



Njuguna & another v Martin Njihia Kimani t/a Maxima Pharmaceuticals (Tribunal Case E050 of 2023) [2023] KEBPRT 1141 (KLR) (14 December 2023) (Ruling)

Neutral citation: [2023] KEBPRT 1141 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E050 OF 2023
P MAY, MEMBER
DECEMBER 14, 2023**

BETWEEN

SAMUEL NJUGUNA 1ST APPLICANT

MARK & JEDDY PROPERTY MANAGEMENT 2ND APPLICANT

AND

**MARTIN NJIHIA KIMANI T/A MAXIMA
PHARMACEUTICALS RESPONDENT**

RULING

1. The application before me is the landlord's notice of motion dated 18th January, 2023 in which the landlord sought for orders to levy distress against the tenant. The application is premised on the grounds set out in the supporting affidavit sworn by the applicant on an even date. The landlord stated that the tenant had since taking possession of the demised premises in 2012 been a habitual rent defaulter.
2. The landlord stated that he issued the tenant with a notice to terminate tenancy dated 26th May, 2022 and which the tenant has never challenged up to date. The landlord therefore sought the intervention of the Tribunal to have the tenant evicted.
3. The tenant opposed the application vide the replying affidavit sworn on 16th August, 2023. He took a multi-pronged approach in denying the contents of the supporting affidavit. First, he stated that the rent payable was Kshs. 30,000 and not 32,600 as alluded to by the landlord. The tenant also gave a chronology of the previous dispute between the parties and which the same had been decided by the tribunal in his favour.

The tenant therefore gave their own computation of what should be the outstanding rent arrears.



4. The parties elected to canvass the application by way of written submissions. There has been compliance by both parties. I wish to proceed as follows.
5. The crux of the dispute is on the power by the landlord to levy distress. The beginning point in determining such a dispute therefore is Section 3(1) of the [Distress for Rent Act](#), Cap. 293, Laws of Kenya 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 arrear 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 is given by the common Law of England in a similar case”.
6. Section 12(1) of [Cap. 301](#) gives the Tribunal power to permit the levy of distress for rent. I want to believe that it is on the basis of the said provision that the landlord has approached the Tribunal. The process of levying distress for controlled tenancies therefore requires one to obtain the consent of the Tribunal. The Landlord by approaching the Tribunal before levying distress has acted within the full purview of the law.
7. In determining whether Landlord’s right to levy distress had crystallized, I am guided by the decision in [Owayo vs. George Hannington Zephaniah Aduda t/a Aduda Auctioneers and another](#) (2007) 2 KLR 140, (2008) EA 287, where the Court of Appeal considered section 3(1) of the [Distress for Rent Act](#) and the English common law in dealing with the question of what constitutes illegality for distress for rent. It was stated that an illegal distress is one where there was no right to distrain or where a wrongful act was committed at the beginning of the levy thereby invalidating all subsequent proceedings. The instances of illegal distress were cited as: where distress is by a landlord who has parted with his reversion, distress by a person in whom the reversion has not vested, a distress when no rent is in arrears, a distress for a claim or debt which is not rent, distress after a valid tender of rent has been made, a second distress for the same rent, distress off the premises or on a highway, distress at night and a distress carried out contrary to the law relating to Distress.
8. In the present situation, it is explicit that the parties have been involved in litigation before. The landlord has his reservations on the orders issued in Nairobi BPRT E257 of 2022. While the proceedings have not been availed to the Tribunal, the landlord has made assertions to the effect that the tenant obtained the said orders through the backdoor by misleading the Tribunal. Respectfully, such aspersions should not be entertained by a litigant who has failed to take any action to remedy the same.
9. The tribunal has considered the competing statements and accounts on the outstanding rent arrears. It is clear that the landlord erred in his computation as the rent payable is Kshs. 30,000/= and not Kshs. 32,600/= as he alluded to. I am therefore convinced that the rent arrears for the year 2023 is Kshs. 49,000/= as computed by the tenant.
10. In the end, the application and reference filed by the landlord is dismissed with no orders as to costs. The tenant shall pay the outstanding rent arrears of Kshs. 49,000/= within 14 days from the date hereof, in default the landlord shall be at liberty to levy distress.

RULING DATED, SIGNED AND DELIVERED THIS 14TH DAY OF DECEMBER 2023

HON. PATRICIA MAY- MEMBER

14. 12.2023

In the presence of Mr. Njau for the 1st and 2nd Applicants (Landlord and Agent)



The firm of Kinya Mwaniki & Co. Advocates for the Tenant - absent

