



**Mzee v Naku Modern Feeds Ltd & another (Tribunal Case E176 of 2023)  
[2024] KEBPRT 1101 (KLR) (Civ) (19 July 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 1101 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
CIVIL  
TRIBUNAL CASE E176 OF 2023  
P MAY, MEMBER  
JULY 19, 2024**

**BETWEEN**

**AGNES WANGECI MZEE ..... APPLICANT**

**AND**

**NAKU MODERN FEEDS LTD ..... LANDLORD**

**AND**

**JULIUS ONYANGO T/A AGUNJA TRADERS AUCTIONEERS ..... AGENT**

**RULING**

1. The tenant filed an application by way of certificate dated 26<sup>th</sup> September, 2023 seeking for the intervention of the Tribunal through the grant of orders of temporary injunction after the landlord initiated rent recovery proceedings. The tenant disputed the legality of the proclamation notice issued terming the same as an act of extortion. The application was placed before the Tribunal on 27<sup>th</sup> September, 2023 whereby the Tribunal issued ex- parte orders in favour of the tenant pending the hearing of the application.
2. The landlord upon being served filed their response in opposition to the application vide the Replying Affidavit sworn on 19<sup>th</sup> October, 2023. The landlord admitted to the existence of tenancy relationship between the parties. They however accused the tenant of being a habitual rent defaulter who had time without number made unfulfilled promises to clear the rent arrears. They therefore accused the tenant of material non- disclosure hence urged the Tribunal to dismiss the application.
3. The application was listed for directions on various dates whereby the tenant indicated that they were pursuing negotiations with a view of settling the dispute. On 16/1/2024 the matter was listed for mention for directions whereby the tenant was absent despite evidence of service being placed



- before the Tribunal. The landlord on that particular date informed the Tribunal that the tenant had since vacated the demised premises thus the Tribunal had been divested the jurisdiction to hear and determine the dispute. The Tribunal therefore proceeded to dismiss the application and the reference filed.
4. The tenant was aggrieved of by the orders issued by the Tribunal and proceeded to file an application dated 22/1/2024 seeking to reinstate the prior application which was pending determination and an order of injunction against the landlord. The tenant denied being served with the mention notice as alluded to despite the existence of an affidavit of service. The application is the subject of this ruling. The tenant filed a further affidavit challenging the contents of the response filed by the landlord.
  5. Having carefully considered the application and the rival affidavits it is my view that the issues for determination are:
    - a) Whether the Application dated 22<sup>nd</sup> January, 2024 is merited;
    - b) What orders to issue and who to bear cost of the Application?
  6. The general principles governing applications like the one at hand are anchored in the realm of judicial discretion. However, I find it relevant to invoke the provisions of Article 159 which provides for the overriding objective of the courts and Tribunals so as to facilitate the just, expeditious, proportionate and affordable resolution of disputes in court. A party in civil proceedings or an advocate for such a party is under a duty in accordance to the law, to assist the court to further the overriding objective by participating in the processes of the court and to complying with the directions and orders of the court as directed. This is in tandem with the spirit under Article 159 of the Constitution, which guides the courts in exercise of its judicial authority to administer substantive justice without undue regard to procedural technicalities.
  7. In the case of *Esther Wamaitha v Safaricom* the court held as follows:-

“...The discretion is free and the main concern of the courts is to do justice to the parties before it (See *Patel Versus EA Cargo Handling Services Ltd*) the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (See *shah v Mbogo*). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See *Sebei District Administration Versus Gasyali*). It also goes without saying that the reason for failure to attend should be considered”. (Emphasis mine)
  8. The stand that this Tribunal takes is not far from what the court in the above cited case have taken. The tenant in her affidavit stated that they noticed that their case had been dismissed after they received a text notification. They have disputed service but from the record it is clear that service was effected on the law firm on record which failed to act on the same. Should this mistake by counsel be revisited on the litigant? Absolutely NO. Parties to a litigation are bound to make mistakes and sometimes the mistake is on the part of the legal counsel retained by those parties who is guilty of laches without the knowledge of the client. However, such a scenario does not leave them without a remedy for the Tribunal to exercise discretion in the interest of justice. I reiterate the view that a litigant who is not guilty of dilatory conduct should not be debarred from pursuing his/her rights in court because of the negligence of his/her Counsel.



9. Having made the above findings, I will now delve into the merits of the application dated 26/9/2023. The tenant stated that the landlord commenced the process of levying distress in an illegal manner. The tenant however admits to having fallen into rent arrears but disputes the amount due. The tenant has also faulted the landlord for failing to seek the consent of the Tribunal in levying distress.
10. The Tribunal is cognizant of the competing commercial interests between the parties herein. It is prudent that the subject matter of the dispute is maintained even as the parties set the matter for hearing. At this preliminary stage the Tribunal cannot conclusively determine the dispute without calling for evidence.
11. The upshot of the above is that the application dated 22/1/2024 is allowed in the following terms:
  - a. The tenant is allowed to remain in the demised premises pending the hearing and determination of the reference.
  - b. The parties to file and exchange paginated bundle of documents which they seek to rely on including updated statements of accounts within 7 days.
  - c. The tenant to pay the uncontested rent arrears within 21 days upon receipt of the statement of accounts.
  - d. Each party to bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19TH DAY OF JULY, 2024**

**HON. PATRICIA MAY**

**MEMBER**

**BUSINESS PREMISES RENT TRIBUNAL**

**Delivered in the presence of Muriithi for the Landlord and in the absence of the Tenant**

