



**Gatero v Njoroge & another (Tribunal Case E252 of 2023)  
[2024] KEBPRT 528 (KLR) (18 March 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 528 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E252 OF 2023  
GAKUHI CHEGE, CHAIR & J OSODO, MEMBER  
MARCH 18, 2024**

**BETWEEN**

**ANNA MUMBI GATERO ..... TENANT**

**AND**

**LUCY NJOROGE ..... 1<sup>ST</sup> RESPONDENT**

**REGENT MANAGEMENT LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The tenant moved this Tribunal by way of a reference/complaint dated 11<sup>th</sup> October 2023 under Section 12(4) of the [Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#), Cap. 301, Laws of Kenya claiming that the landlord was acting unlawfully by claiming rent which was not owed and disputed.
2. The tenant also filed a motion of even date seeking for restraining orders against the Respondents by themselves, their agents, servants, workmen and/or any other person whatsoever and whosoever from distressing for rent, advertising, removing, selling and/or in any other way interfering with her goods which were subject of a proclamation dated 29<sup>th</sup> September, 2023 issued by the Respondents' appointed Auctioneers M/S Kameta Enterprises Auctioneers.
3. The tenant is also seeking for a declaration that the intended distress on her business premises is illegal, null and void ab-initio. She also prays for costs of the application.
4. The application is supported by the tenant's affidavit sworn on even date and the following grounds;
  - a. That the applicant/tenant and the 1<sup>st</sup> respondent enjoy a tenant-landlord relationship with effect 1<sup>st</sup> April 2022.
  - b. That on or about 2<sup>nd</sup> October, 2023, through their appointed Auctioneers, M/S Kameta Enterprises Limited caused service of a proclamation of distress of movable properties



threatening to sell by public auction the applicant's goods in the applicant's business premises known as L.R No. MSA/ML South/BLK 1/498shop No.7 Likoni Block which sale was scheduled to take place on 17<sup>th</sup> October, 2023.

- c. That the said proclamation sought to recover rent for the period from 2012 to date and yet the tenancy agreement was from 1<sup>st</sup> April, 2022 to 31<sup>st</sup> March, 2028.
  - d. That the applicant/ tenant had been paying rent promptly until July, 2023 when a misunderstanding arose between the applicant and the landlord when the landlord refused to receive monthly rent from the applicant alleging that the applicant had to clear rent owing from her for the period between 2012 to March 2022 which allegations appeared strange to the applicant /tenant herein.
  - e. That the applicant depends on the business that she operates on the suit property to earn her livelihood and stood to suffer irreparable loss and damage if the proclaimed items which are tools of trade were sold as threatened.
  - f. That unless the honorable court intervenes, the applicant is bound to be condemned unheard on account of illegal distress for rent.
5. The tenancy agreement is attached to the affidavit of the tenant as annexure "AMG1" and the proclamation notice as "AMG2"
  6. According to the tenant, the said proclamation notice and distress is illegal as the same purports to claim for rent arrears with effect from 2012 to the date thereof yet the tenancy took effect on 1<sup>st</sup> April, 2022.
  7. The application is opposed through the replying of Gabriel Okumu, the Branch Manager of the 2<sup>nd</sup> respondent who is the agent of the 1<sup>st</sup> respondent sworn on 15<sup>th</sup> January 2024. He admits that the 2<sup>nd</sup> respondent levied distress for rent and appointed an Auctioneer on the basis of non-payment of rental obligation as required under the tenancy agreement annexed as "AMG-1" to the tenant's application.
  8. The 2<sup>nd</sup> respondent admits and apologizes that there was an error in computation of the arrears which were calculated from 2012 as per the statement of account annexed by the applicant as "AMG-3".
  9. The affiant deposes that the tenant was in arrears of KES 75,000/= as at 28<sup>th</sup> September, 2023 and has continued to be in further arrears of KES 15,000/= every month as she continued to occupy the rented premises until the rent is fully settled.
  10. That despite the error on the computation of the arrears from 2012, the applicant has come to this Tribunal with unclean hands by claiming that she had been paying rent promptly until the month of April, 2023 whereas the statement of account portrayed a different picture.
  11. That the allegation that the respondents allegedly refused to receive her rent stating that she ought to settle arrears from 2012 to March 2022 before her monthly rent could be received is false since rent is always paid via the Pay bill and account number contained in the tenancy agreement that was annexed by the applicant as "AMG-1" and some of the rental payments are captured in the Mpesa statement annexed as "AMG-3".
  12. The respondents pray that in unlikely event that the court is inclined to grant any orders, the same ought to be conditional that the applicant settles the outstanding rent in full, failure to which, the respondents be at liberty to proceed with the distress as the distress for rent is lawful since the applicant was in arrears of KES 75,000/= as at 28<sup>th</sup> September, 2023 and continues to fall into further arrears as she enjoys interim reliefs from this Tribunal.



13. It is contended by the respondents that the applicant has not met the threshold to be granted the reliefs being sought in her application.
14. The applicant filed a further affidavit pursuant to leave granted by this Tribunal on 6<sup>th</sup> November 2023. The respondents' advocates filed written submissions but the tenant did not file any. The applicant reiterates the contents of her supporting affidavit and contends that the distress carried out by the respondents ought to be declared a nullity on the basis that the rent sought to be recovered is erroneous, a fact which has been admitted in the replying affidavit.
15. We are required to determine the following issues;
  - a. Whether the tenant is entitled to the reliefs sought in the reference and application dated 11<sup>th</sup> October 2023.
  - b. Who is liable to pay costs? dated 11<sup>th</sup>
16. There is no dispute that the tenant and the 1<sup>st</sup> respondent entered into a tenancy agreement dated 1<sup>st</sup> April 2022 in respect of Shop No. 7 situate on I.R No. MSA/ML South/BLK 1/498 with effect from 1<sup>st</sup> April 2022 to 31<sup>st</sup> March 2028 at a monthly rent of KES 15,000/= for the first three years.
17. On 2<sup>nd</sup> October 2023, the tenant was served with a proclamation of attachment by Kameta Enterprise Auctioneers seeking to recover a sum of KES 360,000/= in rent arrears and KES 38,280/= as Auctioneer's charges. The sale of the attached properties was scheduled to take place on 17<sup>th</sup> October 2023. According to the rent account statement attached to the instruction letter to the Auctioneer, the rent arrears were calculated from December 2012 to August 2023.
18. The 2<sup>nd</sup> respondent's Branch Manager, one Gabriel Okumu, admits in his replying affidavit sworn on 15<sup>th</sup> January 2024 that the said calculation of rent arrears was erroneous as the tenancy between the tenant and the 1<sup>st</sup> respondent commenced on 1<sup>st</sup> April 2022 as per the tenancy agreement marked "AMG1" annexed to the tenant's application.
19. In view of the said admission, it is clear that the tenant has established a prima facie case with a probability of success as the intended distress is founded on wrong premises and cannot be allowed to proceed. It is this Tribunal's finding that had the tenant not instituted the instant proceedings, she would have suffered the fate of an illegal distress in the hands of the respondents. It is our view that such illegal distress would have occasioned the tenant irreparable loss and damage in line with the decision in the case of *Thomas Smith Aikman, Allan Malloy & Others Vs Muchoki & Others* (1982) eKLR wherein the court of appeal held as follows;

"The conditions spelled out above for the grant of an interlocutory injunction were rightly understood but wrongly applied as follows: first, the appellants being lawfully in possession of the estates under the authority of the debentures executed by Mbo and Loresho, and the defendants having unlawfully seized and continuing in possession of the estates, the appellants had shown a clear and overwhelming prima facie probability of success; the court ought never to condone and allow to continue a flouting of the law. Those who flout the law by infringing the rightful title of others, and brazenly admit it, ought to be restrained by injunction. If I am adding a new dimension for the grant of an interlocutory injunction, be it so. Equity will not assist law-breakers. This disposes of the second ground for affirming the decision. It was, therefore a limited approach by the learned judge to say that the injury which the plaintiffs may have suffered as result of the defendants' trespass or acts were capable of compensation by an award of damages. I will not subscribe to the theory that



a wrongdoer can keep what he has taken because he can pay for it. The real injury arose from the unlawful seizure of the estates by the defendants in defiance of the law.’ (emphasis added).

20. We have seen the submissions filed by the advocates for the respondents and considered the contents of the replying affidavit filed on their behalf and are not convinced that the respondents were entitled to levy distress on a wrong statement of rent account. We are therefore convinced that the tenant is entitled to the orders of injunction sought in the application.
21. Section 12(4) of Cap. 301, Laws of Kenya provides as follows;  
  
“(4) In addition to any other powers specifically conferred on it by or under this Act, a Tribunal may investigate any complaint relating to a controlled tenancy made to it by the landlord or the tenant, and may make such order thereon as it deems fit.”
22. In view of the foregoing provision, it is important to tackle the instant dispute once and for all by requiring the parties to file and exchange updated rent account statements for the period beginning 1<sup>st</sup> April 2022 to the date of filing showing the debits, credits and balances for each month together with filtered evidence of rent payments in respect of the suit premises before arriving at the final determination of the Complaint.
23. As regards costs of the application, the same are granted to the tenant in any event in line with Section 12(1)(k) of Cap. 301, Laws of Kenya being the successful party.
24. In conclusion, the following orders commend to us in this matter;
  - a. The tenant’s application dated 11<sup>th</sup> October 2023 is allowed in terms of Prayers 3 & 4 thereof.
  - b. Both parties shall file and exchange their rent account statements for the period beginning 1<sup>st</sup> April 2022 to the date of filing showing the debits, credits and balances for each month together with filtered evidence of rent payments in respect of the suit premises with the respondents complying within 15 days hereof and the tenant complying within 15 days thereafter.
  - c. The costs of the application shall be met by the respondents in any event.
  - d. This matter shall be fixed for mention to confirm compliance and for further directions.

It is so ordered.

**DATED, SIGNED & VIRTUALLY DELIVERED THIS 18<sup>TH</sup> DAY OF MARCH 2024.**

**HON. GAKUHI CHEGE - PANEL CHAIRPERSON**

**HON. JOYCE A. OSODO - PANEL MEMBER**

In the presence of:-

Adede for the respondents

Tenant in person.

