



**Gusii Mwalimu Sacco Society Limited v Osano (Tribunal Case
E057 of 2024) [2024] KEBPRT 1617 (KLR) (22 November 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 1617 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E057 OF 2024
GAKUHI CHEGE, CHAIR & J OSODO, MEMBER
NOVEMBER 22, 2024**

BETWEEN

GUSII MWALIMU SACCO SOCIETY LIMITED LANDLORD

AND

JARED OSANO TENANT

RULING

A. Dispute Background

1. The tenant/applicant moved this Tribunal vide a motion dated 29th July 2024 seeking that this court be pleased to issue an order of injunction to restrain the landlord from evicting him from the suit premises. He further sought for setting aside of the orders of 17th July, 2024 dismissing his application dated 16th May 2024 and for reinstatement of the application for hearing to its logical conclusion.
2. There before tenant had filed an application dated 16th May 2024 seeking review of the previous orders made by this Tribunal on 13th May 2024. The application came up for hearing on 17th July 2024 and although his Counsel was logged into court, he did not address it and the application was dismissed for want of attendance. It is the tenant's contention that failure by his Counsel to address the court should not be visited upon him as he is innocent.
3. Following the said dismissal, the landlord moved to evict him from the suit premises. In his supporting affidavit sworn on 29th July 2024, the tenant contends that his advocate was prevented from addressing this court on account of a technical error on his gadget.
4. The tenant contends that he stood to suffer irreparable loss as he had paid his rent up to the filing date. He deposes that failure by his advocate to address the court should not be visited upon him.
5. In response to the application, the landlord filed a replying affidavit sworn by EVANS ATEI MASIRA on 8th August 2024 wherein it is deposed that the Applicant is not a tenant as revealed by the site



inspection visit conducted on 12th April 2023. A copy of the report is annexed as “Eam-1”. As a result, the matter was marked closed on 13th May 2024.

6. It is therefore the landlord’s case that this Tribunal has no jurisdiction to hear and determine the application. The landlord complains that the applications filed subsequent to the orders of 13th May 2024 had not been served upon its advocates on record including the one dated 16th May 2024.
7. According to the landlord, the position has not changed since the 13th May, 2024 as the Applicant herein has not signed any new lease with the Landlord neither does the Landlord have any space for him.
8. It is the landlord’s case that the findings of the inspection done on 12th April, 2023 were crystal clear that the tenants had signed new leases with the Landlord that is Gusii Mwalimu Sacco Ltd (respondent herein) and not the Applicant herein and that, that position obtains to date.
9. The tenants were paying their rent directly to the Landlord and not the Applicant and the same position subsists to date. With these clear findings, the Applicant did not appeal to the Land court in line with Regulation 15 within 30 days against the said findings neither has the report been challenged, cancelled, annulled or declared null and void. It is therefore legally untenable for this Tribunal to sit on appeal or to litigate on a matter it had declared itself as lacking Jurisdiction.
10. It is deposed that if any payments have been made by the Applicant herein, it is a belated attempt to hoodwink this Tribunal into believing that the Applicant is a tenant when he is not.
11. The orders granted by this Tribunal restraining the Landlord from evicting the tenant were granted in vacuum and on false presentation of facts as the Applicant lied that he is a tenant in absence of a valid lease and therefore incapable of enforcement and compliance.
12. The tenant/applicant is accused of seeking to force himself as a sub-landlord and collect rent from the landlord’s tenants and unless this Tribunal stands firm and permanently stop entertaining the Applicant, there will be anarchy and breach of peace as the Applicant has resorted into employing vigilant teams to intimidate the rightful Landlord from collecting rent on allegations that the tenants are his. It is therefore the landlord’s contention that this Tribunal should encourage and advise the Applicant to construct his own houses and become a legal landlord and not use dubious methods to become a landlord on a property which does not belong to him.
13. The landlord simultaneously filed a notice of preliminary objection questioning this Tribunal’s jurisdiction based on the orders of 13th May 2024 restating that there is no landlord/tenant relationship between the parties herein.
14. The application was directed to be disposed of by way of written submissions but only the landlord complied. The landlord’s submissions are dated 26th August 2024. We shall consider the submissions together with the issues for determination.

a. Issues for determination

15. The following issues arise for determination; -
 - a. Whether this Tribunal has jurisdiction to hear and determine the application dated 29th July 2024.
 - b. Whether the tenant/applicant is entitled to the reliefs sought in the application dated 29th July 2024.



- c. Who shall bear the costs of the application?
16. We have seen the decisions cited by the landlord in its submissions in PHOENIX OF E.A ASSURANCE COMPANY LIMITED VS S.M THIGA T/A NEWSPAPER SERVICE (2017) eKLR, REPUBLIC VS KARISA CHENGO & 2 OTHERS (2017) eKLR, OWNERS OF MOTOR VESSEL “LILLIAN S” VS CALTEX OIL (KENYA) LTD (1989) KLR 1 & JOHN GILBERT OUMA VS KENYA FERRY SERVICES LIMITED (2021) eKLR on the issue of jurisdiction and the doctrine of functus officio and we appreciate the reasoning therein noting that the same are binding upon this Tribunal.
17. However, the application before us is for setting aside the ex-parte orders of this Tribunal given on 16th May 2024. Section 12(1)(i) of Cap 301 gives this Tribunal power: -
- “ (i) to vary or rescind any order made by the Tribunal under the provisions of this Act.”
18. It is therefore clear that this Tribunal has power to set aside its own orders in exercise of judicial discretion under the foregoing provision of the law. Such discretion is however to be exercised judicially and not capriciously.
19. The tenant filed an application dated 16th May 2024 seeking review of the previous orders made by this Tribunal on 13th May 2024. The application came up for hearing on 17th July 2024 and although the Applicant’s Counsel was logged into court, he did not address it and the application was dismissed for want of attendance. It is the tenant’s contention that failure of his Counsel to address the court should not be visited upon him as he is innocent.
20. In response to the application, the landlord filed a replying affidavit sworn by EVANS ATEI MASIRA on 8th August 2024, wherein it is deposed that the Applicant is not a tenant as revealed by the site inspection visit conducted on 12th April 2023. A copy of the report is annexed as “Eam-1”. As a result, the matter was marked as closed on 13th May 2024.
21. It is therefore the landlord’s case that this Tribunal has no jurisdiction to hear and determine the application. The landlord complains that the applications filed subsequent to the orders of 13th May 2024 had not been served upon its advocates on record including the one dated 16th May 2024.
22. According to the landlord, the position has not changed since the 13th May, 2024 as the Applicant herein has not signed any new lease with the Landlord neither does the Landlord have any space for him.
23. It is the landlord’s case that the findings of the inspection done on 12th April, 2023 were crystal clear that the tenants had signed new leases with the landlord that is Gusii Mwalimu Sacco Ltd (respondent herein) and not the Applicant herein and that, that position obtains to date.
24. The tenants were paying their rent directly to the Landlord and not the Applicant and the same position subsists to date. With these clear findings, the Applicant did not appeal to the Land court in line with Regulation 15 within 30 days against the said findings neither has the report been challenged, cancelled, annulled or declared null and void. It is therefore legally untenable for this Tribunal to sit on appeal or litigate on a matter it had declared itself as lacking Jurisdiction.
25. It is noted that the impugned orders of 13th May 2024 were made ex-parte without the tenant’s Counsel’s input and therefore cannot be said to be final and incapable of review or setting aside. The question as to how the tenant’s tenancy was terminated is a live matter which this Tribunal requires to



interrogate before it can be concluded that there is no landlord/tenant relationship between the parties herein. The Rent Inspector's report is neither final nor binding upon the Tribunal.

26. In *Shah V Mbogo* [1967] E A 116 and 123 paragraph B, Judge Harris, as he then was, had this to say on the discretion to set aside ex-parte orders—

“The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”

27. The said judgment was approved by the Court of Appeal in *Mbogo v Shah* [1968] EA 93 and in *Shabir Din v Ram Parkash Anand* (1955) 22 EACA 48 where Briggs JA (as he then was) said at page 51 as follows:

“I consider that under order 9 rule 20, the discretion of the Court is perfectly free and the only question is whether upon the facts of any particular case it should be exercised. In particular, mistake or misunderstanding of the appellant's legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised.”

28. There is no dispute that the impugned orders of 13th May 2024 were made ex-parte after the tenant's Counsel was unable to address the Tribunal owing to a technical issue affecting his gadget. This in our view is a good reason for setting aside the orders considering that failure of technology is normal even with the most sophisticated gadgets. We are also cognizant of the right to be heard and that denial of natural justice to a litigant would render a good judgement liable to being set aside even if right (see the court of appeal decisions in *Mbaki & Others Vs Macharia & Another* (2005) 2 E.A 206 at page 210 & *Onyango Vs Attorney General* (1986-1989) E.A 456 at page 460).
29. We therefore allow the tenant's application and reinstate the application dated 16th May 2024 for hearing and determination on the merits. The issue as to whether there exists a landlord/tenant relationship between the parties herein shall be canvassed at the time of hearing of the said application.
30. As regards costs, the same are in the Tribunal's discretion under Section 12(1)(k) of Cap. 301, but always follow the event unless for good reasons otherwise ordered. We shall order costs of the application to abide the outcome of the application dated 16th May 2024.

b. Orders

31. In view of the above analysis, the following orders commend to us: -
- The tenant's application dated 29th July 2024 is allowed in terms of prayer 3 thereof.
 - The costs of the application shall abide the outcome of the application dated 16th May 2024.
- It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 22ND NOVEMBER 2024

HON. GAKUHI CHEGE

(PANEL CHAIRPERSON)

BUSINESS PREMISES RENT TRIBUNAL



HON. JOYCE AKINYI OSODO

(MEMBER)

In the presence of: -

Olucho for landlord

Grace Ogutu holding brief for Nyamweya for tenant

