



**Ayawah t/a Paradiso Maseno Club v Kenya Railways Staff Retirement Scheme  
(Tribunal Case E759 of 2023) [2024] KEBPRT 690 (KLR) (24 April 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 690 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E759 OF 2023  
N WAHOME, MEMBER  
APRIL 24, 2024**

**BETWEEN  
ZABLON HIGHWAY AYAWAH T/A PARADISO MASENO CLUB ..... TENANT  
AND  
KENYA RAILWAYS STAFF RETIREMENT SCHEME ..... LANDLORD**

**RULING**

1. These proceedings were originated by the Tenant's Reference dated 10.8.2023. His grievances were that the Landlord had;-
  - i. Closed down the business premises of the Tenant in purported rent arrears of unknown amount, without a demand notice or document whatsoever.
  - ii. That the Tenant has paid and has always been paying rent as an obligation and is up to date without any rent arrears for the last thirteen (13) years.
  - iii. That the Landlord is bent on crippling the Tenant's business and has caused the Tenant untold suffering without any justification or at all.
2. The Reference is said to be founded under Section 12(4) of the Landlord and Tenant (Shops, Hotels and Catering Establishment Act) Cap 301 hereinafter "The Act." Accompanying the Reference is the notice of motion Application of even date and founded on a certificate of urgency.
3. The motion principally sought for orders that the Respondent be ordered to re-open the Tenant's business known as Paradiso Maseno Club situated on Unit No. 493 on Jogoo Road within Makongeni Estate in Nairobi. Orders were also sought to restrain the Respondent from interfering with the Tenant's quiet possession of the demised premises or entering therein, seizing, carting away goods or evicting the Tenant from the demised premises.
4. The Tenant's contention is that;



- i. The Respondent had no authority to close down his business either by an order of this court or under the Act.
  - ii. He did not owe any rent in arrears to warrant the interference by the Respondent.
  - iii. If there was any rent in arrears, the Landlord would have followed the law and levy distress, instead of locking up the premises.
5. The Respondent filed the notice of Preliminary objection dated 31.08.2023 which is inexplicably purported to have been amended on the 8.8.2023. The same contended that the present matter was res-judicata having been earlier decided in BPRT Case 651B of 2018 between the parties herein by Hon. Mbichi Mboroki on the 23.7.2023.
6. The Respondent further filed the Replying affidavit sworn by Audrey Chepkoech on 6.11.2023. It was the Landlord's assertion that:-
- i. The Tenant was in rent arrears of Kshs. 220,000/= as at September, 2023 pursuant to paragraph 9 of the Replying affidavit.
  - ii. The Tenant has rented a residential premises as per a lease agreement that he refused to sign but that he runs a bar and restaurant without the consent of the Respondent.
  - iii. The Tenant had erected temporary structures around the demised premises and which had been ordered removed by the National Building Inspectorate by their letter dated 19.7.2018 (annexure LL2).
  - iv. Denied ever having entered the demised premises or having closed down the same.
  - v. The suit/Reference and the Application herein were Res-judicata in view of the orders of the Tribunal in BPRT Case No. 651B of 2018 made on the 23.7.2019 (Annexure LL5).
7. The Respondent therefore sought for the dismissal of the Application and the Reference both dated 10.8.2023. Directions was taken in this matter on 5.9.2023 and by concurrence of the parties, the preliminary objection and the Application were to be canvassed by way of written submissions. The parties were only able to comply with the same by the 21.3.2024.
8. The Tenant's submissions are dated 22.1.2024 whereas those of the Respondent are dated the 08.02.2024. Having considered all the materials on record, I am persuaded that the issues for determination in this matter are the following:-
- A: Whether this matter is Res-judicata.
  - B: Whether the Tenant's Application has merit
  - C: Who should bear the costs of this suit.

**Issue No. A: Whether this matter is Res-judicata**

9. The determination on this matter will also by implication or inference dispose off the notice of preliminary objection dated 31.8.2023 and which by obvious error indicated that it was amended on the 8.8.2031. I believe that the date of amendment should read 8.11.2024. The error in the dates does not visit any prejudice to the Applicant and will proceed to consider the same on its merits.



10. 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 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.”

11. In BPRT Case No. 615B of 2018 as per the Respondent’s own annexure LL5 was dismissed on the 15.07.2019 and the order thereof issued on the 23.7.2019 on the grounds that;-

“The Tenant’s Reference dated 13.8.2019 is hereby dismissed with costs for want of prosecution.”

12. For the principle of Res-judicata to be available to a party, the matter in issue must be heard and finally decided by such court. The matters in BPRT 615B of 2018 were not heard and they were not decided.

13. The only issue decided on that matter was on whether the demised premises were residential or business. The Tribunal on the guidance of the report of an Inspector of the Court returned a verdict that the same was a Business Premises. That particular issue is not available for discourse in this matter.

14. It is also evident that the Applicant could never have imagined that the Landlord would lock up the premises in August, 2023 as alleged by him or that he would have fallen into arrears as asserted by the Respondent.

In taking this position, I find support in the case of; Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR where the court of Appeal held that;-

“Thus for the bar of Res-judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in distinctive but conjunctive terms;-

- a. The suit or issue was directly and subsequently in issue in the former suit.
- b. The former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties are litigating under the same title.
- d. The same was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

15. The upshot of this is that, the notice of preliminary objection herein does not meet the threshold of law on the question of the Application of the principle of Res-judicata and the same is dismissed.

#### **Issue No. B: Whether the Tenant’s Application has merit**

16. The Applicant sought the intervention of the court to have his business premises known as Paradiso Maseno Club housed with inhouse unit No. 493 ordered re-opened and the Respondent be restrained from interfering with the Applicant’s quiet occupation of the same.

17. The Applicant asserted that agents of the Respondent descended on the demised premises and harassed workers as they also threw his tools of trade out of the demised premises. This was alleged



- to have been on the morning of 9.8.2023. The assumed agents of the Respondents claimed that the Applicant was in rent arrears.
18. The Tenant further claimed that food products were locked up in the premises and would easily get spoilt. The reason he moved the court the following day which was on the 10.8.2023. I doubt that the Applicant moved the court to engage in an academic exercise. I on a balance of probabilities and putting into consideration, the provisions of Section 107 of the Evidence Act tend to belief him as against the Respondent.
  19. Indeed, the Respondents denial in paragraphs 17 and 18 of the Replying affidavit that its agents never invaded the demised premises, locked up and threw the Tenant's tools of trade out seems and feels very faint and which cannot be easily believed.
  20. As alluded to by the Applicant, there are better lawful and decent ways of claiming rent arrears. One of them being the levy of distress for rent in arrears. The Respondent did not follow this path. I therefore find that the Applicant has established a prima facie case with chances of success. Also that the damages to be incurred by him would be irreparable for reasons that his legal rights were breached. Lastly, the balance of convenience is that it would be justicious to grant the orders than to deny the same to the Applicant.
  21. The Applicant has satisfied all the pre-requisites in the grant of the orders sought as laid down in the case of; *Giella vs Cassman Brown* [1973] EA 358. I would therefore uphold the Applicant's Application in terms that he will be allowed quiet possession of the demised premises unless otherwise disturbed by operation of the law.
  22. Looking at the Reference and taking due regard to my determination on the Application, I find that nothing will be left to be canvassed on and I would therefore determine the same in similar terms with the Application.
  23. The Respondent has claimed that the Applicant owed it Kshs. 220,000/= in rent arrears as at September, 2023. Though the Applicant has denied the same, his own account does not show up to date payment of rent. His payments are also scattered and not easy to follow. However, the Respondent provided what it referred to as "Rent Reconciliation statement marked annexure LL3."
  24. The same provides a detailed account of rent since the time the Applicant took up the business premises in August, 2010 to September, 2023. The Applicant has not in any way been able to rebut this evidence by the Respondent that he owed Kshs. 220,000/= in rent arrears as at September, 2023.
  25. I therefore find that the Respondent was entitled to recover this amount of arrears but not in the manner and methodology that it employed. I would therefore determine that indeed the Applicant owed the Respondent Kshs. 220,000/= in rent arrears as at September, 2023.
- Issue No. C: Who should bear the costs of this suit and Application thereof
26. The Applicant sought equitable reliefs though he was not equitable in meeting his cardinal obligations of paying rent timely and as it fell due. On the other hand, the Respondent employed unorthodox means to recover the rent in arrears. The justice of this case would therefore be that each party do bear own costs of this suit.
  27. In conclusion, I make the following orders;-
    - a. That the notice of preliminary objection is dismissed.
    - b. That the Reference and Application herein are allowed in terms that the Tenant shall be allowed quiet possession of the demised premises otherwise known as Paradiso Maseno Club



as found on Unit No. 493 Block Jogoo Road, Makongeni Estate- Nairobi unless disturbed in strict compliance with the law.

- c. The Tenant shall pay Kshs. 220,000/= being all the rents in arrears for up to the month of September, 2023 and any other arrears accrued thereafter within thirty (30) days of the date hereof and in default the Respondent will be at liberty to effect distress in recovery of the same.
- d. That each party to bear own costs of this matter.

Those are the orders of the court.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24<sup>TH</sup> DAY OF APRIL, 2024.**

**HON. NDEGWA WAHOME, MBS**

**MEMBER**

**BUSINESS PREMISES RENT TRIBUNAL**

Ruling delivered in the presence of M/S Chite holding brief for Mr. Amandi for the Tenant/Applicant  
M/S Obege for the Respondent/Landlord

