



**Nyaguthii v Mbogori (Tribunal Case 46 of 2019)
[2024] KEBPRT 784 (KLR) (4 June 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 784 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE 46 OF 2019
A MUMA, MEMBER
JUNE 4, 2024**

BETWEEN

JACKLINE NYAGUTHII APPLICANT

AND

JOYCE KARIMI MBOGORI RESPONDENT

RULING

A. PARTIES AND REPRESENTATIVES

1. The Applicant, Jackline Nyaguthii, is the Tenant herein who rented space which is located at Kiiirua Market, Meru (the “suit premises”) for purposes of carrying out business activities (“the Tenant”).
2. The firm of Kithinji Kirigiah & Co. Advocates represents the Tenant in this matter.
3. The Respondent, Joyce Karimi Mbogori, is the registered owner of the suit premises and the Landlady who rented out to the Tenant (“the Landlady”).
4. The firm of Muchomba Law Advocates represents the Landlady in this matter.

B. THE DISPUTE BACKGROUND

5. The Tenant moved this Honourable Tribunal vide a Reference and Application evenly dated 18th October 2019 on the ground that the Landlady denied her right to access the suit premises on 7th October 2019.
6. On 22nd October 2019, the Tribunal considered the Tenant’s Application and certified the matter as urgent thereby granting restraining orders against the Landlady. The Tribunal also ordered the Landlady to open the suit premises failure which the Tenant was permitted to break in and gain access of the suit premises and thereafter deduct expenses incurred from his future rent liability.



7. Following this, the Landlady filed a Notice of Preliminary Objection dated 18th November 2019, seeking to have the suit struck out on the basis that the suit is incompetent and bad in law as it offends the provisions of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*.
8. During the hearing on 19th November 2019, the Tribunal confirmed its previous orders issued on 22nd October 2019. The Tenant was present. However, neither the Landlady nor her advocate was present. Further, the Landlady was ordered to pay Kshs. 20,000/= as costs to the Tenant failure to which execution shall be issued.
9. Aggrieved by the decision, the Landlady filed an Application dated 25th November 2019 seeking orders to set aside orders dated 19th November 2019 on the grounds that she was allegedly not served with the Tenant's Application which was summarily allowed in her absence.
10. On 27th November 2019, the Tribunal certified the Landlady's Application as urgent and ordered the Tenant to be served before hearing on 19th December 2019.
11. In response to the Landlady's Application, the Tenant filed a Replying Affidavit dated 16th December 2019 through her advocates.
12. During the hearing on 19th December 2019, the Tribunal directed that the Landlady's Application dated 25th November 2019 shall be canvassed through submissions. Consequently, the matter was scheduled for Ruling on 11th February 2020.
13. However, ruling was not delivered and the matter stood pending since 2020 until 29th April 2024 when the Tribunal set down the matter for Ruling on 4th June 2024.
14. It is in respect of the Landlady's Application dated 25th November 2019 that is the subject of this ruling.

C. TENANT'S CLAIM

15. The Tenant avers that the Landlady locked down the suit premises on 7th October 2019 without proper notice thus denying the Tenant access of her tools for trade.
16. In paragraph 3 of the Replying Affidavit, the Tenant avers that the Landlady's Application dated 25th November 2019 is full of falsehoods. Further, the Tenant alleges that the Landlady is in blatant breach of the orders issued on 19th November 2019 to deserve mercy.
17. To rebut the Landlady's claim, the Tenant avers under paragraph 10 of her Replying Affidavit that failure of the Landlady's advocate to attend the hearing is without basis since no logical reason has been provided to justify non-attendance by the Landlady in person.
18. Despite alleging service to the Landlady with orders dated 19th November 2019, the Tenant avers that the Landlady declined to comply and thereafter placed other padlocks on the suit premises.
19. The Tenant asserts that the Landlady failed to defend Tenant's Application thus the Landlady's attempt to set aside orders is an afterthought.

D. LANDLADY'S CLAIM

20. In response, the Landlady admits in her Supporting Affidavit that the Tenant only furnished her with a copy of the orders from the Tribunal. Resultantly, the Landlady confirms compliance under paragraph 4 of the Supporting Affidavit. However, she denies that the Tenant failed to serve the application upon the Landlady.



21. Under paragraph 6 of the Supporting Affidavit, the Landlady states that she filed a Preliminary Objection through her advocates in response to the Application.
22. The Landlady submits that the hearing notice was too short thus occasioning failure by her advocates to attend in good time. The Landlady's advocate prays that failure to attend court on their part should not be revisited on the Landlady as the innocent client.
23. The Landlady alleges under paragraph 12 of her Supporting Affidavit that the Tenant is in rent arrears whose amounts exceeds Kshs. 20,000/=. Therefore, the Landlady submits that condemning the Landlady to pay Kshs. 20,000/= as costs would amount to double jeopardy.
24. The Landlady avers that condemning the Landlady unheard contravenes the Rules of Natural Justice. Therefore, the Landlady prays that the orders delivered on 19th November 2019 be set-aside and the Tribunal be pleased to reinstate the Tenant's Application dated 18th November, 2019 for hearing and determination.

E. JURISDICTION

25. The jurisdiction of this Honourable Tribunal is not disputed by the parties.

F. ISSUES FOR DETERMINATION

26. Upon consideration, I find that the sole issue for determination is:

1. Whether the Tribunal has authority to vary and/or set aside its orders dated 19th November 2019

G. ANALYSIS AND FINDINGS

27. The Landlady filed an Application dated 25th November 2019 seeking to vary and/or set aside the orders dated 19th November 2019 issued in favour of the Tenant for reinstatement of Tenant's Application pending hearing and determination.
28. Section 12 of the *[Landlord and Tenant Shops Hotels and Catering Establishments Act](#)* Cap 301 Laws of Kenya (hereinafter "the Act") provides for the powers conferred to the Tribunal by the Act as follows:
 - (i) to vary or rescind any order made by the Tribunal under the provisions of this Act;
29. Further, Order 45 Rule 1 of the *[Civil Procedure Rules](#)* provides:

Any person considering himself aggrieved—

 - (1)
 - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain



a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

30. In light of the above, the Tribunal is satisfied that it has the power and discretion to vary or rescind its orders previously issued in tandem with the Act.
31. Having established this, the Tribunal makes reference to the decision in *Patel v E.A Cargo Handling Services Ltd* [1974] EA 75 at 76 where Duffus P held:

“ the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. “
32. Similarly, the court in *Shah v Mbogo & another* (1967) EA 116 stated that:

“ ...the court’s discretion to set aside a judgement is intended to be exercised to avoid injustice or hardship, resulting from accident, inadvertence or excusable mistake or error but not to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”
33. From the authorities above, the Tribunal has a duty to ensure that the discretion conferred under Section 12 of the Act does not amount to injustice as a result of inadvertence or excusable mistake. Accordingly, the Tribunal is of the view that failure by the advocate to attend court on behalf of a party is an excusable mistake which amounts to a procedural technicality. As such, absence of the advocate during a hearing does not go to the root or the substance of the matter.
34. Consequently, I am convinced that this mistake is curable under Article 159 (2)(d) of the Constitution of Kenya, 2010. Additionally, this Tribunal is obliged under Article 50 of the Constitution of Kenya, 2010 to observe and uphold the Rules of Natural Justice and in particular, to hear and determine each case on its merit. No litigant should be driven from the seat of justice without a hearing however weak their case may be.
35. Based on this, justice demands that the Landlady be accorded an opportunity to plead her case before being condemned to pay costs as ordered.
36. Subsequently, the main question for review is whether the Landlady has raised any triable issues. The Landlady alleges in paragraph 12 of the Supporting Affidavit that the Tenant is in rental arrears whose amounts exceed the sum ordered in favour of the Tenant in the sum of Kshs. 20,000/=.
37. With respect to service, the Landlady alleges that they were not served with the Tenant’s Application which is the subject of the decision for review. In light of this fact, I have perused the court file and established that indeed, there is no affidavit of service on record as proof of service to the opposing party. In light of the foregoing, I am satisfied that the Landlady raises triable issues which are best determined on merit.

ORDERS

38. In the upshot, the Landlady’s Application dated 25th November 2019 is hereby Allowed.
 - i. Each party to bear their own costs.
 - ii. There being no interest shown on the file by parties the file is closed.

**RULING DATED DELIVERED AND SIGNED AT NAIROBI ON THIS 4TH DAY OF JUNE 2024
IN THE ABSENCE OF THE PARTIES.**



HON. A MUMA

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

