



**Njoroge v Pwani Shopping Centre Limited (Tribunal Case
E027 of 2022) [2024] KEBPRT 792 (KLR) (Civ) (21 May 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 792 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
CIVIL
TRIBUNAL CASE E027 OF 2022
N WAHOME, CHAIR & JOYCE MURIGI, MEMBER
MAY 21, 2024**

BETWEEN

NELLIE NJOROGE APPLICANT

AND

PWANI SHOPPING CENTRE LIMITED RESPONDENT

RULING

1. By a Reference dated 4.2.2022, the Tenant/Applicant complained that the Landlord had committed the following transgressions; -
 - a. Has threatened to levy distress unlawfully over disputed rent arrears.
 - b. Has failed to furnish accounts of rent paid; and
 - c. Failed to keep a rent book.
2. The Reference was said to be founded on Section 12(4) of the Landlord and Tenant (Shops, Hotels and Catering Establishments Act) Cap 301 which we shall hereinafter refer to as the Act. The Reference was accompanying by the motion dated 1.2.2022. The same sought that;-

“The landlord, its servants or agents be prohibited and restrained from unlawfully evicting the Tenant, distressing for rent and that the Landlord be ordered to give accounts of rents paid and due.”
3. It was the evidence of the Tenant that;
 - i. The Landlord’s agents M/S Sure Auctioneers had given her fourteen (14) days’ notice to attach the already proclaimed goods.



- ii. On some occasions, the landlord had refused to accept rent.
 - iii. The Landlord had a campaign of harassment against her to ensure that she vacates the premises.
 - iv. The proclamation was effected when she was diligently paying her rents to the agents of the Landlord M/S Mugema Auctioneers and Al Jazeera Properties Ltd. – Annexure “NJ2.”
 - v. The purported rent arrears were exaggerated and only made to ensure that she was evicted.
 - vi. She had offered to clear the rent in arrears as she paid the current rent as it fell due.
4. The Tenant further filed the submissions dated 23.5.2022 and emphasized that she had satisfied all the principles in the grant of the orders sought. She therefore asked that her Application be allowed.
5. On its part, the Respondent/Landlord filed the Replying affidavit sworn on the 1.4.2022 by Brek Islam Omar who was said to be a director thereof. The Respondent also filed the submissions dated 13.6.2022. The case for the landlord is that;-
- i. The Tenant was in rent arrears of Kshs. 210,750/= and had refused to execute a formal lease agreement.
 - ii. It did not require the permission of the court to levy distress. Only needed to confirm presence of rents in arrears.
 - iii. The Tenant was a serial rent defaulter and paid rent in parts and pieces.
 - iv. The Tenant had come to court with dirty hands and did not deserve the equitable reliefs sought.
 - v. Tenant was only paying rent after being induced through proclamations by auctioneers to her properties.
 - vi. The Tenant had not satisfied the pre-requisites for the grant of orders of injunction as sought by her.
6. Having considered the parties pleadings including the submissions thereof, we are of the view that the issues for determination in this matter are the following;-
- A: Whether the Tenant is deserving of the restraining/injunctive orders sought.
 - B: Whether the landlord was entitled to levy distress.
 - C: Who should bear the costs of the suit.

Issue No. A: Whether the Tenant is deserving of the restraining/injunctive orders sought.

- 7. The Tenant claims that if there is at all any rents in arrears, the same cannot be ascertained. It was her evidence that the Landlord does not maintain a rent book pursuant to Section 3(3) of the Act and has also failed to render a legitimate rent account.
- 8. The Tenant submitted exhibit No.” NJ2” to confirm that she had paid Kshs. 175,000/= to the Landlord’s agents’ M/S Mugema Agents and Aljazeera Properties Ltd. These payments had not been reflected in the Landlord rental account in its statement of account marked “B10-1”.
- 9. We have indeed confirmed that the said amount of Kshs. 175,000/= is not reflected in the Landlord’s account aforesaid. If the same was taken into account, it would then show that the rents in arrears would only be Kshs. 210,750/= less Kshs. 175,000/= leaving a balance of Kshs. 35,000/=.



10. I would therefore opine that it would have only been prudent if the parties took account of the rents in arrears before any further action was taken in recovery of the same. This was important in view of the reality that there seems not to be a rent book maintained to govern the tenancy.
11. In view of the above, I find that the Tenant had bonafide grounds to move to court and seek for its intervention. The intervention sought is to restrain the landlord from effecting levy of distress, interfering with her business or evicting her from the demised premises. Without any certainty in the rent purportedly in arrears, in the absence of a notice of termination and with the interference with her quiet possession of the demised premises, in my view, the Tenant has satisfied all the pre-requisites in the grant of the orders sought as laid down in the locus classicus case of; *Giella v Cassman Brown* [1973] EA.
12. We would therefore grant the Applicant's Application in terms that she will be allowed quiet possession of the demised premises unless the same is disturbed in strict compliance with the Act.

Issue No. B: Whether the Landlord was entitled to levy distress

13. Section 3(1) of the *Distress for Rent Act* provides that;-

“Subject to the provisions of this Act and any other written law, any person having any rent or any rent service in arrears and upon a grant, lease, demised or contract shall have the same remedy to distress for the recovery of that rent or rent service as if given by the common law of England in a similar case.”
14. It is also a settled principle of law in our jurisprudence that the only requirement to levy distress is that there is the presence of rent in arrears. There is no requirement in law for permission or license from the courts for the same to be effected.
15. In the case of *Joseph Nthumbi Kamwithi vs Asha Akumu Juma HCCA No. 7A of 2016 at Embu*, the court held that;-

“The right to distress serves the purpose of a remedy for the landlord to recover rent that may be in arrears. For this right to be enforced, there must be rent in arrears.”
16. On whether the landlord required permission to levy such distress, the court further held that;-

“I have perused the Act but I find no provision to the effect that such permission be sought. I find that 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.”
17. Though from our own account of the materials placed before us show rents in arrears at Kshs. 35,750/=, the Tenant has denied the same and sought and demanded that an account be taken on the same. On its part, the landlord claims Kshs. 210,000/= in arrears.
18. The best we can do in the circumstances is to direct both parties to hold a forum and agree on the rent in arrears within thirty (30) days of the date of this Ruling. Once the account is taken and a consent registered on the same, the Reference herein and dated 4.2.2022 would also stand resolved in the same terms of the Application.
19. We therefore determine that though the Landlord has inherent rights to levy distress for recovery of rent in arrears, the rents in arrears herein if at all, are not determinable from the materials placed before



the court. I would therefore restrain the landlord from levying distress on the Tenant's property until such time that same is ascertained by the consent of the parties or through the hearing of the Reference itself.

Issue No. C: Who should bear the costs of the Application

20. In the interim, we would direct that the costs of the Application will abide the outcome of the deliberations between the parties or the eventual outcome of the Reference if same goes to full hearing.
21. In the final analysis, the orders that commend to us are the following:-
- (a) The Application is allowed in terms that the Applicant shall be allowed quiet enjoyment of the demised premises.
 - (b) That the parties shall take an account of all the rents in arrears if at all and file a report in court within thirty (30) days of this Ruling.
 - (c) That the Respondent is restrained from levying distress until order No. (b) hereinabove is implemented.
 - (d) That the costs of this Application shall abide the outcome of order No. (b) hereinabove or the outcome of the Reference if it goes to full hearing.

Those are the orders of the court.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF MAY, 2024.

HON. NDEGWA WAHOME, MBS

PANEL CHAIRPERSON

BUSINESS PREMISES RENT TRIBUNAL

AND

HON. JOYCE MURIGI

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

Delivered in the presence of the Tenant/Applicant in person and in the absence of the Respondent and Counsel

Court:Mention on 27.06.2024. The Tenant to serve the Landlord. Further directions on that date.

