Hersi was not an agent of the Association and had no authority to collect rent on its behalf and she stopped rent payment to her.
 - vii. The true landlord for the premises she rented was Bungoma Jamia Mosque and the Muslim Community thereof and not the 1st Respondent.
 - viii. She has been paying rent to M/S Bungoma Mosque who are the agents of Bungoma Muslim Association the Landlord.
 - ix. A complaint has been lodged by the DCI (Director of Criminal Investigations) against M/S Hersi and other persons for impersonating the officials of Bungoma Muslim Association.
 - x. She was not a party to Kisumu Civil Appeal No. 13 of 2015 and Bungoma chief Magistrates’ court civil case no. 393 of 2023 and was only pursuing her rights as a Tenant.
 - xi. There has never been a change of leadership relating to Bungoma Muslim Association and her Landlords as sworn in the Affidavits both dated 22/11/2022 and 22/12/2023 are those in the affidavits.
 - xii. The change of leadership within the Bungoma Muslim Association can only be effected by the Registrar of societies and not by Baraza la Mufti.



- xiii. The officials of Bungoma Muslim Association are those as listed in the Affidavits both sworn on the 22/11/2023 and 22/11/2023.
 - xiv. That M/S Hersi was a stranger to the Association and was defrauding the later by collecting rents without its authority.
 - xv. That title no. Bungoma Municipality/341 is registered in the names of Bungoma Muslim Association.
 - xvi. The certificate of registration No. 14035 by the Registrar of companies confirms Abdulhamed Mwikanda as chairman, Buyela M. Wanjala as secretary and Mohamed J. Wepukhulu as Treasurer.
9. The Applicant therefore sought that the application be found to have merit and the same be allowed.
10. On her part, the 1st Respondent who was associated with the Bungoma Muslim association in the pleadings, in opposing the applicant's suit and application filed a response to the reference dated 22/1/2024, list of witnesses and witness statements also dated 22/1/2024.
11. The 1st Respondent had earlier on filed the replying Affidavit dated 14/12/2023 together with grounds of opposition of even date. The 1st Respondent finally filed the submissions dated 22/1/2023. Her case is that she was an agent of Bungoma Muslim Association (hereinafter the Association) through an Agreement dated 31/1/2020).
- i. She thereafter entered into a tenancy agreement with the Applicant to commence on the January 2023 at a monthly rent of Kshs.10,500/-.
 - ii. The Applicant paid rent until July, 2023 when she defaulted and has not paid rent to date.
 - iii. Title No. Bungoma municipality/341 was registered in the names of her Principal namely Bungoma Muslim Association.
 - iv. The outstanding rent arrears as at December, 2023 was Kshs.52,500.
 - v. That the association is a distinct entity without any relationship with Jamia Mosque committee.
 - vi. The court of appeal in Kisumu civil appeal no. 13 of 2015 and Bungoma Chief Magistrate's court in Civil case no. 393 of 2023 had decreed the suit plot to the Association.
 - vii. That the Jamia Mosque committee the alleged landlord never appealed the two courts decisions.
 - viii. THAT the office of the Attorney General denounced the letter dated 19th October 2023 purporting to confirm Abdulhamud Mukanda as Chairman, Buyela M. Wanjala as Secretary and Mahamed Wepukulu as Treasurer and declared same fake.
 - ix. The said officials are not members of Bungoma Muslim Association.
 - x. The Applicant should be compelled to pay all the outstanding rents to the 1st Applicant.
 - xi. The 1st Respondent was entitled to levy distress for rent arrears.
12. The 1st Respondent in her submissions has also relied on the following decided cases:-
- a. Richard Onyango Juma T/A Golden Chariots Junior School – vs- Joseph Wambura Mwema (2021) eKLR.



- b. Giella – vs- Cassman Brown & Co. Ltd (1973) EA 358.
 - c. John Edward Ouko – vs- National Industrial Credit Bank Ltd (2013) E KLR,
 - d. Kenya Breweries Ltd – vs- Okeyo (2002) EA, and
 - e. National Bank of Kenya Ltd – vs- Pipelastick Smakolit (k) Ltd & Another (2001) KLR.
13. Having considered all the materials placed before me, I am of the view that the issues to determine this application are the following:-
- A. Whether a Landlord/Tenant relationship exists between the Applicant and the Respondent?
 - B. Whether the 1st Respondent's levy of distress for rent was lawful.
 - C. Whether the applicants Application is merited?.
 - D. Who should bear the costs of this suit.

Issue No. A- Whether a landlord/Tenant relationship exists between the Applicant and the 1st Respondent.

14. Section 2 (1) of the Act provides that:-

“Controlled Tenant means a tenancy of a shop, hotel or catering establishment.

- a. Which has not been reduced into writing, or
 - b. Which has not been reduced into writing and which-
 - i. Is for a period not exceeding five years or
 - ii. Contains provision for termination otherwise than for breach of covenant, within five years from the commencement thereof”.
15. Pursuant to the Agreement herein, the duration of the tenancy was not stated. It was therefore left upon the parties discretion on termination of the same. It was a periodic tenancy and therefore controlled and creating a landlord/Tenant relationship.
16. I note that the property management agreement between the Association and the 1st Respondent has not been impeached. Indeed there is no allegation or at all that it was forged or that it was not executed by an authorized official of the association.
17. The Applicant paid rent to the 1st Respondent between January and July, 2023. There is no explanation whatsoever on the whereabouts of the alleged officials of the Association.
18. The Act defines a landlord as:-

“In relation to a tenancy, means the person for the time being entitled as between himself and the tenant to the rents and profits of the premises payable under the terms of the tenancy”.



19. The relationship between the Applicant and the 1st Respondent having been established, the same could not be altered or terminated without recourse to the Act and in particular Section 4 (3) of the Act which provides that:-

“ A Tenant who wishes to obtain a reassessment of the rent of a controlled tenancy or the alteration of any term or condition in, or of any right or service enjoyed by him under, such a tenancy shall give notice in that behalf to the landlord in the prescribed form”.
20. It is clear from the above, that the Tenant purported to walk away from the tenancy herein without any regard to the mandatory provisions of the Act. Such an action is sadly of no legal effect and the tenancy relationship remains in force.
21. I have observed and appreciated that Kisumu Court of Appeal in Civil appeal No. 13 of 2015 and Bungoma Chief Magistrate’s Court in Civil Case No. 393 of 2023 decreed plot No. Bungoma Municipality/341 to the Association. Not to the Jamia Mosque committee as claimed by the purported officials in their twin affidavits dated 22/11/2023 and 22/12/2023 in support of the Applicant’s case.
22. The office of the Attorney General stamped the letter dated 19th October 2023 and marked SHA-9 purporting to recognize Abdulhamid Mukanda, Buyela Wanjala and Mohamed Wepukulu as officials of the Associations as fake.
23. It is inexplicable that the Applicant never annexed the alleged form H in the application to support the impugned leadership of the three in relationship to the Organization/Association.
24. Section 107 of the [evidence Act](#) provides that:-

“ Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”.
25. In the circumstances of this case it is highly doubtful that the Applicant has been able to demonstrate that the suit plot is managed by Jamia Mosque committee and that the three purported persons are members of the Association.
26. I therefore determine that there indeed exists a Landlord/Tenant relationship between the Applicant and the 1st Respondent. The misguided action by the Applicant to pay rent to strangers did not at all affect her relationship with the 1st Respondent and was not capable of terminating the same.
27. The upshot of this is that the Applicant was obligated to continue paying rents to the 1st Respondent and is liable to pay all the rents in arrears effective the month of August, 2023 to date.
28. I have looked at the landlord’s notice of termination dated 15th September 2023, and find that the same was grounded on the non payment of rent only. In view of the confusion created by the strangers purporting to be officials of the Association, it would only be fair for the issue to be determined on hearing of the reference. This also noting that the Tenant has also demonstrated payment of rent to the strangers.

Issue No. B- Whether the Respondent’s levy of distress was lawful.

29. Section 3 of Cap. 296, the [distress for rent Act](#) provides “that subject to the provisions of this Act and having any rent or rent service in arrears and due upon a grant, lease, demise or contract shall have the same remedy by distress for the recovery of that rent or rent, service as given by the common law of England in a similar Case”.



30. The distress for rent as per the proclamation by the 2nd Respondent M/S Armok Auctioneers was on 21st November 2023. The notice is marked “LK-1”. From evidence, at this date the Applicant was in rent arrears for the months of August, September, October and part of November, 2023.

31. To distress for rent, the only requirement is that there are rents in arrears. This position obtained in the present case. In Civil Appeal No. 7A of 2016 at the High Court of Kenya in Embu John Thumbi Kamwithi – vs- Asha Akumu Juma. The court held that:-

“This right serves the purpose of a remedy for the Landlord to recover rent that may be in arrears. For this right to be enforced, there must be rent in arrears”.

It is not in dispute that the Applicant has not paid any rents to the 1st Respondent from August, 2023 to date.

32. The law is also settled that to levy distress the landlord does not require the permission of any court or authority. In the case of John Thumbi Kamwithi Supra the court held that:-

“I find that the Appellant had no obligation to seek permission from the tribunal to levy distress. The fact that the tenancy is controlled does not mean that the landlord applies to the Tribunal to levy distress”.

I therefore find that the 1st Respondent was within her right to effect the distress for rent to recover the rents in arrears.

Issue No. C- Whether the Applicant’s Application has merit.

33. In view of the above determinations on the twin issues of the relationship between the parties and on the distress for rent, the Applicants application is without merit and the equitable reliefs sought cannot be granted. There simply could be no merit to grant same and such a grant would occasion unnecessary hardship to the 1st Respondent. I would therefore dismiss the same.

Issue No. D- Who should bear the costs of this Application.

33. I do not find any cause nor justification to depart from the wisdom of the proviso to Section 27 of the Civil Procedure Act. I would therefore award costs of the application to the Respondents.

34. In the final analysis, the orders that commend to me are the following:-

- i. The Application dated November 27, 2023 is dismissed with costs to the Respondents.
- ii. The Applicant shall pay all the rents in arrears from August, 2023 to date to the 1st Respondent within fourteen (14) days of the date hereof and in default the 1st Respondent is at liberty to levy distress in recovery of the same.
- iii. That the reference dated November 27, 2023 shall be fixed for hearing on priority, the parties having already complied with order 11 of the Civil Procedure Rules.

Those are the orders of the court.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 9TH DAY OF APRIL, 2024.

HON. NDEGWA WAHOME MBS, - MEMBER

BUSINESS PREMISES RENT TRIBUNAL



Court: Ruling delivered in the absence of the parties who had been duly notified.

The court to notify the parties.

Mention on the 3rd may 2024 to take directions on the hearing of the reference.

HON. NDEGWA WAHOME MBS, - MEMBER

BUSINESS PREMISES RENT TRIBUNAL

