



**Hemark Properties Limited v Gathima (Tribunal Case E182 of 2024)  
[2024] KEBPRT 1674 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 1674 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E182 OF 2024  
N WAHOME, CHAIR & JOYCE MURIGI, MEMBER  
NOVEMBER 14, 2024**

**BETWEEN**

**HEMARK PROPERTIES LIMITED ..... APPLICANT**

**AND**

**GEORGE KIRUBI GATHIMA ..... RESPONDENT**

**RULING**

1. This Ruling is on the Landlord's notice of motion application dated 5<sup>th</sup> August 2024. The same is seeking for the following orders:-
  - i. Spent
  - ii. That pending the hearing and determination of this application, the Hon. Tribunal does order a stay of its orders issued on 20<sup>th</sup> June 2024 and any subsequent directions thereof.
  - iii. That pending the hearing and determination of this application, the court be pleased to restore the landlord and its current tenants quiet possession of the premises known as LR No. 209/213 Kalsi House, Luthuli Avenue Nairobi.
  - iv. That the court be pleased to review its orders dated 20<sup>th</sup> June 2024 in entirety.
  - v. That the court be pleased to vacate the orders issued for quiet possession to be granted to the Tenant who is not in occupation of the alleged premises.
  - vi. That the Honourable Tribunal does strike out the Tenant's suit against the landlord as there is no Landlord-Tenant Relationship.
  - vii. That the Tenant does herewith collect any uncollected items from the premises within 14 days thereof.



- viii. That in the event the Tenant fails to comply with order 6 above, the Landlord be and is hereby permitted to cause the removal of any uncollected items from the landlord's property being Kalsi House, Luthuli Avenue L.R No. 209/2713 in its possession, at the Tenant's own cost and expenses.
  - ix. That the costs of this Application be borne by the Tenant.
2. The Landlords application was on grounds that:-
- a. There was no longer a Landlord and Tenant relationship between it and the Tenant, the same having been extinguished on 31<sup>st</sup> December 2023 and confirmed by an order of this court date 22/3/2024.
  - b. The orders granted to the Tenant by this court on the 20<sup>th</sup> June 2024 were on the reason of material non-disclosure.
  - c. The landlord had since entered into fresh Tenancy agreements with the Tenant's previous sub tenants and the Tenant was not in possession of the premises.
  - d. The Tenant did not oppose the landlord's termination notice and the reference thereof as required by Cap. 301.
  - e. The landlord annexed exhibit No. PNK-3 which is a bundle of tenancy agreements with the Tenants sub-tenants.
3. On his part, the Tenant filed the Replying Affidavit sworn by himself on the 6/8/2024 and the grounds of opposition dated 6/8/2024. In the pleadings, the Tenant asserted that:-
- i. The application dated 5<sup>th</sup> August 2024 had no merit and was an abuse of the court process.
  - ii. That the Landlord could not originate proceedings against the Tenant are then allege that there was no landlord and Tenant relationship.
  - iii. The landlord had an opportunity to raise the present issues in reply to the Tenant's application dated 27/3/2024.
  - iv. The Tenant re-took possession of the demised premises on the strength of the orders of this court and cannot therefore be a trespasser.
  - v. The new tenancy agreements were of no consequences as the same were executed in defiance of orders of this court.
  - vi. There are no new materials that were unavailable during the hearing of the application dated 27<sup>th</sup> March 2024 nor any error disclosed on the face of the record to warrant the review orders sought.
  - vii. This court is functus official and the only available avenue to the landlord was to file an appeal against the Ruling of 20<sup>th</sup> June 2024.
  - viii. The Tenant in his submissions dated 3/10/2024 argued that:-
    - a. The application dated 5/8/2024 be dismissed as it had not been effectively prosecuted. He relied on the case of Lelei & 2 Others vs- Kimeto & 30 Others (Environment and Land Court Case No. 143 of 2017 (2024) KE ELC 1220 (KLR) (7<sup>th</sup> March 2024).



- b. This matter is Res-judicata having been decided by the Ruling dated 20<sup>th</sup> June 2024 and this court was therefore functus officio. The Tenant relied on the case of John Florence Maritime Services Ltd and Another- vs- Cabinet Secretary for Transport and infrastructure and 3 Others (2015) eKLR which cited with approval the case of Henderson – vs- Handerson (1843) 67 ER 313.
  - c. On the principle of functus officio, the Tenant sought reliance on the case of Telkom Kenya Ltd – vs- John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Ltd (2014) eKLR.
- 4. On having perused the parties pleadings including the submissions thereof and the Ruling of this court dated 20<sup>th</sup> June 2024. In our view, the issues that arise for determination are the following:-
  - a. Whether the landlord’s application is merited when looked against the principles that guide the grant of the orders of review, Res-judicata and functus officio.
  - b. Who should bear the costs of this application.

**Issue No. A- Whether the landlord’s application is merited when looked against the principles that guide the grant of orders of review, Res-judicata and functus officio.**

- 5. To start off on this issue, we make reference to our Ruling dated 20<sup>th</sup> June 2024 and in particular paragraphs 13 and 14 thereof. Under paragraphs 13 we held that:-
 

“The Respondent has not in anyway rebutted the assertion that the tenant do not run any offices at the premises. It therefore creates a lot of doubt on the alleged service of the notice of termination of the tenancy dated 27<sup>th</sup> October 2023. We also doubt that the landlord had issued the termination notice on the 27/10/2023 and then wrote the letter dated 24/12/2023 agreeing to review the tenancy and without in any way mentioning the purported termination notice in the letter”.
- 6. This court at paragraph 14 of the Ruling went further to hold that:-
 

“Further despite the purported termination notice having purportedly taken effect on the 1/1/2024, the respondent confirmed to have received rent for upto and including the month of March, 2024 when the application dated 27/3/2024 was filed. For the reasons of possible further proceedings in this matter, we would not wish to make any further observations on the issue”.
- 7. From the above holdings, it is clear that this court was alive to the landlord’s claim that there did not exist a landlord and Tenant relationship and which notion it disabused. This court was also conscious that the Tenant was not in actual possession of the demised premises when it ordered for the hearing of the reference on its merits.
- 8. It is therefore not correct for the landlord to depone that there was material information that was not disclosed to the court. It has also not demonstrated any apparent error either on the face of the record or proceedings that culminated into the impugned Ruling.



9. Section 2(1) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* (Cap. 301) which we herein after refer to as “the Act” define a Tenant as:-

“In relation to a tenancy means the person for the time being entitled to the tenancy whether or not, he is in occupation of the holding, and includes a sub-tenant”.

10. Order 45 1(1) a and (b) of the Civil Procedure Rules provides that:-

Any person considering himself aggrieved-

- a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred, or
- b. By a decree or order from which no appeal is hereby allowed and who from discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree or order may apply for a review of judgement to the court which passed the decree or made the order without unreasonable delay”.

11. In this case, the Landlord has not demonstrated which is that matter or evidence that was not within his reach during the hearing of the application dated 27/3/2024 by the Tenant. Indeed this court by its ruling, effectively addressed the question of existence of a landlord and Tenant relationship and also the question of possession thereof.

12. We therefore opine that the Applicant has fallen far short of the required threshold to justify review. Having decided on the issues raised in the application herein and dated 5/8/2024 in the Tenant’s application dated 27/3/2024, we are persuaded that the matters and/or issues raised in the present application are Res-judicata.

13. Section 7 of the *Civil procedure Act* provides that:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between the parties under whom they or any of them claim, litigating under the same Title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”.

14. In the case of Henderson – vs- Handerson supra the court while addressing the doctrine of Res-judicata held the following:-

“.....Where a given matter becomes the subject of litigation in any adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward, as part of the subject in contest, but which was not brought, only because they have from negligence inadvertence or even accident omitted part of the case. The plea of Res-judicata applies except in special cases not only to points upon which the court actually required by parties to form an opinion and pronounce a judgement, but to every part which properly



belonged to the subject litigation and which the parties exercising reasonable diligence might have brought forward at the time”.

15. The issues we are expected to determine herein, are issues that were looked into and concluded by the Ruling dated 20<sup>th</sup> June 2024. We decline the invitation to revisit the same. In any event this court is functus officio in that regard. The court of appeal in the case of Telkom Kenya Limited – vs- John Ochanda Supra on the doctrine of functus officio held that:-

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon”.

16. The upshot of all these is that the Landlord’s application fails. We had also been called upon to determine that the application dated 5<sup>th</sup> August 2024 was not effectively prosecuted and to therefore dismiss the same. We are of the view that the circumstances of this matter are distinct. In this case the landlord sought to rely on the filings made and it indeed appeared in court to confirm the same. The dismissal of the application dated 5/8/2024 is therefore not for want of prosecution but for lacking in merit.
17. On costs, the Tenant is the successful party in this matter. We have no reason nor justification to depart from the conventional wisdom of Section 27 of the Civil Procedure Act. We therefore award him costs of this application.
18. In the final analysis, we make the following orders:-
- i. That the application dated 5/8/2024 is dismissed.
  - ii. That costs are awarded to the Tenant.

Those are the orders of the court.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 14<sup>TH</sup> DAY OF NOVEMBER 2024.**

**HON. NDEGWA WAHOME MBS - CHAIRPERSON**

**HON. JOYCE MURIGI - MEMBER**

**BUSINESS PREMISES RENT TRIBUNAL**

Ruling delivered in the presence of Mr. Onger Counsel for the Tenant/Respondent and Mr. Munene Counsel for the Landlord/Applicant.

**HON. NDEGWA WAHOME MBS - CHAIRPERSON**

**HON. JOYCE MURIGI - MEMBER**

**BUSINESS PREMISES RENT TRIBUNAL**

**14<sup>TH</sup> JANUARY 2024**

