



**Kariuki v Mwakande (Tribunal Case 93B of 2018)
[2023] KEBPRT 1125 (KLR) (21 November 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 1125 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE 93B OF 2018
CN MUGAMBI, CHAIR
NOVEMBER 21, 2023**

BETWEEN

SUSAN MICHAEL KARIUKI TENANT

AND

ABDALLAH ALI MWAKANDE LANDLORD

RULING

Introduction

1. The tenant's motion dated 23.8.2023 seeks orders that the orders made on 10.5.2023 dismissing the Tenant/Applicant's suit herein be set aside and the suit be reinstated and thereby heard on merit.

The Tenant's/Applicant's Depositions

2. The Tenant's affidavit in support of her application may be summarized as follows:-
 - a. That on 10.5.2023, the Honourable court dismissed this matter for non-attendance by the parties.
 - b. That the tenant was not aware that the matter was coming up for hearing since she had not been notified of the same.
 - c. That the tenant only became aware that the matter had been dismissed when she visited the registry.
 - d. That it is in the interest of fairness and justice that this matter be heard on merits.

The Landlord's replying affidavit

3. The landlord's affidavit sworn on 23.10.2023 may be summarized as follows:-



- a. That this matter was dismissed by court for want of prosecution and especially given that this matter has been pending for more than five years with no action taken.
- b. That the tenant has conceded the following facts;
 - i. That she vacated the premises a long time ago and the same has been let to another tenant, hence disturbing the current status quo with effect to the current tenant.
 - ii. That the tenant vacated the suit premises with rent arrears amounting to Kshs. 300,000/=.
 - iii. That the Tribunal issued orders of vacant possession in BPRT Case No. 215 of 2019 and there has been no appeal against the same.
- c. That the Tribunal's orders were lawful and procedural because the tenant failed to file a reference.
- d. That the Respondent after obtaining the orders mentioned above, let out the suit premises to a third party and there does not therefore exist a landlord/tenant relationship between the parties.

The Tenant's supplementary affidavit

4. The tenant's supplementary affidavit may be summarized as follows:-
 - a. That this case started in the year 2018 when the Respondent's agent refused to accept the tenant's rent.
 - b. That after refusing to accept rent, the Respondent sent auctioneers to levy distress prompting the tenant to file these proceedings.
 - c. That inspite of the existence of a valid court order, the Respondents agents demolished part of the tenant's premises and removed some of her items to an unknown destination.
 - d. That the Respondent obtained orders for vacant possession in BPRT Case No. 2015 of 2019 but the said orders were set aside.
 - e. That the tenant does not owe the Respondent any rent arrears.

Analysis and determination

5. The issues that arise from the pleadings herein and which I have to determine are the following;-
 - a. Whether there exists a landlord/tenant relationship between the parties herein and whether therefore, the Tribunal has the jurisdiction to hear and determine this dispute.
 - b. Whether, if the court has the jurisdiction to hear this matter, the tenant is entitled to the orders sought in her application.

Issue A

6. The Respondent's position is that there does not exist a landlord/tenant relationship between the parties for the reasons that the Respondent obtained orders of vacant possession in BPRT Case No. 215 of 2019 and to which there has been no appeal. The Respondent has further stated that the suit premises has already been given out to a third party and in proof thereof, the Respondent has annexed a lease agreement between himself and one Ms. Dolvine Kamonde. The Respondent has



annexed to his affidavit a letter from the Tribunal confirming that the tenant did not file any reference to oppose the landlord's notice dated 21.6.2019 and effective from 1.9.2019. I have also seen annexed to the Respondent's affidavit an order from the Magistrates court in Mombasa authorizing M/S Sure Auctioneers to levy distress for rent arrears. I have also seen a copy of the orders issued by the Tribunal on 22.8.2019 granting vacant possession to the Respondent and ordering for the eviction of the tenant.

7. The tenant has deponed in his affidavit that he contested the orders in BPRT Case No. 215 of 2019 and obtained orders of stay. The tenant has annexed to her affidavit the orders she obtained in the said case. The orders read as follows;-
 1. The orders issued on 22.8.2019 are stayed pending the hearing and determination of this application.
 2. The landlord/Applicant either by himself his servants and/or agents is restrained from evicting and/or in any other manner interfering with the tenant/Respondent's occupation of the landlord/Respondent's business premises.
 3. Costs in the cause.
 4. Hearing on 12.11.2019 at Mombasa Law Courts
8. It is not clear as to what happened to the application in BPRT Case No. 215 of 2019 as none of the parties have volunteered any information. It cannot be told therefore what the eventual outcome of the application was.
9. The tenant has not disputed that she is no longer in the suit premises. Her position seems to be that she was illegally evicted when the Respondent obtained orders from the Magistrates court in Mombasa as a consequence of which part of the suit premises was demolished. The tenant has also deponed that there is no tenant in the suit premises and the agreement is a manipulation for the Tribunal to favour the Respondent. I do not think it is sufficient for the tenant to challenge the written lease agreement exhibited by the Respondent on the grounds that the agreement is a manipulation. If indeed it is true as the tenant suggests that there is no tenant in the suit premises, the tenant was obligated to adduce more evidence than just a statement that the lease agreement is manipulative and mean to hoodwink the Tribunal to issue orders in favour of the Respondent.
10. On the basis of the material placed before the Tribunal, I am convinced and I do find that the tenant is no longer in the suit premises and that further, the Respondent has already let out the premises to a third party and the status as far as the suit premises is concerned has materially changed. In the circumstances, the Tribunal does not have the jurisdiction to upset that status by ordering for the reinstatement of the tenant back into the suit premises. The tenant having left the premises and the suit premises having already been given to another tenant as evidenced by the lease agreement exhibited by the Respondent, there does not exist any landlord/tenant relationship between the parties herein. Consequently, the Tribunal lacks the jurisdiction to hear and determine this matter.
11. While dealing with the question of the Tribunal's jurisdiction to reinstate a dispossessed tenant, the High Court in the case of; *Re Hebtulla Properties Ltd* [1979] eKLR stated as follows:-

“the recovery of possession must have meant and means recovery of possession by and not from the landlord. The legislature deemed it necessary to empower the Tribunal to order recovery of possession by the landlord. If the reverse had been intended, it would have been expressly provided since the intention of the Act is to protect tenants. In my opinion, it is therefore clear that Parliament never intended that the Tribunal should have power to order recovery of possession by a tenant where such possession has been seized by a



landlord and it never gave that power to the Tribunal. That power cannot be implied. In the premises, forcible taking of possession is not a matter within the area of jurisdiction of the Tribunal and that being the case, the Tribunal cannot investigate any complaint about forcible possession of premises by a landlord, such a matter being for the courts. I find that the complaint was outside the area of jurisdiction of the Tribunal, jurisdiction was wanting.”

12. In similar vein, therefore, the Tribunal in the instant case has no jurisdiction in this matter, the landlord having already taken possession of the premises in the manner described in the foregoing paragraphs.

Issue B

13. Having already found that the Tribunal no longer has the jurisdiction to hear this matter, it would be an academic exercise to determine whether or not the tenant is entitled to the orders sought in her application.
14. But for the record, I do note that BPRT Case No. 251 of 2019 was last in court in the year 2019 specifically on 12.11.2019. The parties have never taken any steps in that matter since then and the tenant’s application dated 2.10.2019 remains unprosecuted. The other suit mentioned by the tenant, BPRT Case No. 6 of 2019, was on 19.11.2019 stayed pending the hearing and determination of Mombasa ELC Case No. 413 of 2019. The outcome of the ELC Case remains unknown. The record for the instant case shows that the parties were absent from court on 16.9.2021, 4.10.2021, 4.11.2021, 15.6.2022, 26.10.2022 and 15.10.2023. I do not think that even if I had found I had the jurisdiction to hear this case, I would have exercised my discretion in favour of the tenant. The substratum of this suit has been completely eroded and the tenant can now only seek redress (if any) in the civil courts.
15. Consequently, and for the above findings, I do not find any merits in the tenant’s application dated 23.8.2023 and the same is hereby dismissed with no orders as to costs.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 21ST DAY OF NOVEMBER 2023.

HON. CYPRIAN N. MUGAMBI

CHAIRPERSON

