



**Omutuku v Habwe & another (Tribunal Case E121 of 2023)
[2024] KEBPRT 1186 (KLR) (14 August 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 1186 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E121 OF 2023
J OSODO, CHAIR & GAKUHI CHEGE, MEMBER
AUGUST 14, 2024**

BETWEEN

MOSES OMUTELEMA OMUTUKU APPLICANT

AND

CHRISTOPHER OCHUKA HABWE 1ST RESPONDENT

YAMUKO AUCTIONEERS 2ND RESPONDENT

RULING

1. This matter was commenced vide a Reference under Section 12(4) of the [Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#) Cap 301 dated 7th August 2023 with a Complaint that the tenant has not filed any reference to oppose the termination notice served on him dated 3rd May 2023 which has expired.
2. The matter came up for hearing before the tribunal on 12th September 2023 when the tribunal issued the following orders in the presence of the landlord and in absence of the tenant; -
 - i. That the notice of termination of tenancy is approved.
 - ii. That the tenant vacates the suit premises on or before 30th September 2023 and in default be evicted with the assistance of the O.C.S Luanda Police Station.
 - iii. That the tenant clears the rent arrears of KES. 60,000 and in default, the landlord shall be at liberty to distress for rent without paying additional court fees.
 - iv. That the tenant shall pay costs of KES. 5,000 to the landlord.
3. The tenant then filed a notice of motion under a certificate of urgency dated 2nd September 2023 in which he sought for the following orders; -
 - i. That the application be certified urgent.



- ii. That J.E Namenge and Co. Advocates be deemed appointed advocates for the applicant/respondent.
 - iii. That there be a stay of execution of the orders issued on 12th September 2023 pending hearing and determination of the application.
 - iv. That the tribunal reviews/set aside its orders made on 12th September 2023 and consequential orders.
 - v. That the costs of the application be provided for.
4. The application is supported by an affidavit of even date in which the tenant deposes as follows; -
- i. That he is a business man running a business on the leased premises of FAHIDA KWA JAMII CBO.
 - ii. That he has never been served with the respondent's reference
 - iii. That the tenant came to learn of the matter when he was served with the proclamation notice from Yamuko Auctioneers dated 8th September 2023. A copy of the proclamation notice is annexed as "MOO-1".
 - iv. That upon enquiring the orders the proclamation notice emanated from, the auctioneers provided him with an order dated 12th September 2023.
 - v. That the applicant is not a tenant of the landlord/respondent herein as the tenant has a lease agreement with FAHIDA KWA JAMII CBO which has been running since 15th August 2015. The lease agreement is annexed as "MOO-3".
 - vi. That the tenant has been paying rent to the said landlord as evidenced by the copies of receipts attached.
 - vii. That the landlord/respondent herein has not furnished the court with any lease agreement to show that the applicant is his tenant.
5. At the court hearing on 9th October 2023, the court granted prayers 2 and 3 thus staying the execution of the orders issued on 12th September 2023 pending the hearing and determination of the application dated 2nd September 2023. The tenant was also ordered to serve the said application afresh since the landlord stated that he has not been served with the said application.
6. The tenant filed another application dated 19th December 2023 pursuant to Section 3, 3A and 80 of the Civil Procedure Act for orders that the application be certified urgent. Secondly, that the tribunal restrains the 2nd respondent from selling by auction the goods seized from the suit premises on 18th December 2023 and that the court issues orders that the 2nd respondent returns the seized goods to the suit premises at the Auctioneer's costs.
7. The application dated 19th December 2023 was based on grounds that the landlord issued instructions to the 2nd respondent to levy distress against the tenant despite there being an order for stay of execution dated 17th October 2023 and that both respondents had been served with the stay orders.



8. The tribunal issued a ruling dated 28th March 2024 on the application dated 19th December 2023 in which the following orders were issued; -
- “(a) The application dated 19th December 2023 is allowed in terms of prayer 2 thereof pending hearing and determination of the application dated 2nd September 2023.
 - (b) Prayer 3 of the application dated 19th December 2023 is denied and shall await the hearing and determination of the application dated 2nd September 2023.
 - (c) Costs of the application shall abide the outcome of the application dated 2nd September 2023.
 - (d) The respondents will file and serve their response to the application dated 2nd September 2023 within the next 7 days failing which the same shall be deemed as unopposed and the prayers sought automatically granted.
 - (e) The tenant shall have 7 days upon service of a response to file and serve a further affidavit and submissions (if need be) together with submissions in support of the said application while the respondents shall have 7 days thereafter to file and serve their submissions in response thereto.
 - (f) Mention of the case shall be fixed after 21 days to confirm compliance and fix a ruling date.”
9. Both parties filed their written submissions with the landlord filing his dated 11th April 2024 and the tenant filing his dated 21st May 2024.
10. We note that there is no response from the landlord on the application dated 2nd September 2023 despite the order issued in the ruling dated 28th March 2024 which stated as follows; -
- “(d) The respondents will file and serve their response to the application dated 2nd September 2023 within the next 7 days failing which the same shall be deemed as unopposed and the prayers sought automatically granted.”
11. Based on the finding above, this tribunal has no option but to allow the application dated 2nd September 2023 because the same is unopposed yet the landlord was served with the application as evidenced by the affidavit of service dated 6th October 2023.
12. Consequently, the tribunal shall order that this matter proceeds to viva voce hearing to establish the claims raised by the applicant/tenant that he is not a tenant to the respondent/landlord herein.
13. In conclusion, the following orders commend to us; -
- a. The application dated 2nd September 2023 is hereby allowed as prayed.
 - b. The reference dated 7th August 2023 shall proceed to viva voce hearing and determination on merit.
 - c. Parties shall comply with Order 11 of the Civil Procedure Rules within 21 days hereof.
 - d. Costs of the application shall abide the outcome of the reference.
- It is so ordered.



RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 14th DAY of AUGUST 2024.

HON. JOYCE AKINYI OSODO

(PANEL CHAIRPERSON)

BUSINESS PREMISES RENT TRIBUNAL

HON GAKUHI CHEGE

(MEMBER)

In the presence of:

Landlord present in person.

Ms. Namenge for Tenant.

