



**Mwangi v AIC Church Nakuru & another (Tribunal Case
E116 of 2024) [2024] KEBPRT 1631 (KLR) (22 October 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 1631 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E116 OF 2024
CN MUGAMBI, CHAIR
OCTOBER 22, 2024**

BETWEEN

ZACHARIA MURITHI MWANGI APPLICANT

AND

AIC CHURCH NAKURU 1ST RESPONDENT

GILLETTE TRADERS AUCTIONEERS 2ND RESPONDENT

RULING

Introduction

1. The Tenant's Application dated 13.8.2024 seeks orders that pending the hearing and determination of the suit, the Respondents and/or their agents be restrained from in any manner interfering with the Tenant/Applicant's tools of trade. The Tenant has also sought an order that the costs of the Application be provided for.

The Tenant's depositions

2. The Tenant's affidavit in support of his Application may be summarized as follows:-
 - a. That the Tenant pays to the Landlord rent of Kshs. 61,000/= per month and which rent the Tenant pays promptly and he has never defaulted in the payment of the said rent, and therefore the allegation that the Tenant is in rent arrears amounting to Kshs. 400,000/= was shocking.
 - b. That on 13.8.2024, the Tenant received a proclamation dated 27.9.2023 threatening to auction his goods by 15.8.2024.
 - c. That the Respondents did not adhere to the forty-five (45) days statutory period which rendered the demand notice a nullity.



- d. That it is vital for the Respondent to avail statements and do account reconciliations to show how the Tenant has defaulted in rent payment.

The 1st Respondent's Replying affidavit

3. The Replying affidavit of the 1st Respondent sworn by Mr. Stephen Maina Ndung'u an agent of the 1st Respondent may be summarized as follows'-
 - a. That on the instructions of the Landlord, he instructed the auctioneers to levy distress for rent.
 - b. That on 11.7.2024, an Application by the 2nd Respondent to break into the suit premises and preserve the Tenant's goods was allowed.
 - c. That as at the filing of the Application, the Tenants were in rent arrears amounting to Kshs. 933,002/=, the balances running as far back as the year 2020.
 - d. That the Landlord has explored its rights to levy distress for rent in accordance with the law and the orders issued in Misc. E125 of 2024.
 - e. That the Tenant has failed to disclose to court that distress has been served against him more than once.

The Tenant's Supplementary Affidavit

4. The Supplementary affidavit sworn by the Tenant on 9.10.2024 may be summarized as follows;-
 - a. That the Tenant has never been served with the pleadings in Misc. No. E125 of 2024 or any court process or application.
 - b. That the Tenant paid his rent faithfully until he was hit by some medical challenges which led to the amputation of one of his legs above the knee.
 - c. That the Tenant has always complied with the terms of the lease between himself and the Landlord, and the said lease had no provision for the locking of the premises or levying the charges allegedly stated on the rent statement.
 - d. That the entries in the rent statement showing paid auctioneers, lock charges fees, cooking gas refill and late fees totaling to Kshs. 258,252/= are alien to the terms of the lease signed between the Tenant and the Landlord/1st Respondent.
 - e. That the 2nd Respondent has received the sum of Kshs. 394,500/= which is not captured in the 1st Respondent's statement of accounts.
 - f. That therefore, a total sum of Kshs. 652,752/= needs to be deducted from the 1st Respondent's rent statement in computing the rent arrears payable.
 - g. That the rent paid to the Landlord through the 2nd Respondent was paid through Mr. Mwaura 's daughter's cell phone number 0729-929-982.
 - h. That the 2nd Respondent has not acknowledged any money paid to him on behalf of the 1st Respondent.
 - i. That on 2.8.2024, the 2nd Respondent collected the Tenant's stock together with goods belonging to the Tenant's customers and locked the premises, and on 13.8.2024, the 2nd Respondent took away the remaining Tenant's goods, including the Tenant's special chair.



- j. That the Respondents have now closed the premises and taken away the Tenant's goods and job equipment valued at close to Kshs. 3,000,000/= which is way above the disputed rent.

Analysis and determination**

5. The only issue that arises for determination in this Application is whether the Tenant is entitled to the orders sought in his Application.
6. The resolution of this dispute revolves around the question whether or not the Tenant owes the 1st Respondent/Landlord any rent arrears and whether therefore the Landlord was entitled to levy distress for the rent arrears.
7. The Landlord has deponed in its affidavit that as at the time the instant Application was filed, the Tenant was in rent arrears in the sum of Kshs. 933,002/=. In countering this allegation, the Tenant has deponed that he had paid to the 2nd Respondent the sum of Kshs. 394,500/= and that further the Landlord had included charges amounting to Kshs. 258,252/= not recognized under the lease agreement between the parties. The Tenant therefore claims the sum of Kshs. 652,752/= ought to be deducted from the 1st Respondent's rent statement.
8. Even if I was to assume that the Tenant is entitled to the deduction he has sought, he would still be in rent arrears amounting to Kshs. 280,250/= (Kshs. 933,002-652,752) which at the rate of Kshs. 61,000/= per month represents unpaid rent for four and half (4 ½) months. The Landlord would still be entitled to levy distress for the said rent in accordance with Section 3(1) of the distress for rent Act Cap 293 which provides as follows;-

“Subject to the provisions of this Act and any other written law, any person having any rent or rent service in arrears 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.”
9. Although the Tenant has deponed that he is not in any rent arrears and has paid all due rent, at paragraph 5 of his Supplementary affidavit, he seems to state that he started having problems with his payment of rent after he got into this unfortunate situation that led to the amputation of one of his legs. It is therefore not entirely true that the Tenant is not in any rent arrears.
10. It is not possible to determine at this stage in the proceedings whether indeed the Landlord is entitled to burden the Tenant with the charges the Tenant alleges that they were not part of the lease agreement between the parties as it is also not possible to determine whether the money allegedly paid out via Mpesa to one Ms. Florence Mwaura indeed was meant for rent for the demise premises. I will leave this determination to the full hearing of the Reference and even as I do so, I am of the view that the said determination will not affect the finding that the Tenant is still in rent arrears, even if the figure of Kshs. 652,752/= was to be deducted from the total owing.
11. Having found that the Tenant is in rent arrears and the Landlord's right to levy distress under the provisions of the distress for rent Act Cap 293 of the Laws of Kenya had crystalized, I do not find any merits in the Tenant's Application and the same is dismissed with costs to the Landlord.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 22ND DAY OF OCTOBER, 2024

HON. CYPRIAN MUGAMBI

CHAIRPERSON



Business Premises Rent Tribunal

Delivered in the presence of Mr. Wambeyi for the Tenant and in the absence of the Landlord and Counsel.

