



**Mtindi Dairies Limited v Mongoose Property Cares Ltd & another (Tribunal
Case E160 of 2024) [2024] KEBPRT 881 (KLR) (25 June 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 881 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E160 OF 2024
N WAHOME, CHAIR & JOYCE MURIGI, MEMBER
JUNE 25, 2024**

BETWEEN

MTINDI DAIRIES LIMITED TENANT

AND

MONGOOSE PROPERTY CARES LTD 1ST RESPONDENT

LITTLE VINEYARD AUCTIONEERS 2ND RESPONDENT

RULING

1. The Tenant filed the present reference dated 6th February 2024 under Section 12(4) of the [Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#) (Cap 301) hereinafter “the Act” with a complaint to the effect that:-

“The Landlord intends to auction the Tenants property on or about 9/2/2024”
2. It also filed the notice of motion application dated 6/2/2024 brought under certificate of urgency in which it sought that the landlord be compelled to open the demised premises, the Respondents be restrained from auctioning its good, it be allowed quiet possession of the demised premises and that the Respondents be ordered to return back to the Tenant the proclaimed goods attached from it.
3. The evidence by the Tenant is that:
 - i. It had leased the demised premises at the monthly rent of Kshs.32,000/-.
 - ii. It was not in rent arrears but had paid Kshs.64,000/- to avoid the sale of its proclaimed goods.
 - iii. Had paid rent security deposit at Kshs.64,000/- and had also caused developments on the premises at Kshs.400,000/-.



- iv. The Respondents had denied her access to the demised premises without any justification in law.
 - v. If given time, it would get into a scheme with the landlord on how to settle the rents in arrears.
4. On their part, the Respondents filed the Replying Affidavit sworn by James Nganga Wanjiku the proprietor of the 2nd Respondent on the 28/2/2024 and another one by Robert Simiyu Wasike the property manager of the 1st Respondent. The same was sworn on the 4/3/2024. Their evidence was the effect that:-
- i. The tenant was in rent arrears at Kshs.128,000/- equivalent to four (4) months by January 2024.
 - ii. It was a serial rent defaulter and only paid after persistent demands and or the threat of attachment and auction of its properties.
 - iii. They had not locked the premises and only carried out levy of distress which was carried out procedurally and within the law.
 - iv. The Tenant had not been operating any business at the premises for the last 10 months.
5. Thereafter the Respondents filed their submissions dated 29/4/2024 but the Tenant did not file any despite being afforded opportunities to do so. On perusing all the pleadings and submissions on record, it is our view that the issues for determination in this matter are the following:-
- A. Whether the Tenant's application is merited.
 - B. Whether the Respondents levy of distress for Rent was lawful.
 - C. Who should bear the costs of this suit.

Issue No. A- Whether the Tenant's Application is merited.

6. A tenant's cardinal obligation under a tenancy is to pay rents and other service fees as they fall due. In this matter the Tenant has not in anyway demonstrated that he was not in rent arrears of Kshs.128,000/- by January 2024. He has infact admitted that on the Respondents proclaiming and attaching its goods, it paid Kshs.64,000/- in rent arrears and more arrears were still left and due to the Respondents.
7. The Tenant did not provide any evidence that he had paid the rents for October, November and December, 2023 and January 2024 when its goods were being proclaimed and attached on the 16/1/2024. The Tenant did also not offer any evidence that it was meeting its rental obligations during the hearing of the matter or that it had settled the rents in arrears as at January, 2024.
8. It is our view that the Tenant has not on a balance of probabilities been able to demonstrate that it was not in rent arrears at Kshs.128,000/- at the date the levy of distress was being effected. 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 asserts must prove that those facts exist”.
9. In this matter the Tenant has fallen short of satisfying that threshold. It is our view that at the time of levy of distress, it was in huge rent arrears against its legal obligations. This court cannot be its refuge nor issue equitable reliefs as the Tenant is not deserving of the same. In the case of Samuel Kipkorir



Ngeno & Another – vs- Local authorities Pension Trust (Registered Trustees) and Another (2013) e KLR the High court sitting at Nairobi held that:-

“The temporary injunction sought in the present application is an equitable remedy at the court’s discretion. He who comes to equity must come with clean hands. A tenant who is in huge arrears of rent is underserving of the court’s discretion. The court cannot be the refuge of a tenant who fails to meet his principle obligation of paying rent as and when it becomes due”.

It is therefore our determination that the application dated 6/2/2024 is without merit and the same is dismissed. Looking at the reference of the even date, it is obvious that the same is spent by the determination in this application. We shall therefore determine the same in similar terms with the application.

B. Issue No. B- Whether the Respondents levy of distress for Rent was lawful.

10. It is our determination that as at January, 2024 the Tenant was in rent arrears of Kshs.168,000/- which is equivalent to the rent for four (4) months at the rate of Kshs.32,000/- per month. Section 7(1) (b) of the Act provides as a ground of termination as that:-

“The tenant has defaulted in paying rent for a period of two months after such rent has become due or payable or has persistently delayed in paying rent which has become due or payable”.

10. If rent in arrears for two (2) months can be a ground for termination of a tenancy, it must also be a good ground for levy of distress in recovery of such rents in arrears. Section 3(1) of the [*Distress for Rent Act*](#) provides that:-

“Subject to the provisions of this Act, every person having any rent or rent service in arrears and due upon any grant, lease, demise or contract whatsoever shall have the same remedy by distress for the recovery of such rent or rent service as is given by the common law of England in the like case”.

11. The question on the requirements for the levy of distress for rent are now well settled within our jurisprudence. The principal requirement is that there is rent in arrears. There is no requirement either under the Act or under the [*Distress for Rent Act*](#) for a landlord to seek for license to effect the same. In the case of John Nthumbi Kamwithi – vs- Asha Akumu Juma (2018) e KLR the High court sitting at Embu held that:-

“I have perused the Act but I find no provision to the effect that such a permission be sought. 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. Distress is a right the landlord is entitled to for recovery of rent”.

12. There is no doubt that the Tenant owed the Landlord rent in arrears for at least 4 months when the distress for rent was levied. The landlord was therefore within his rights to levy such distress in recovery of such rents in arrears. We therefore are of the view that the same was lawful.

ISSUE NO. C- Who should bear the costs of the suit.

13. The proviso to Section 7 of the [*Civil Procedure Act*](#) provides that costs should follow the event. The event in this matter is that the Respondent’s defence has prevailed. We have no reason nor justification to depart from the wisdom of that proviso. We therefore award costs to the Respondents.



14. In the final analysis, the orders that commend to us are the following:-

- i. That the Application and reference herein both dated 6/2/2024 are dismissed.
- ii. That the Respondents are at liberty to levy for distress in recovery of all the rents in arrears.
- iii. That the Tenant shall pay costs to the Respondents assessed at Kshs.30,000/-.

Those are the orders of the court.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF JUNE, 2024.

HON. NDEGWA WAHOME, MBS - PANEL CHAIRPERSON

HON. JOYCE MURIGI - MEMBER

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Ruling delivered in the absence of the parties and their respective counsels though duly notified. The court registry to notify the parties of the Ruling.

HON. NDEGWA WAHOME, MBS - PANEL CHAIRPERSON

HON. JOYCE MURIGI - MEMBER

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