



**Anzeze v Lilian Wangui t/a Royal Haven International School (Tribunal
Case E1209 of 2023) [2024] KEBPRT 529 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 529 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E1209 OF 2023
A MUMA, MEMBER
APRIL 26, 2024**

BETWEEN

ESTHER ANZEZE APPLICANT

AND

**LILIAN WANGUI T/A ROYAL HAVEN INTERNATIONAL
SCHOOL RESPONDENT**

RULING

A. Parties And Representatives

1. The Applicant, Esther Anzeze, is the Landlord and registered owner (“the Landlord”) of the suit property being Plot No. 3734/270 located at Convent Drive in Lavington (“the suit property”) who rented out the suit property to the Tenant.
2. The firm of Cliff Oduk Advocates represents the Landlord.
3. The Respondent, Lilian Wangui T/A Royal Haven International School, is the Tenant herein who rented space on the suit property (“the Tenant”).
4. The firm of Muturi S.K & Co. Advocates represents the Tenant.

B. The Dispute Background

5. The Landlord issued a termination notice to the Tenant dated 25th August 2023 accusing Tenant for allegedly changing use of the suit premises to commercial use without authorization thus seeking payment of duly owed rent arrears. Consequently, the Tenant failed to file a response to the said notice.
6. Upon lapse of the termination notice, the Landlord filed a Reference dated 28th November 2023 and an application under a certificate of urgency dated 29th November 2023 seeking payment of rent for



letting out the suit premises to the Tenant at commercial rates failure to which the Tribunal be at liberty to grant eviction orders.

7. The Tribunal having considered the Landlord's Application, it ordered the application be served ahead of inter-partes hearing. In compliance, the Landlord through its advocates filed a return of service vide an affidavit of service dated 6th December 2023 acknowledging service of the Hearing Notice and the Application to the Tenant.
8. During the hearing on 13th December 2023 and in the absence of the Tenant, the Landlord notified the Tribunal that she filed a valuation report which placed the rent for letting out the suit premises at Kshs. 550,000/=. Following, the Tribunal allowed the application dated 12th November 2023 as prayed and further ordered Tenant to deposit rent in the sum of Kshs. 500,000/= to the Landlord's bank account effective 1st December 2023 failure to which the Tribunal be pleased to grant eviction orders against the Tenant.
9. Subsequently, the Tenant through her advocates filed an application dated 9th February 2024 under a certificate of urgency seeking to restrain the Landlord from executing the orders on increase of rent payable thus requesting to stop eviction and distraint levied.
10. Upon perusal of the application, the Tribunal certified Tenant's Application as urgent since there are children involved thus enforcing court orders for eviction would be detrimental if undertaken. Therefore, it was directed that the status quo be maintained pending further directions.
11. On 20th February 2024, the Tenant sought leave to amend her application dated 9th February 2024. As such, the Tribunal allowed the Tenant to file an amended application together with her submissions and thereafter Landlord to respond and file her submissions. Additionally, interim orders were extended.
12. During the hearing on 5th March 2024, parties confirmed that they filed their submissions. The matter was then set for ruling on 22nd April 2024.

C. Tenant's Claim

13. The Tenant avers that the Landlord had knowledge that the Tenant was going to run a kindergarten when the Tenant rented the premises. Further, the Tenant claims that she lodged change of user application upon approval from Landlord.
14. The Tenant prays for Landlord to be restrained from increasing monthly rent and illegally terminating the tenancy. Additionally, the Tenant requests to be allowed to file a reference objecting Landlord's termination notice.

D. Landlord's Claim

15. In response, the Landlord denies giving consent for the alleged change of use. She alleges that the letter giving authorization is a forged document. Further, she states that she has never submitted any documents to the County Government for change of user.
16. The Landlord allege that it is unfair and unjust for the Tenant to convert the use of the suit property and continue paying rent for residential use. The Landlord adduces the valuation report in support of the increase rent of Kshs. 550,000.00.



E. Issues For Determination

17. Upon considering the application and submissions filed by both parties, I find that the following are the issues for determination:
- Whether the Tribunal has authority to vary and/or set aside its *ex-parte* orders; and
 - Whether the Tribunal is already *functus officio*.

F. Analysis And Findings

- Whether the Tribunal has authority to vary and/or set aside its *ex-parte* orders.
18. The Tenant filed an amended application seeking orders to vary and/or set aside *ex-parte* orders issued on 13th December 2023 to be allowed to plead her case.
19. Section 12 of the [Landlord and Tenant Shops Hotels and Catering Establishments Act](#) Cap 301 Laws of Kenya (hereinafter “the Act”) provides for the powers conferred to the Tribunal by the Act as follows:
- to vary or rescind any order made by the Tribunal under the provisions of this Act;
20. By dint of the above section, this Tribunal is conferred with discretion to vary or rescind any orders previously issued in tandem with the Act.
21. In realizing its discretion, the Tribunal is guided by the principles as laid out in *Patel vs E.A Cargo Handling Services Ltd* [1974] EA 75 at 76 where Duffus P. held:
- “.... the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. “
22. To add emphasis, the court in *Shah vs Mbogo & another* (1967) EA 116 held that:
- “...the court’s discretion to set aside a judgement is intended to be exercised to avoid injustice or hardship, resulting from accident, inadvertence or excusable mistake or error but not to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”
23. In seeking to justify itself that the delay was reasonable, the Honourable Tribunal is of the view that indeed the Tenant moved with haste to enter appearance to protect the best interest of the children. The Tenant avers that she has never been served with a termination notice up until she was served with court documents. In view of the fact that the claim involves school going children, the Tribunal opines that it is not just that the Tenant would risk jeopardizing the safety of these tender aged children to avoid compliance.
24. Having accepted the explanation for the delay, this Honourable Tribunal has to deal with the issue of whether the Tenant raises any triable issues for consideration in their application to set aside orders.
25. The Court of Appeal in [CMC Holdings Limited vs Nzioki](#) [2004] 1 KLR 173 noted as follows:
- “The law is now settled that in an application for setting aside *ex parte* judgment, the Court must consider not only reasons why the defence was not filed...but also whether the defence, if filed already or if a draft defence is annexed to the application, raises triable issues.”



26. In paragraph 7 of the Tenant's amended application, the Tribunal is of the view that the Tenant raises a triable issue as to whether the eviction will be in the best interest of the children to access their right to education as well as their safety.
27. Paragraph 4 of the Tenant's Supporting Affidavit raises a triable issue as to whether the consent was sought to seek approval for change of user in relation to the suit property and whether the approval was lawful. Additionally, there is a triable issue whether the letter by the Landlord giving permission for the change of user is alleged to be a forgery as particulars of fraud are shown.
28. Further, there is discrepancy whether the Lease Agreement dated 15th February 2022 entered between the Tenant and the alleged Property Manager is binding upon the Landlord who claims rent arrears owed from the Tenant based on the said agreement.
29. The Tenant also raises a triable issue as to whether the Landlord followed the due procedure laid out under the Act on rental increment. Alternatively, under clause 1 of the said Agreement, rent was to be increased at the rate of 10% after 3 years. Therefore, it is not clear on what basis the Landlord claims rental increase from Kshs. 230,000/= to Kshs. 500,000/= noting that 3 years have not yet lapsed since commencement.
30. In light of the above, I do find that there are unresolved issues which require the Tribunal's full attention. It is therefore essential that the Tenant is granted leave to defend and plead her case.
 - ii. Whether the Tribunal is already functus officio.
31. In determining this issue, the Court in [*Dodhia Motors Limited v Mbatia Mule & another*](#) [2021] eKLR cited the Court of Appeal decision in [*Telkom Kenya Limited v John Ochanda*](#) [2014] eKLR which 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...The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the Court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available.”
32. Further, in [*Mombasa Bricks & Tiles Ltd & 5 others v Arvind Shah & 7 others*](#) [2018] eKLR, the Court observed that:

“...It is designed to discourage reopening a matter before the same court that has considered a dispute and rendered its verdict on the merits.”
33. In this case the Tribunal failed to hear one party and cannot be said to have conclusively heard parties and finally determined the matter.
34. Since the Tribunal has established that the Tenant raises triable issues for determination, it is in the best interest if the Tenant is allowed to defend its case thus determining the case on merits in line with the Constitutional Right to a Fair hearing under Article 50.

G. Orders

35. In the upshot, the Tenant's Application dated 9th February 2024 is hereby allowed in the following terms:



- i. That the orders issued by this Honourable Tribunal on 13th December 2023 are hereby set aside;
- ii. Tenant to file its Reference and any other relevant document in support of their claim within 14 days;
- iii. Thereafter, Landlord to file her response within 14 days; and
- iv. Hearing on 31st May 2024.
- v. Tenant to pay rent for February, March, April and May before the hearing date failure to which the landlord will be at liberty to proceed to not only levy distress but to take back vacant possession of the suit premises with the assistance of OCS Muthagari Police.

HON. A MUMA

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

Ruling dated, delivered and signed at Nairobi on this 26th day of April 2024 in presence of Wanjiku h/b for Oduk for the Landlord. There was no appearance for the Tenant.

HON. A MUMA

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

