



**Ndeto v Resma Commercial Agencies Ltd (Tribunal Case E051 of 2023)  
[2023] KEBPRT 675 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 675 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E051 OF 2023  
GAKUHI CHEGE, CHAIR  
SEPTEMBER 22, 2023**

**BETWEEN**

**DAMARIS MUTHOKI NDETO ..... TENANT**

**AND**

**RESMA COMMERCIAL AGENCIES LTD ..... RESPONDENT**

**RULING**

1. The Tenant moved this Tribunal by way of a complaint dated 27<sup>th</sup> March 2023 claiming that the Respondent/Agent had locked her business premises from 10<sup>th</sup> February 2023 without any valid reason. She also complained that the landlord was threatening and harassing her to vacate the suit premises without any justifiable cause. The complaint was filed pursuant to Section 12(4) of [Cap. 301](#), Laws of Kenya.
2. The tenant simultaneously filed a motion of even date seeking a raft of orders including one for reopening of the suit premises and to restrain the landlord from evicting her from the suit premises known as Masters Plaza, Ground floor, Room B018 and B019 Nakuru pending hearing inter-partes. Interim orders were given on 31<sup>st</sup> March 2023 pending hearing inter-partes on 10<sup>th</sup> May 2023.
3. The application is opposed through the Respondent's replying affidavit sworn on 19<sup>th</sup> April 2023 in which it is deposed that the tenant defaulted in making monthly rent payments and was in arrears of Kshs.153,235/- as at 1<sup>st</sup> April 2023 as per annexure marked "SKM1".
4. As a result, the Respondent instructed Tango Auctioneers and General Merchants to levy distress and a proclamation marked "SKM2" was issued upon the tenant. The applicant by a letter dated 24<sup>th</sup> February 2023 indicated that she intended to vacate the premises which the Respondent objected to by its letters dated 27<sup>th</sup> February 2023 and 13<sup>th</sup> March 2023.
5. By a second application dated 30<sup>th</sup> May 2023, the tenant sought for a notice to show cause against the Respondent compelling it to appear in court and show cause why it should not be cited for



- contempt for disobeying the orders of this honourable Tribunal issued on 31<sup>st</sup> March 2023 and that the Respondent be committed to civil jail for a period not exceeding 6 months for the said disobedience.
6. The tenant finally seeks that the Respondent be denied audience before this court until they purge the contempt. The said application is supported by the affidavit of the Applicant sworn on 30<sup>th</sup> May 2023 and the grounds on the face thereof.
  7. I hasten to note that there is no evidence of service of the said application nor the orders sought to be enforced through the contempt proceedings. In absence of such evidence, I am afraid that the application cannot be entertained and is hereby struck out for want of service.
  8. I am required to determine the following issues in regard to the application dated 27<sup>th</sup> March 2023:-
    - a. Whether the tenant is entitled to the reliefs sought in the application dated 27<sup>th</sup> March 2023 and the complaint of even date
    - b. Who is liable to pay costs?
  9. The tenant moved to this Tribunal complaining that the Respondent had locked her business premises in an attempt to evict her therefrom. The Tribunal gave an *ex-parte* order for the suit premises to be reopened and set the application for hearing inter-partes on 10<sup>th</sup> May 2023. Although the Applicant was directed to serve the Respondent and file an affidavit of service, there is no evidence of service of the orders.
  10. It is deposed in the tenant's supporting affidavit that she has been paying Kshs.22,500/- as monthly rent with 5% annual increment to the Respondent exclusive of utilities since 4<sup>th</sup> August 2021 as annexure "DMN-001".
  11. The tenant deposes that the landlord has been closing her business for two weeks and reopening it for two weeks without a valid reason. The tenant fearing eviction rushed to this Tribunal seeking for protection. As a consequence, interim orders were granted on 31/3/2023 pending hearing inter-partes.
  12. The Respondent opposes the application through a replying affidavit sworn on 19<sup>th</sup> April 2023 by one Samuel Maigua who is a director thereof. The Respondent contends that the Applicant defaulted in making monthly rental payments and was in arrears of Kshs.153,235/- as at 1<sup>st</sup> April 2023 in terms of annexure marked "EXSKM-1". As a result the Respondent instructed Auctioneers to proclaim the tenant's goods by way of distress for rent. A proclamation marked "EXSK2" is annexed. The Respondent further annexes a letter dated 24<sup>th</sup> February 2023 in which the tenant indicated her desire to vacate the suit premises.
  13. According to the Respondent, the Applicant closed the suit premises after the proclamation to prevent attachment of her goods. The Respondent wrote two letters marked "EXSKM-3 and 4" objecting to the intended vacation of the tenant from the suit premises as it was contrary to the lease agreement. The applicant is accused of attempting to cart away the proclaimed goods as a result of which the Auctioneer added his own padlock to preserve the goods pending attachment.
  14. On 27<sup>th</sup> February 2023, the applicant wrote a letter marked "EXSKM-6" wherein she admitted owing Kshs.96,815/- in rent arrears and as such she was evading to pay the arrears and being in default, the Respondent was entitled to levy distress. According to the Respondent, it is the Applicant who locked the suit premises.
  15. In her further affidavit sworn on 15<sup>th</sup> June 2023, the Applicant deposes that she was denied access to the business premises through closure without notice which was illegal. The tenant avers that the Respondent had not obtained any order allowing it to levy distress.



16. The matter proceeded by way of written submissions and both parties complied. I note that the Applicant is seeking for equitable remedy of injunction whose principles have been settled by superior courts in a plethora of cases including *Giella – vs- Cassman Brown & Co. Ltd* (1973) EA 358, *Mrao Ltd – vs- First American Bank of Kenya Ltd & 2 Others* (2003) eKLR and *Nguruman Limited – vs- Jan Bonde Nielsen & 2 Others* (2012) eKLR.
17. I have noted that the tenant has not denied being in rent arrears of Kshs.153,235/- as at 1<sup>st</sup> April 2023. She has not denied having authored the admission letter dated 27<sup>th</sup> February 2023 marked “EXSKM-6” where she agreed owing Kshs.96,815/-. It is therefore inconceivable that such a litigant could dare to seek for equitable reliefs from a court of law. He who comes to equity must come with clean hands.
18. I have seen the submissions by counsel for the tenant to the effect that the distress sought to be levied by the Respondent is illegal in absence of leave of the Tribunal permitting it. I however differ with the said submissions on the authority of *Richard Onyango Juma t/a Golden Chariots Junior School – vs- Joseph Wambua Mwema* (2021) eKLR, I also follow the decision in the case of *John Nthumbi Kamwithi – vs- Asha Akumu Juma* (2018) eKLR and the Court of Appeal decision in *CYO Owayo – vs- George Hannington on Zephania Aduda T/A Aduda Auctioneers & another* (2007) eKLR where the law on distress was ably and conclusively discussed.
19. I find and hold that Section 12(1) (h) of *Cap. 301*, Laws of Kenya which gives this Tribunal power to permit the levy of distress for rent is not mandatory but merely permissive. Failure by the Respondent to seek and obtain leave to levy distress is not fatal to the proclamation issued by Tango Auctioneers.
20. In the premises, I find and hold that the tenant has not brought herself within the principles considered in an application for injunction and the application before me is a candidate for dismissal.
21. Costs of every action before the Tribunal are in its discretion under Section 12(1) (k) of *Cap. 301*, Laws of Kenya but always follow the event unless for good reasons otherwise ordered. I have no reason to deny costs to the Respondent.
22. Consequently, the final orders which commend to me in this case are:-
  - a. The tenant’s application and Reference dated 27<sup>th</sup> March 2023 are hereby dismissed with costs.
  - b. The interim orders given on 31<sup>st</sup> March 2023 are hereby discharged or vacated.
  - c. The tenant shall pay costs of Kshs.25,000/- to the Respondent/Landlord.

It is so ordered.

**RULING SIGNED & VIRTUALLY DELIVERED THIS 22<sup>ND</sup> DAY OF SEPTEMBER 2023.**

**HON. GAKUHI CHEGE**

**FOR: CHAIRMAN**

**BUSINESS PREMISES RENT TRIBUNAL**

