



**Ndibaru v Koinange (Tribunal Case E763 of 2022)  
[2023] KEBPRT 197 (KLR) (Civ) (17 March 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 197 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
CIVIL  
TRIBUNAL CASE E763 OF 2022  
GAKUHI CHEGE, VICE CHAIR  
MARCH 17, 2023**

**BETWEEN**

**ZACHARIA MAINA NDIBARU ..... APPLICANT**

**AND**

**BARBARA WAMBUI KOINANGE ..... RESPONDENT**

**RULING**

1. Through a complaint dated 26<sup>th</sup> August 2022, the Tenant moved this Tribunal under Section 12(4) of Cap. 301, Laws of Kenya complaining that the landlord instructed one Francis M. Gitau t/a Fisra Auctioneers to levy distress for rent on his property and tools of trade without lawful permit. He also complains that the landlord was not providing and/or keeping a proper record of how much rent is payable for the area/space currently occupied by the tenant. He finally complains that the landlord was continuing to collect rent (allowing him to use a reduced area/space).
2. The tenant also filed a motion dated 26<sup>th</sup> August 2022 seeking to stop the proclamation to levy distress on 26<sup>th</sup> August 2022 pending hearing and determination of the application. He also seeks that Francis M. Gitau t/a Fisra Auctioneers and Sheila & Co. Advocates do act within the preserve of the law. He finally seeks that the leased premises be assessed to establish the proper rent chargeable for the space occupied by the Tenant/Applicant and for costs of the application.
3. On 12<sup>th</sup> August 2022, the said Auctioneers called on the suit premises in absence of the tenant and proclaimed various items under instructions of Sheila & Co. Advocates claiming arrears of Kshs. 594,000/-. The proclamation notice is marked 'ZMN2'.
4. According to the tenant, the Auctioneers ought to have obtained a certificate permitting levy of distress for rent from this Tribunal.



5. The tenant occupied the suit premises pursuant to a lease entered into with the landlord dated 1<sup>st</sup> August 2014 marked 'ZMN1' which was for a period of 5 years ending 31<sup>st</sup> July 2019.
6. The tenant deposes that after taking possession of the suit premises, he carried out extensive investment by levelling the land, erected a metal plated perimeter wall and installed expensive equipment thereon for his trade.
7. Although the tenant was entitled to 1/8 of an acre as defined in the lease agreement, the space made available by the landlord covers 169 metres (0.0169 ha) as against the expected 500 Square metres thereby denying him use of 331 square metres (0.0331 ha) as per copy of the surveyor's report marked 'ZMN3'.
8. The tenant contends that the landlord was in the habit of collecting rent payment from him whenever in need of funds and would only issue a receipt when pushed by him and in the year 2020 to the date of filing suit, she would call at the suit premises and take money from his staff on the understanding that she would issue corresponding receipts in vain. Previous receipts issued by the landlord are marked as annexure 'ZMN4'.
9. The tenant accuses the landlord of not making any efforts of establishing whether the area occupied by him was commensurate with the monthly rent and has treated his concerns casually and continued to enjoy the rent paid to her.
10. The tenant deposes that his investment in the suit premises was made on projections based on the lease period and that he invested thereon knowing it was his only source of stable livelihood and if disrupted would greatly affect his life and that of his family who depend on him as their bread winner. It was thus in the interest of justice that the Auctioneers' threat to cart away his assets ought to be stopped.
11. Interim orders were given on 29<sup>th</sup> August 2022 stopping the proclamation to levy distress pending hearing inter-partes on 16<sup>th</sup> September 2022.
12. The application is opposed through the replying affidavit of the landlord sworn on 6<sup>th</sup> September 2022 wherein it is deposed that the lease was for 5 years with an option for renewal for a further term of 5 years subject to modifications by the landlord and was therefore not to automatically come into force.
13. If the rent due by the tenant was unpaid for 60 days after becoming due, Article 4(a) of the lease allowed the landlord to enter upon the premises and repossess it. In exercise of the said right, the landlord sent a demand letter on 15<sup>th</sup> June 2022 for three (3) years rent by which the tenant had extended the lease without payment of rent but the tenant failed to settle the rent neither did he make arrangements to pay.
14. The landlord denies that the tenant advanced goods to her in lieu of rent as no invoices have been produced and the mode of rent payment could not abruptly change as that would breach the contract.
15. The landlord deposes that she kept records of rent payment for the tenancy and could not claim what was already paid. According to the landlord, the tenant had not made rent payment since and that the of the lease had ended on 31<sup>st</sup> July 2019. No rent has been paid since then and the landlord did not intend to renew the lease for a further term although the tenant has continued to stay on the suit premises without making payments or consulting on the lease renewal.
16. The landlord contends that the action to levy distress for rent was her legal right as she had severally demanded rent from the tenant without success and non-payment was a clear breach of the terms of the lease. There was no obligation to seek leave of the Tribunal.



17. As regards the size of the land, the landlord deposes that the lease is clear that anything concerning the terms thereof was to be presented in writing which the tenant has never done. The tenant had for all the period been on the land and only went for a valuation when rent payment was demanded from him on 23<sup>rd</sup> August 2022 which was a ploy he was using to avoid paying rent.
18. The landlord deposes that following the end of the first lease term on 31<sup>st</sup> July 2019, the tenant should not have continued to stay on the suit premises but ought to have vacated or raised the issue of size of the occupied premises to be considered in case there was a renewal of the lease which was not automatic. As such, the tenant being in breach of the most critical term of tenancy which is payment of rent has come to court with unclean hands for injunctive orders and the application ought to be dismissed with costs.
19. The tenant filed a further affidavit sworn on 29<sup>th</sup> September 2022 where it is deposed that the landlord all along maintained a very casual manner and style of dealing with her and would call on him at anytime and make demands for money with a rider that whatever was owing would be charged to the rent account.
20. According to the tenant, the landlord had failed to produce a rent book or records to show how she apportioned any of the bulk rental payments made to her contrary to Section 3 of Cap. 301, Laws of Kenya.
21. According to the tenant, the space she has all along occupied was meant to attract a rent of Kshs.7000/- as per the rent assessment report marked “ZMN5”.
22. The landlord filed two other affidavits and described “supplementary affidavit” and further supplementary affidavit” sworn on 24<sup>th</sup> October 2022 and 9<sup>th</sup> November 2022 respectively.
23. In the first affidavit, the landlord deposes that the lease relied upon by the tenant was the same one relied on by her which she annexes as “BK1”. She denies taking goods from the tenant’s carwash in exchange for rent.
24. According to the landlord, Section 3 of Cap. 301, cannot apply where no rent has been received and recorded as the last rent payment was in the year 2019 and covered the first term of the lease and that she has not received any rent thereafter which explains the demand letters marked ‘BK2’.
25. The tenant had not paid rent for the last 3 years and only managed to give a cheque for Kshs.45,000/- after intervention of this Tribunal and has an outstanding amount of Kshs.611,250/- in rent arrears.
26. The landlord deposes that the tenant paid rent and continued to do so for the entire period of the first 5 years and could not thereafter claim that the space rented to him was smaller than what was contracted as he had seen the land before making the lumpsum rent payment prior to signing the lease agreement.
27. The landlord deposes that the rent of Kshs.7000/- proposed by the tenant was not within the market rate in Ruaka area and the lease agreement contemplated determination of rent as a condition precedent to renewal of the lease for a further term of 5 years.
28. In the second supplementary affidavit of the landlord, she has attached a valuation report dated 1<sup>st</sup> November 2022 wherein the recommended market rent for the suit premises is Kshs.100,000/-. The report is annexed as ‘BK1’.
29. Both parties filed written submissions which I shall consider together with the issues for determination set out here below-
  - a. Whether the tenant is entitled to the reliefs claimed in the reference and application dated 26<sup>th</sup> August 2022.



- b. Who is liable to pay costs of the suit?
30. The tenant moved this Tribunal seeking in pertinent part for orders to stop the proclamation by the landlord to levy distress for rent pending hearing and determination of the application. He also seeks that Francis M. Gitau t/a Fisra Auctioneers and Sheila & Co. Advocates be compelled to act within the preserve of the law. He finally seeks that the leased premises be assessed to establish the proper rent chargeable for the space occupied by the Tenant/Applicant and that he be awarded costs of the application.
31. The relationship between the two parties started vide a lease entered into on 1<sup>st</sup> August 2014 marked 'ZMN1' for a period of 5 years ending on 31<sup>st</sup> July 2019.
32. The tenant states that although he was entitled to 1/8 of an acre as defined in the lease agreement, the space made available by the landlord covers 0.0169 hectares and he has been denied use of a portion measuring 0.0331 hectares as per his surveyor's report marked "ZMN3". He accuses the landlord of not making any efforts aimed at establishing whether the area occupied by him was commensurate with the monthly rent and of treating his concerns casually despite enjoying rent paid to her in respect of the suit premises.
33. On 12<sup>th</sup> August 2022, the landlord sent Auctioneers to the tenant's premises to levy distress for rent in the sum of Kshs.594,000/- as at the said date. This is what prompted the tenant to rush to this Tribunal to obtain interim orders of injunction.
34. The tenant contends that the landlord does not keep a rent book which is supposed to record details of all payments of rent and of all repairs carried out in the premises. He relies on the case of John Kariuki Maina v Winfred M. Kamita [2015] on the importance of keeping a rent book. He further relies on the case of *Thomas Masare v George Anyoke Rogito & 3 Others* [2009] eKLR. On the basis of lack of the rent book, it is submitted that the landlord has failed to demonstrate that the tenant owes Kshs.611,250/- and how the amount was calculated and determined with specific months owed.
35. On the other hand, the landlord submits that as at October 2022, the tenant owed Kshs.656,250/- and only paid a sum of Kshs.45,000/- after being compelled to pay rent by this court. The tenant is accused of withholding the landlord's dues while continuing to use the premises uninterrupted. The landlord relies on the decision in the case of *Samuel Kipkori Ngeno & Another v Local Authorities Pension Trust (Registered Trustees) & Another* [2013] eKLR.
36. According to the landlord, the tenant had accumulated rent over three years and has tried to justify the arrears by relying on an innocent misrepresentation to claim that he should have been paying Kshs.7000/- per month yet he has not produced any written proof that he intended to amend one of the most vital terms of the contract. Apart from the cheque of Kshs.45,000/-, no other payments of rent have been made since July 2019 and the issue of keeping records does not arise as the key requirement for receipts covering the period up to July 2019 showing that the first term had fully been settled and the second term is what the landlord was claiming in arrears. As such there were no payments to be recorded.
37. I have examined the pleadings and submissions and there is no claim by the tenant of any specific amount of rent paid by him and not recorded by the landlord for the period after July 2019. All the tenant deposes in the further affidavit sworn on 29<sup>th</sup> September 2022 is that the landlord had maintained a very casual manner and style of dealing with him as her tenant by feeling free to call on him anytime and making demands of money with a rider that whatever was owing would be charged to the rent account leaving her with no option.



38. This allegation is however discounted by the rent payment receipts annexed to the supporting affidavit which shows that their dealings was formal all along. It is therefore the tenant who had the legal obligation under Section 107 and 108 of the Evidence Act to prove payment of rent and not the landlord. I refuse to buy his story and hold that he indeed owed rent arrears sought to be recovered by the landlord by way of distress for rent.
39. I rely on the decision in the case of John Nthumbi Kamwathi v Asha Akumu Juma [2018] eKLR at paragraph 35 where it was held as follows:-
- “35. I find that the appellant had no obligation to seek permission from the Tribunal to levy distress. Distress is a right the landlord is entitled to for recovery of rent. If the tenant chooses, he/she could file a reference to the Tribunal for orders in objection of the distress”.
40. In the premises, the tenant having failed to pay rent from July 2019 cannot be entitled to any protection from distress for rent by this Tribunal. He who comes to equity must come with clean hands and must do equity. This is what Justice Waweru Hatari held in the Samuel Kipkori case (*supra*) cited by the Landlord’s counsel.
41. In regard to the dispute on the rent payable, I note that the lease agreement relied upon was for a period of 5 years and expired on 31<sup>st</sup> July 2019 after running its full course. The lease was not renewed and the same having expired by effluxion of time cannot create any future rights or obligations upon the parties thereto. It cannot be the basis for this litigation.
42. In any event the application by the tenant for the leased premises to be assessed to establish the proper rent chargeable for the space occupied by him cannot hold any water in view of Section 4(3) of Cap. 301, Laws of Kenya which provides as follows:-
- “(3) A tenant who wishes to obtain a reassessment of the rent of a controlled tenancy or the alteration of any term as condition in or any right or service enjoyed by him under such a tenancy shall give notice in that behalf to the landlord in the prescribed form”.
43. Regulation 4(2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Tribunal (forms and procedure) Regulations, 1966 provides as follows:-
- “(2) A notice under Section 4(3) of the Act by a tenant shall be in Form A1 in the schedule to these Regulations”.
44. This Tribunal’s Jurisdiction cannot be invoked in absence of any notice under the foregoing provisions as doing so will only open up a flurry of similar applications and will be anarchical to good order in the administration of justice. In any event, the tenant having paid the agreed rent for the initial 5 years term cannot be heard to complain after its expiry that the area occupied by him is smaller than what had been contracted for. He owed himself a duty to undertake due diligence before entering into the lease contract and taking possession. The application is to that extent a non starter and a candidate for striking out.
45. As regards costs, the same are in the Tribunal’s discretion but always follow the event unless for good reasons otherwise ordered under Section 12(1) (k) of Cap. 301, Laws of Kenya. I have no reason to deny costs to the landlord.



46. In conclusion, the final orders which commend to me under Section 12(4) of [Cap. 301](#), Laws of Kenya are:-

- a. The application dated 26<sup>th</sup> August 2022 and the complaint of even date is hereby dismissed with costs.
- b. The interim orders given on 29<sup>th</sup> August 2022 are hereby discharged.
- c. The Landlord is at liberty to proceed with the distress for rent/mesne profits in arrears.
- d. Landlord's costs assessed at Kshs.20,000/- all inclusive against the tenant.

It is so ordered.

**RULING DATED, SIGNED & DELIVERED THIS 17TH DAY OF MARCH 2023.**

**HON. GAKUHI CHEGE - VICE CHAIR**

**BUSINESS PREMISES RENT TRIBUNAL**

Ruling delivered in the presence of:

Mbeche for Tenant

Miss Musau for the Landlord

Mbeche: I seek for temporary stay of execution and copy of proceedings.

Musau: Muted.

Order: Stay of execution of 30 days granted. Proceedings to be supplied upon payment of requisite court fees.

**HON. GAKUHI CHEGE - VICE CHAIR**

**BUSINESS PREMISES RENT TRIBUNAL**

