



**Maswii v Hamisi (Tribunal Case E154 of 2023)**  
**[2024] KEBPRT 414 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 414 (KLR)

**REPUBLIC OF KENYA**  
**IN THE BUSINESS PREMISES RENT TRIBUNAL**  
**TRIBUNAL CASE E154 OF 2023**  
**J OSODO, CHAIR & GAKUHI CHEGE, MEMBER**  
**APRIL 26, 2024**

**BETWEEN**

**DAVID MWENGE MASWII ..... LANDLORD**

**AND**

**ABDUL HAMISI ..... TENANT**

**RULING**

**A. Dispute Background**

1. The tenant/applicant moved this tribunal vide a Notice of Motion under a Certificate of Urgency dated 28th September, 2023 in which he sought for the following orders; -
  - i. That the matter be certified urgent.
  - ii. That the orders issued on 2<sup>nd</sup> August, 2023 be set aside.
  - iii. That the status quo prevailing prior to the issuance of the order on the 2<sup>nd</sup> August, 2023 be restored and the reference and application be set down for inter-partes hearing.
  - iv. That the costs of the application be in the cause.
2. The application is supported by an affidavit of even date in which the tenant deposes as follows; -
  - i. That the landlord moved the tribunal vide an application dated 16<sup>th</sup> June, 2023 under a certificate of urgency.
  - ii. That the application was never served upon the tenant.
  - iii. That the applicant/landlord proceeded to obtain ex-parte orders as against the tenant on 2<sup>nd</sup> August, 2023.



- iv. That the landlord without serving and acting outside the issued orders, proceeded and break into the premises, forcefully evicted the tenant and seized his items amounting to KES. 2,000,000.
  - v. That the order was irregularly issued and thus it is in the best interest of justice that the same be set aside.
3. The application is opposed vide a replying affidavit dated 20<sup>th</sup> December, 2023 in which the landlord deposes as follows; -
- i. That vide a reference dated 16<sup>th</sup> June, 2023, the landlord sought for orders of distress for rent amongst others with the supervision of the O.C.S Voi Police Station.
  - ii. That the tribunal upon being satisfied of the service made orders on 2<sup>nd</sup> August, 2023, allowing the landlord's reference and directed that the landlord levies distress in order to recover the outstanding rent arrears of KES. 223,000. A copy of the orders issued on 2<sup>nd</sup> August, 2023 is annexed as "DMM-1".
  - iii. The orders were issued to the O.C.S Voi Police station who sought to verify authenticity before taking action vide his letter dated 3<sup>rd</sup> August, 2023 addressed to the tribunal which confirmed the orders as authentic. Copies of the letters are annexed as "DMM-2" and "DMM-3".
  - iv. That consequently on 24<sup>th</sup> August, 2023, under the supervision of the O.C.S Voi Police Station, the landlord proceeded to levy distress. A copy of the inventory is annexed as "DMM-4".
  - v. That the process leading up to the levying of distress was legal.
  - vi. That at no point was the tenant forcefully evicted because orders issued by the tribunal directed the tenant to grant vacant possession and as such the repossession of the premises was lawful.
  - vii. That there is no demonstration by the tenant that the orders issued by the tribunal were irregular, there is no affidavit challenging the personal service effected and the tenant does not offer a draft defense on the main reference for consideration together with the application.
4. The tenant filed a Supplementary affidavit dated 2<sup>nd</sup> January, 2024 in which he deposes as follows; -
- i. That the tenant was not served with the application that led to the issuance of the orders and that the tenant will be urging to summon the process server in respect to the filed affidavit of service for cross examination in respect thereof.
  - ii. That the service that led to issuance of the order is hereby impugned and therefore the order issued should be set aside.
  - iii. That there is no evidence that the application was served and therefore the tenant was condemned unheard.
  - iv. That it is incumbent upon the landlord who claims to have effected service to prove in absence of which, it should be deemed that service was not effected.
  - v. That the tenant has a defense which is merited and which raises triable issues which can only be determined at the hearing. A copy of the draft defense is annexed as "AH-1" dated 2<sup>nd</sup> January, 2024.



- vi. That the said orders were issued ex-parte and therefore amenable to be set aside as failure to do so would occasion a grave miscarriage of justice.
  - vii. That no evidence has been tabled to prove that the premises was leased to a third party.
5. This Tribunal directed that parties to file written submissions but only the tenant filed his dated 17<sup>th</sup> February, 2024. The landlord's counsel on the other hand, at a court mention on 12<sup>th</sup> February, 2024 stated that he will not be filing any written submissions but will be relying on the replying affidavit. We have considered the written submissions filed together with the issues for determination.

## **B. Issues for determination**

6. The following are the issues for determination; -
- a. Whether the tenant is entitled to the orders sought in the application dated 28<sup>th</sup> September, 2023.
  - b. Who shall bear the costs of the application?

### **Issue (a) Whether the tenant is entitled to the orders sought in the application dated 28<sup>th</sup> September, 2023.**

7. The tenant approached this tribunal seeking to set aside the orders issued on 2<sup>nd</sup> August, 2023 on grounds that the application and reference dated 16<sup>th</sup> June, 2023 were not properly served rendering the consequent orders not fit and proper.
8. The tenant in his supporting affidavit dated 28<sup>th</sup> September, 2023 deposes that he was not personally served with the said application and that the landlord proceeded to obtain ex-parte orders on 2<sup>nd</sup> August, 2023.
9. The landlord on the other hand in his replying affidavit deposes that service was properly effected and the subsequent process leading up to the levying of distress was legal and regular.
10. Upon perusal of the affidavit of service in question, which is dated 27<sup>th</sup> July, 2023, we find that the process server one Festus Kyalo Mutinda allegedly served the pleadings upon the tenant's servant one Solomon. The process server indicates that the servant received the pleadings on behalf of the tenant whereupon he informed the process server that he had travelled and promised to hand over the pleadings to the tenant immediately he arrived.
11. The tenant in his written submissions dated 17<sup>th</sup> February, 2024 refers the tribunal to the case of *Yooshin Engineering Corporation vs Aia Architects Limited* (Civil Appeal E074 of 2022) where it was stated as follows; -
- “What comes out clearly is that where the judgement is irregular in the sense that service was not effected, or that the judgement was improperly or prematurely entered, then such a judgement is irregular and must be set aside as a matter of right. It does not matter whether the defendant has a defense or not. The defendant only needs to satisfy the court that the judgement was irregular and that is the end of the matter. The issue of imposing conditions does not arise.”
12. We have confirmed from the materials on record that indeed the tenant was not personal served and that the orders issued on 2<sup>nd</sup> August, 2023 were granted ex-parte. It is our view that the tenant has a right to be heard and therefore we shall allow the application herein.



**Issue (b) Who shall bear the costs of the application?**

13. Under Section 12(1)(k) of [Cap. 301](#), Laws of Kenya, costs of any suit before this tribunal are in its discretion but always follow the event unless for good reasons otherwise ordered. We shall order that costs of the application shall abide the outcome of the main reference.

**C. Orders**

14. In conclusion, the following orders commend to us-
- a. The application dated 28<sup>th</sup> September, 2023 is hereby allowed to the extent that the ex-parte orders given herein are set aside to enable the matter to be heard and determined on the merits.
  - b. The tenant is at liberty to file and serve a response to the application dated 16<sup>th</sup> June, 2023 within the next 7 days hereof with leave to the landlord to file any supplementary affidavit within 7 days of service of the response.
  - c. Hearing of the main application dated 16<sup>th</sup> June, 2023 shall be on 20<sup>th</sup> May, 2024.

**It is so ordered.**

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 26<sup>th</sup> DAY of APRIL 2024.**

**HON. JOYCE AKINYI OSODO**

**(PANEL CHAIRPERSON)**

**BUSINESS PREMISES RENT TRIBUNAL**

**HON GAKUHI CHEGE**

**(PANEL MEMBER)**

**In the absence of parties.**

