



**Kiatie & 13 others v Wahu & another (Tribunal Case E649 of 2023)
[2024] KEBPRT 321 (KLR) (15 March 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 321 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E649 OF 2023
N WAHOME, MEMBER
MARCH 15, 2024**

BETWEEN

JOHN KIATIE & 13 OTHERS TENANT

AND

MARY WAHU LANDLADY

AND

MATUMBO COMPANY LIMITED LANDLORD

RULING

1. This matter was commenced by the Applicants through the reference dated 29/6/2023. The grievances by the Applicants/Tenants were that, the landlord had,-
 - i. Served us with contradicting letters telling the Tenants to pay rent to different accounts,
 - ii. Has threatened to evict the Tenants unlawfully.
2. Accompanying the reference was the Notice of motion application dated the even date of 29/6/2023. It principally sought that the respondents be restrained from interfering with the quiet enjoyment of their respective premises on land reference No. 2091/38/64 within Nairobi city. They also requested for orders by this court on where to deliver rents for their respective premises as they fall due.
3. By a consent order entered into by the parties on the 15/8/2023 it was resolved that:-

“Prayer 3 of the Notice of Motion dated 29/6/2023 is granted. Tenants to pay rent arrears from April, May, June, July, August and every subsequent month into the tribunals account”.

The matter was to be mentioned on the 31/8/2023 to confirm compliance.



4. In the meantime all the Applicants appeared before the Tribunal in person and physically and indicated that some payments had been made to the 2nd Respondent and expressed their willingness to pay all future rents to the tribunal. The applicants were then discharged from the need to appear as long as compliance with the court orders was strictly effected.
5. However, the Applicants counsel was by several orders of the court as was the 2nd Respondent required to submit complete schedules of payments of rent by the Applicants to the later but at the time of writing this Ruling those otherwise plain and easy to comply with orders had not been respected with compliance.
6. On its part the 2nd Respondent filed the notice of motion Application dated 29/8/2023 seemingly in answer to the Application by the Applicants dated 29/6/2023. The same sought for the following reliefs:-
 - i. Spent,
 - ii. That this Honourable court be pleased to review, vary, rescind and/or set aside its orders issued on the 18/8/2023.
 - iii. That the costs of this Application be provided for.
7. The 1st respondent responded to the 2nd Respondents motion by filing the grounds of opposition dated 30/8/2023 and had earlier filed the Replying Affidavit sworn on the 27/7/2023. The 1st Respondent also filed the Application dated 13/10/2023 which sought for the following orders which I have edited accordingly,
 - i. Spent
 - ii. Summon the Applicants to show cause why they should not be condemned by committal to civil jail for contempt.
 - iii. Commit all the Applicants to civil jail for a period of six (6) months or until such time that the Applicants will purge their contempt on the orders issued on the 15/8/2023.
8. When directions were taken on disposal of all the matters herein, the Applicants did not demonstrate any intent to pursue any further the reference and application both dated the 29/6/2023 and seemed contended with the orders made on the 15/8/2023, 17/11/2023 and 15/12/2023 which allowed them to deposit their respective rents with this Tribunal.
9. The directions therefore taken were prayer 3 in the 1st Respondent's application dated 13/10/2023 and the 2nd Respondent's application dated 29/8/2023. The applications were canvassed by oral submissions. The 2nd Respondent also filed submissions dated 29/1/2024. The 1st respondent elected to rely on the materials on record.
10. At this point, I would wish to state the case for the 2nd Respondent in brief. The same is that:-
 - i. There existed Milimani Civil case No. 37 of 2013 between the respondents herein in respect of the subject matter herein namely L.R No. 209/138/164,
 - ii. That the High Court had issued an order on distribution of the rents collected from the premises at 60:40 in favour of the 1st respondent and 2nd respondent respectively.
 - iii. A ruling in the High Court matter was to be delivered on the 19/10/2023.



- iv. The 2nd respondent maintained the premises with the rent collected and in case the same was stopped, the premises would go to waste.
 - v. The 1st Applicant was collecting rents from other tenants who were not in court and that was therefore a case of material non-disclosure and the 1st respondent did not come to court with clean hands.
 - vi. The tribunal could not issue orders on payment of rent to contradict the High Court orders.
11. In response, the 1st respondent by her grounds of opposition dated 30/8/2023 asserted that:-
- i. Case No. ELCC 25 of 2022 had been dismissed and with it the orders cited by the 2nd Respondent,
 - ii. In the event that the suit is reinstated, the same would not be the case with the purported orders thereof.
 - iii. The Applicants were working in cahoots with the 2nd respondent to defeat the interests of the 1st respondent and also the orders issued on the 15/8/2023.
12. Having perused the materials before me, I have made a finding that this court is allowed powers to make orders as those sought by the 2nd respondent. Section 12(1)(i) defines some of the powers of the Tribunal as:-
- “Vary or rescind any order made by the Tribunal under the provisions of this Act”.
13. The question that I then need to determine is whether there is any merit in exercising those powers. To start with, I note that the orders purportedly dated 18/8/2023 sought to be varied and/or rescinded do not exist. I however treat that as an error and would endeavour to look at the larger interest of justice.
14. The orders sought to be set aside are consent orders, they were initially issued by the court on the 15/8/2023 and thereafter reiterated by the Applicants with the concurrence of the 1st respondent and in the presence of the 2nd respondent on 17/11/2023 and 15/12/2023.
- In the case of *Hirani vs- Kassan* (1952) 19 EACA 131 it was held that:-
- “Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court or if the consent was given without sufficient material facts or in general for a reason which would enable the court to set aside an agreement”.
- “A court cannot interfere with a consent judgement except in such circumstances as would afford good ground for varying or rescinding a contract between the parties”.
15. The court of Appeal on the same issue in the case of *Brook Bond liebig – vs- Mallya* (1975) EA 266 it held that,-
- “A court cannot interfere with a consent judgement except in such circumstances as would afford good ground for varying or rescinding a contract between the parties”.
16. In this matter, the 2nd respondent has not in anyway alluded to any collusion, coercion or fraud in all the three instances that the Applicants committed to deposit rental income on Title No. 209/138/164 to this Tribunal.



17. It is also not clear nor unequivocal that the orders issued by the High Court in ELC case No. 25 of 2022 formerly HCCC No. 37 of 2013 are still subsisting and in fact whether the dismissed suit has been reinstated. I understood the parties to say that a Ruling on determination of the dismissed suit would be made on 19/10/2023 but the trial run cold and none of the parties addressed the issue thereafter.
18. It is however my view that the deposit of the rents into the Tribunal would not affect or be contrary to the orders of the High Court as the distribution would still take effect as the deposited funds would be readily available for such distribution when required. I also note that the High court itself had before the dismissal of the suit directed that the Deputy Registrar of the court to open a Bank account to receive deposits of rents by the Tenants on the suit property.
19. The issue of one Bernard Kanyi Mwangi to preside over these proceedings on behalf of the 2nd Respondent has also been brought to question. Annexure “MWK1” of the 1st respondent’s replying affidavit sworn on the 27/7/2023 shows the directors of the 2nd Respondent in form CR 12. The said Bernard Kanyi Mwangi is not one of them, it therefore casts a lot of doubts and raises integrity issues on the said person’s continued insistence that he was a director of the 2nd respondent.
20. The upshot of all these is that the 2nd Respondent’s/Applicant’s application dated 29/8/2023 is devoid of any merit and is dismissed with costs to the 1st respondent.
21. Prayer 3 of the 1st respondent/Applicant’s application dated 13/10/2023 is purely for the enforcement of the consent orders of this court adopted on the 15/8/2023 and the further orders made in concurrence with the applicant’s on the 17/11/2023 and the 11/12/2023. The consent orders were categorical that the Tenant’s/Applicants in the Application dated 29/6/2023 would deposit rents for their respective spaces occupied for the months of April, May, June, July, August and every subsequent month into the Tribunal.
22. It was not explained how then that the same applicant’s who indicated their desire to get direction from this court on where or to whom to pay the rent, ended up paying the same to the 2nd respondent. I would agree with the 1st respondent that the said purported payments to the 2nd respondent was a scheme crafted by both parties to defeat the said orders of this court dated 15/8/2023, 17/11/2023 and 11/12/2023.
23. This would inform the reason why the Applicants and the 2nd respondent have not been able to submit schedules of payments if at all to the 2nd respondent and the evidence of receipt of such rent payments by the 2nd Respondent. A faint attempt to demonstrate that was by the 2nd respondents further affidavit pursuant to annexure “BKMS1” but which only showed payment to the 1st respondent by the 14th applicant and not to itself as demanded by this court.
24. I would therefore and without much ado allow the application dated 13/10/2023 in terms of prayer no. 3 on the terms that it will only be put to effect if:
 - i. The applicant’s default in compliance with the orders of this court made on the 15/8/2023, 17/11/2023 and 11/12/2023.
 - ii. The Applicant’s do not comply with the orders of this court to file evidence of payment of rent relating to the months where the same is not deposited with the Tribunal within 14 days of the date hereof.
 - iii. That in the event of failure in (ii) above, to pay such rent into the tribunal or their respective goods will be distrained in recovery thereof and deposit of the same into the tribunal.



25. As earlier indicated, I reiterate that the Applicant's reference and application dated 29/6/2023 are spent and the same are marked as settled but any party may move this court appropriately to ensure strict compliance with the orders herein.
26. In the final analysis the orders that commend themselves to me are the following:-
- i. That the application dated 29/8/2023 by the 2nd Respondent/Applicant is hereby dismissed.
 - ii. That prayer 3 of the 1st Respondent/Applicant's application dated 13/10/2023 is allowed but on condition that same shall only be effect if:
 - a. The Tenants/Applicants default in payment of rent into the Tribunal pursuant to the orders of 15/8/2023, 7/11/2023 and 11/12/2023.
 - b. The Tenants/Applicants do not within 14 days of the date hereof submit into this court the schedules of all their payments for the months of April, 2023 to August, 2023 both months inclusive.
 - iii. That in the event that order No. 2(b) is not complied with, the 1st Respondent shall be at liberty to levy distress to recover all such rents in arrears and deposit the same with the Tribunal.
 - iv. That the Tenants/Applicants reference and application dated 29/6/2023 are marked as settled but any party is at liberty to move this court appropriately on implementation of the orders herein with no orders as to costs.
 - v. The costs of the application dated 29/8/2023 and 13/11/2023 are awarded to the 1st Respondent against the 2nd Respondent and the same are assessed at Kshs.20,000/-.

Those are the orders of the court.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH MARCH 2024.

HON. NDEGWA WAHOME MBS

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

Ruling delivered in the presence of Mr. Njugi for the 1st Landlady/applicant

Mr. Nyakundi for the Applicants- absent

Mr. Oloo for the 2nd Respondent/Applicant absent

HON. NDEGWA WAHOME MBS

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

