



**Anytime Limited v Hussein t/a Associated Glass and Hardware (Tribunal Case E012 of 2024) [2024] KEBPRT 1217 (KLR) (29 August 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 1217 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E012 OF 2024  
A MUMA, MEMBER  
AUGUST 29, 2024**

**BETWEEN**

**ANYTIME LIMITED ..... TENANT**

**AND**

**MOHIB TEHERALI ABDUL HUSSEIN T/A ASSOCIATED GLASS AND  
HARDWARE ..... LANDLORD**

**RULING**

**A. Parties And Their Representatives**

1. The Applicant, Anytime Limited, is a proprietor of a wholesale and distribution business in a Go-Down owned by the Landlord within Eldoret Town in the Republic of Kenya.
2. The Firm of E. Kinyanjui & Co. Advocates represents the Tenant in this matter.
3. The Respondent, Mohib Teherali Abdul Hussein is the owner of the Go-Down rented by the Tenant herein and hence the Landlord.
4. The Firm of W. Kevin Michuki & Company Advocates represents the Landlord in this matter.

**B. Dispute Background**

5. The Tenant moved this Tribunal vide a Reference and a Notice of Motion Application dated 9<sup>th</sup> February 2024 seeking orders certifying the matter as urgent, restraining the Landlord and his agents, servants and/or personal representatives from levying distress against the Tenant and declaring the distraint for rent illegal, irregular invalid and incompetent.
6. When the matter came up for hearing on 19<sup>th</sup> February 2024, the parties recorded a consent agreeing to open a joint interest earning account within 7 days wherein the Tenant would deposit rent arrears in the sum of KShs. 800,000.00 pending the determination of rent owing and issuance of ETR receipts.



Further, the Court directed that parties exchange statements of accounts within 14 days and that the Tenant pays rent for the month of March before the next hearing date.

7. On 3<sup>rd</sup> April 2024, the parties confirmed that they had opened a joint interest earning account and that the Tenant had deposited the rent arrears owing but the Landlord was yet to issue the Tenant with an ETR Receipt.
8. Consequently, the Tenant's Reference and Application were settled by consent on condition that the amount deposited in the joint account be released to the Landlord upon issuance of ETR Receipts and invoices to the Tenant's Advocates for onward transmission to the Tenant. As such, the Landlord undertook to issue the ETR Receipts upon payment of rent within 5 days and that the said undertaking would lapse within 3 months and the Landlord to keep issuing ETR Receipts upon payment of rent.
9. Subsequently, the Tenant filed an Application dated 2<sup>nd</sup> May 2024 under a certificate of urgency seeking orders certifying the matter as urgent, restraining the Landlord and its agents, Eshikhoni Auctioneers from levying distress on the Tenant pending the hearing and determination of the Application and orders declaring the distraint from rent undertaken on 29<sup>th</sup> April 2024.
10. The Landlord filed an Application dated 9<sup>th</sup> May 2024 seeking orders compelling the Tenant's Advocates to sign RTGS forms for releasing the rent arrears deposited in the joint account to the Landlord and in the alternative, the branch manager African Banking Corporation Ltd Bank be ordered to release the amount of rent arrears.
11. It is the Tenant's Application dated 2<sup>nd</sup> May 2024 and the Landlord's Application dated 9<sup>th</sup> May 2024 that are the subject of this ruling.

### **C. The Tenant's Case**

12. The Tenant's Application is based on the grounds that at the beginning of 2023, the Landlord instructed it to pay part rent of KShs. 80,000.00 by cheque while a further amount of KShs. 160,000.00 was to be paid in cash to various phone numbers as provided by the Landlord until November 2023 when the Tenant requested to be furnished ETR Receipts for the period between 2021 to 2023.
13. It is the Tenant's case that it stopped paying KShs. 160,000.00 as the Landlord was not willing to give ETR receipts in respect of that amount. Consequently, the Tenant agrees that the arrears owing amount to KShs. 800,000.00 which it has deposited in a joint interest earning account in light of the consent Order dated 3<sup>rd</sup> April 2024 and which amount is to be released upon issuance of ETR receipts by the Landlord.
14. The Tenant submits that it is unfair for the Landlord to be allowed to distress for rent while he has failed to comply with the Consent Order to enable the Tenant's Advocates to release the funds to him.

### **D. The Landlords' Case**

15. The Landlord claims that he has issued the Invoices and ETR Receipts to the Tenant's Advocates on 17<sup>th</sup> April 2024 but the Tenant's Advocates failed to release funds to him contrary to the Consent Order dated 3<sup>rd</sup> April 2024.
16. It is the Landlord's case that the Tenant's fresh demands to issue receipts from 2021 to 2023 does not absolve the Tenant from paying rent and that this Court lacks jurisdiction to adjudicate on tax matters.



## E. Issues For Determination

17. I have given full consideration to the Tenant's Notice of Motion Application 2<sup>nd</sup> May 2024, the Landlord's Application dated 9<sup>th</sup> May 2024, and all other materials placed before this Court. It is my considered opinion that the following issues fall for determination:
- Whether the consent order dated 3<sup>rd</sup> April 2024 should be set aside
  - Whether the amount held in the interest earning escrow account should be released to the Landlord?

## F. Analysis And Determination

- Whether the consent order dated 3<sup>rd</sup> April 2024 should be set aside
18. I note that the principles that appertain to setting aside of a consent order are well established in a line of cases including *Brooke Bond Liebig vs Mallya* (1975) EA 266 where Mustafa Ag. VP stated thus;
- “The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.”
19. I am guided by the decision of the Court of Appeal in *Board of Trustees National Social Security Fund versus Micheal Mwalo* [2015] eKLR where the Court gave the grounds upon which consent judgment may be set aside in the case of as follows;
- “The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.”
20. In the instant case, the Tenant insists that the Landlord has failed to comply with the Consent Orders of this Honorable Court by failing to issue ETR receipts for the period between 2021 and 2023 and that the same should be set aside and its Reference heard on merit.
21. I note that on the other hand, the Landlord insists that he issued the ETR receipts as required vide a letter dated 17<sup>th</sup> April 2024 which lists the ETR receipt for KShs. 110,344.83, invoice dated 11<sup>th</sup> April 2024 for KShs. 800,000.00, Invoice dated 21<sup>st</sup> March 2024 for KShs. 240,000 for the rent for March, Invoice dated 10<sup>th</sup> April 2024 for KShs. 240,000 for the rent for April and an RTGS Application form dated 18<sup>th</sup> April 2024.
22. It is clear that the Landlord has not provided any ETR receipts for the period between 2021 to 2023 as well as for the months of March and April 2024. In fact, the Landlord believes that the Tenant's demand for ETR receipts for the period between 2021 and 2023 amounts to a fresh demand.



23. In the circumstances, it is my opinion that at the time of recording the Consent Order, there was a misunderstanding as to the period for which the ETR receipts were to be issued. I am therefore convinced that the Consent Order dated 3<sup>rd</sup> April 2024 ought to be set aside to allow this Court to make a determination on the matter.
- b. Whether the amount should be released to the Landlord.
24. Having set aside the Consent Order, it is noteworthy that the Landlord has to pay the amount in advance to generate the ETR receipt. I note that the Landlord has already issued a receipt in respect of the amount held in the escrow account. In the circumstances, it is only fair that the Tenant releases the rent arrears in the escrow account to the Landlord.
25. However, I note that the Landlord has issued the invoices but is yet to issue the ETR receipts for the months of March and April which he ought to have done by now.
- c. Whether the Landlord should be allowed to levy distress for rent
26. Pursuant to Section 3 of the [Distress for Rent Act](#), Cap 292 Laws of Kenya, the landlord has a right to levy distress for rent as follows:
- “Subject to the provisions of this Act and any other written law, any person having any rent or rent service in arrear and due upon a grant, lease, demise or contract shall have the same remedy by distress for the recovery of that rent or rent service as is given by the common law of England in a similar case.”
27. However, this right must be exercised according to the Law. In this instance, the rent arrears owing is not in dispute. In fact, the Tenant had demonstrated goodwill and complied with the consent order by depositing KShs. 800,000.00 being the arrears owing.
28. Therefore, it is quite unfair for the Landlord to distress for rent when the Tenant has already paid the arrears into an escrow account and which amount was to be released upon complying with the Consent Order. I therefore find the proclamation dated 29<sup>th</sup> April to be illegal.

## G. Determination

- H. In the upshot, the Tenant's Application and Reference dated 2<sup>nd</sup> May 2024 and the Landlord's Application dated 9<sup>th</sup> May 2024 are hereby partially allowed in the following terms:
- a. The Consent Order dated 3<sup>rd</sup> April 2024 is hereby set aside;
- b. The Landlord is hereby restrained from levying distress for rent;
- c. The rent arrears in the escrow account shall be released to the Landlord who shall within 7 days issue ETR Receipts failure to which the Tenant shall be at liberty to withhold further rent payment and apply for further directions;
- d. The Tenant shall continue paying rent on or before the 5<sup>th</sup> of every month and ETR shall follow within 5 days, failure to which the Tenant shall be at liberty to withhold further rent payment and apply for further directions; and
- e. Each party to bear their own costs.

HON. A MUMA



**MEMBER**

**BUSINESS PREMISES RENT TRIBUNAL**

**RULING DATED, DELIVERED AND SIGNED AT NAIROBI ON THIS 29<sup>TH</sup> DAY OF AUGUST  
2024 IN THE ABSENCE OF THE PARTIES.**

**HON. A MUMA**

**MEMBER**

**BUSINESS PREMISES RENT TRIBUNAL**

