



**Hashi Medical Centre Limited v Madari & 2 others (Tribunal Case
E030 of 2023) [2023] KEBPRT 1213 (KLR) (1 September 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 1213 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E030 OF 2023
GAKUHI CHEGE & J OSODO, MEMBERS
SEPTEMBER 1, 2023**

BETWEEN

HASHI MEDICAL CENTRE LIMITED APPLICANT

AND

CHARLES OLOO MADARI 1ST RESPONDENT

JUNIOR BIZ MART LIMITED 2ND RESPONDENT

SSEBO INTEL CO. AUCTIONEERS 3RD RESPONDENT

RULING

1. Through a motion dated 11th July 2023, the tenant moved this Tribunal seeking for an order directing the landlords, their employees, servants, agents, and/or any other person purported to act under their instructions from seeking rent or distress and for rent from April to July being the period which the 3rd Respondent closed the business premises.
2. Prayer 3 seeks for an order directing the 3rd Respondent to open the premises to the bonafide tenant to allow the tenant gather and collect his equipment and vacate the premises with assistance of OCS, Migori Police station.
3. Prayer 4 seeks that the tenant having issued a vacation notice to the landlords should be allowed to take possession of its equipment and vacate the suit premises with assistance of OCS, Migori Police station.
4. Prayer 5 seeks that the landlord and the 3rd Respondent be stopped from enforcing the notification for sale of the tenant's equipment which the former had a deal to sell to the latter's local competitor and the orders they purport to enforce were complied with.
5. The tenant also seeks that costs of the application be provided for. The application is supported by the affidavit of Abdikadir Abdilahi Hashi sworn on 11th July 2023 and the grounds were given thereof.



6. Interim orders were given on 20th July 2023 restraining the Respondents from distressing for rent/enforcing the notification of sale issued by the 3rd Respondent pending hearing inter partes on 3rd August 2023. Both parties were also ordered to maintain the *status quo* and the OCS, Migori police station was directed to ensure compliance with the orders.
7. The application is opposed through the 1st Respondent's replying affidavit of 28th July 2023 and that of the 3rd Respondent's proprietor one Kennedy Ooko Jacob sworn on 24th July 2023.
8. The tenant's director aforesaid filed yet another affidavit on 10th August 2023 headed "Replying Affidavit". The same amounts to a supplementary affidavit and I shall treat it as such.
9. Through a motion dated 7th August 2023, the 3rd Respondent moved this Tribunal seeking assessment of auctioneer's costs and issuance of a certificate thereof in the sum of Kshs. 367,047/= and an order to compel the tenant to pay the said amount. The application is supported by the affidavit of Kennedy Ooko Jacob sworn on 7th August 2023 and the grounds on the face thereof.
10. The application was directed to be served for hearing inter partes on 16th August 2023. The application is supported by the 1st Respondent/landlord's replying affidavit sworn on 11th August 2023 and approved through the tenant's director's replying affidavit of Abdikadir Ibdilahi Hashi.
11. We are now required to determine the following issues
 - a. Whether the tenant is entitled to the reliefs sought.
 - b. Whether the 3rd Respondent is entitled to the reliefs sought in the application dated 7th August 2023.
12. In regard to the application dated 11th July 2023, the main issue which arises for consideration is whether the tenant owed the sum of Kshs. 2,105,200/= as at 29th March 2023 when the landlords instructed the 3rd Respondent to distrain the tenant's properties for recovery of rent arrears.
13. In the supporting affidavit sworn on 11th July 2023, the tenant's director admits having had challenges due to tough economic times and was willing to offset any rent balances and vacate the suit premises as per the notices marked "AIH-1". A sum of Kshs. 1,325,000/= had been paid to the landlords who had instructed the 3rd Respondent to attach and auction the tenant's tools of trade despite paying all the rent in arrears. A cheque of Kshs. 1,325,000/= is attached as annexure "AIH-2".
14. According to the tenant, it complied with orders of 6th July 2023 which had granted it 14 days to do so. The tenant seeks for waiver of rent for April to July 2023 when the suit premises was closed by the landlords through the 3rd Respondent who issued notification for attachment of equipment marked as annexure "AIH-6",
15. The notification of sale dated 5th July 2023 marked as "AIH-7" notifies the tenant that "taking into consideration the delicate nature of the items under attachment, we do hereby invoke and proceed Under *Distress for Rent Act*, Cap 293, Section 49(1) Which provides for auction of property in-situ":

"consequently, the property in the schedule on the notification of sale are under our custody and taking into consideration that there are no operations on-going within the premises, we operatively take possession of the premises. You can still make access with prior arrangements of the premises with us if need be."



16. It is therefore clear that from 5th July 2023, the suit premises were in possession of the 3rd Respondent who was acting for the landlord and the tenant cannot be under obligation to pay rent or mesne profits from the said date.
17. In the 1st Respondent's replying affidavit of 28th July 2023, it is deposed that the tenant is attempting to evade his contractual obligations of paying rent, water bills, electricity bills, facility maintenance costs, internet access costs and refurbishing the arears he currently occupies upon his intended departure based on the initial termination notice dated 31st May 2023 which was to take effect on 1st July 2023 being the only termination notice served via email on 31st May 2023 upon the landlords.
18. According to the landlords, the termination notice having taken effect, the tenancy terminated on 1st July 2023. It is thus deposed that the termination could not be partial based on the occupied floors as the tenancy agreement did not give that latitude.
19. In the supporting affidavit of the tenant sworn on 9th May 2023, it is deposed by its director at paragraph 12 as follows:-
 - “ 12. That the 1st and 2nd Respondents have instructed Auctioneers (3rd Respondent) who have proclaimed our tools of trade with intention to attach them after expiry of 14 days due to late payment of rent and accumulated rent arrears of Kshs. 1,325,000/= up to March 2023 (exhibit marked and annexed A1H-2) is a copy of the proclamation notice attached.”
20. The only complaint by the tenant regarding the proclamation is that the Auctioneers have grossly undervalued its tools of trade and the Auctioneers fees was exaggerated at 18.3% of the rent distress amount and that the assets proclaimed were under debenture instrument.
21. Going by the said depositions, it is clear that rent per month being Kshs. 260,000/= for the first premises further accumulated by a further sum of Kshs. 780,000/= being rent for April, May and June 2023 to make altogether Kshs. 2,105,000/= as claimed by the landlord.
22. The tenant paid a sum of Kshs. 1,325,000/= vide cheque marked “AIH-2” dated 6th July 2023 drawn in favour of NCBA in support of the application for funds transfer of even date.
23. On 20th June 2023, the tenant had been ordered by this Tribunal to pay a sum of Kshs. 2,105,000/= in rent arrears within 14 days and file evidence to that effect failing which the interim orders could stand vacated and the landlord could be at liberty to distress for rent. The time given lapsed on 4th July 2023 paving way for the distress according to the landlords. As at the time of attachment, the rent arrears stood at Kshs. 2,105,000/= and the payment made by the tenant was effected two (2) days after.
24. A sum of Kshs. 780,000/= still remained unpaid after payment of Kshs. 1,325,000/= by the tenant outside the timelines given by this Tribunal. It is contended by the landlords that the amounts accruing after July 2023 are to be considered as “mesne profits” at the rate of Kshs. 260,000/=.
25. We have already observed that the premises were taken over by the 3rd Respondent on 5th July 2023 on instructions of the 1st and 2nd Respondents and aswe do not agree with the latter that they are entitled to mesne profits as the tenant no longer does business in the suit premises.
26. We therefore find and hold that the tenant owed Kshs. 2,105,000/= as at 5th July 2023 when the 3rd Respondent issued the proclamation of even date. Having paid Kshs. 1,325,000/= on 6th July 2023, the balance remained at Kshs. 780,000/=.



27. We note that on 8th August 2023, the tenant made a further payment of Kshs. 520,000/= vide a cheque of even date in favour of NCBA in support of its application for funds transfer of the same date. This left a balance of Kshs. 160,000/= which the tenant states will be catered for by a sum of Kshs. 120,000/= paid as deposit at the start of the lease. As there was no such prayer in the application before us and given the fact that the amount is security which requires to be applied for other purposes we refrain to apply it towards rent as there are other issues of unpaid utilities and restoration of the premises to the original condition in which the tenant found it at inception of the lease.
28. We therefore find and hold that the tenant still owes the landlord a sum of Kshs. 160,000/= in rent arrears.
29. In regard to the Auctioneers bill, we note that this Tribunal has discretion under Section 12(1)(k) to exercise powers in awarding costs and given the fact that the only thing done by the Auctioneer was to receive instructions and issue a proclamation, we shall order that a sum of Kshs. 100,000/= be paid in that regard taking into consideration the provisions of the Auctioneers Act.
30. In the premises and in line with Section 12(4) of Cap 301, Laws of Kenya, we shall dismiss the tenant's application and allow the 3rd Respondent's application on the following terms:-
- a. The tenant shall pay the sum of Kshs. 160,000/= being the balance of rent arrears to the landlord and in default distress shall proceed in recovery thereof after expiry of fourteen (14) days hereof,
 - b. The tenant shall in addition pay Auctioneers charges of Kshs. 100,000/= to the 3rd Respondent within the same period,
 - c. The Tenant shall upon payment of the foregoing amounts and costs of Kshs. 40,000/= to the Respondents be entitled to vacate the suit premises and in default shall be evicted therefrom with the assistance of the OCS, Migori Police Station upon expiry of 14 days hereof.

It is so ordered.

RULING DATED, SIGNED AND VIRTUALLY DELIVERED THIS 1ST DAY OF SEPTEMBER 2023

HON. GAKUHI CHEGE

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

HON. JOYCE OSODO

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

In the presence of;

Jura for the 1st and 2nd Respondents

Gesore for the Applicant/tenant

3rd Respondent present in person

