



Kamau t/a Victory Choma Roast v Kinyanjui; Mwangi (Interested Party) (Tribunal Case E742 of 2021) [2023] KEBPRT 1391 (KLR) (27 September 2023) (Ruling)

Neutral citation: [2023] KEBPRT 1391 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E742 OF 2021
A MUMA, MEMBER
SEPTEMBER 27, 2023**

BETWEEN

PATRICK MUIRURI KAMAU T/A VICTORY CHOMA ROAST TENANT

AND

BONIFACE KAMANDE KINYANJUI RESPONDENT

AND

STEPHEN MWANGI INTERESTED PARTY

RULING

A. Parties And Their Representatives

1. The Respondent/Applicant, Boniface Kamande Kinyanjui, instituted this suit (hereinafter known as the “Applicant”).
2. The Applicant is represented by the Firm of Mwaura Kelvin Karuga & Associates Advocates.
3. The Tenant/Respondent, Patrick Muiruri Kamau, is the Tenant of a rented business space known as Victory Choma Roast (hereinafter known as the “Tenant”).
4. The Tenant is represented by the Firm of Daniel Henry & Company Advocates.

B. Dispute Background

5. This Honourable Tribunal vide a Ruling dated 17th January 2023 made Orders inter alia:
 - I. Status quo be maintained and the Tenant to continue paying rent to the Interested Party, the Landlord of the premises as per the Lease Agreement entered into by the two parties.
 - II. The Respondent to cater for the losses incurred by the Applicant as a result of the illegal closure of the business premises contrary to CAP 301 assessed at KShs.90,000 within 30 days.



- III. The Respondent to cover the Applicant's costs of the suit assessed at KShs.10,000.
6. Subsequently, the Applicant filed a Notice of Motion Application dated 23rd January 2024 seeking orders inter alia that this Tribunal be pleased to set aside and /or quash the Judgment dated 17th January 2023 pending the hearing and determination of this application.
7. It is this application that is the subject of this Ruling.

C. The Applicant's Claim

8. The Applicant contends that the Ruling was rendered in his absence, as the law firm of M/S Solomon Mugo & Co. Advocates, whom he had instructed to represent him, failed to act despite being provided with the mention and hearing notices.
9. Furthermore, he asserts that the failure of his advocates to act led to an unfavourable Ruling which ordered that he must pay the Tenant Kshs.90,000 as damages for the closure of the business premises and Kshs.10,000 as costs of the suit.
10. He maintains that the issuance of the Ruling occurred without his participation contrary to the principles of natural justice.
11. The Applicant avers that the execution of the Ruling and any resulting Decree would result in irreparable loss, injury, and damage to him.
12. Additionally, he avers that the errors of his counsel should not be attributed to him as an innocent litigant.

D. The Tenant's Defence

13. The Tenant filed an undated Replying Affidavit and a Supplementary Affidavit dated 19th March 2024 both sworn by Patrick Muiruri Kamau.
14. He avers that court proceedings are adequate enough to demonstrate who attended court on a particular day and what transpired on the said day.
15. Furthermore, he contends that the only means for the Tribunal to ascertain attendance is by reviewing the court proceedings, as he has adequately highlighted.
16. The Tenant maintains that the Ruling can only be overturned if the Applicant has fulfilled the necessary requirements, which, in this instance, the Applicant has failed to do. He characterizes the Applicant's Application as an afterthought, as no reasons have been provided to justify why the requested prayers should be granted.

E. Issues For Determination

17. I have given full consideration to the parties' pleadings presented before this Honourable Tribunal, and in my respectful view, I find that the sole issue that falls for determination is:

Whether this Tribunal should set aside and/or quash its Ruling and orders delivered on 17th January 2023.



F. Analysis And Determination

18. Section 80 of the [Civil Procedure Act](#) Cap 21 provides as follows: -

“Any person who considers himself aggrieved—

- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

19. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows: -

“1.

(1) Any person considering himself aggrieved—

- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

20. In *Republic v Public Procurement Administrative Review Board & 2 others* [2018] e KLR it was held:

“Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

21. Flowing from the above, the issue for determination is whether the applicant has satisfied any of the conditions set out in Order 45 of the Civil Procedure Rules.



22. The Applicant has not presented any evidence indicating the grounds as outlined in the aforementioned jurisprudence, which is necessary for seeking a review.
23. It should also be noted that the application herein was made one year after the Ruling was rendered. It is trite law, as per Order 45 Rule (1) (b), that an application for review should be made without unreasonable delay.
24. With regard to delay in seeking review, the Court, in *Stephen Gathua Kimani vs. Nancy Wanjira Waruingi t/a Providence Auctioneers* [2016] eKLR, stated:
- “One thing is clear in this application. The delay of one year has not been explained. Perhaps, it’s important to recall the last sentence of Order 45 Rule 1 (1) (b) which reads “... may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.”
- The logical question that follows is, was the present application made without unreasonable delay? Or is a delay of one year reasonable. The issue for determination is whether or not the applicant has unreasonably delayed in filing the present application. Under normal circumstances it should not take an applicant one year to file an application in court. It would require sufficient explanation to justify a delay of one year. To my mind this is a long period, and indeed an unreasonable delay.”
25. In the present case, the applicant, has not addressed the delay in filing the application for review, let alone the reasons for it. The delay is, therefore, not explained. It is my view that a delay of one year is gross and unreasonable, and, therefore, the orders sought in the instant application cannot be available for granting. Only issue raised is the ruling was delivered in his absence thus denying him right to be heard a ruling is at the tail end after hearing of parties and not attending to the same would not culminate into a breach of a right to be heard as parties were already heard.
26. In the upshot, the applicant has utterly failed to provide sufficient grounds to justify grant of the orders sought in the application, dated 23rd January 2024.

G. Determination

27. In the upshot, the following orders shall abide:
- a. The Review Application dated 23rd January 2024 is dismissed based on unreasonable delay. Review must be within reasonable time.
 - b. Each party to bear their own costs.

HON A. MUMA - MEMBER

BUSINESS PREMISES RENT TRIBUNAL

RULING DATED, DELIVERED AND SIGNED AT NAIROBI ON THIS 27TH DAY OF AUGUST 2024 IN THE PRESENCE OF KAMAU HOLDING BRIEF FOR GACHAU FOR THE TENANT/RESPONDENT AND IN THE ABSENCE OF THE FOR THE LANDLORD/APPLICANT.

