



Décor Pebbles Ltd v Ontulili Investments Limited & 2 others (Tribunal Case E232 of 2021) [2023] KEBPRT 1026 (KLR) (17 November 2023) (Ruling)

Neutral citation: [2023] KEBPRT 1026 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E232 OF 2021
A MUMA, AG. CHAIR
NOVEMBER 17, 2023**

BETWEEN

DÉCOR PEBBLES LTD APPLICANT

AND

ONTULILI INVESTMENTS LIMITED 1ST RESPONDENT

PYRAMID AUCTIONEERS LIMITED 2ND RESPONDENT

VILLA CARE LIMITED 3RD RESPONDENT

RULING

A. Parties and their Representatives

1. The Applicant, Décor Pebbles Limited, is the tenant in the suit premises known as the Titan Building (hereinafter known as the ‘Tenant’).
2. The firm of Gakahu & Rosana Advocates represents the Tenant (info@gnlegal.online).
3. The 1st Respondent is the Landlord in the suit premises, rented out space to the tenant for business purposes.
4. The 2nd and 3rd Respondents are the auctioneer and Agent in respect of the suit premises.
5. The 1st, 2nd & 3rd Respondents are all represented by the firm of T.N Ogwoka & Osili Advocates (legal@ogwokaandosili.com).

B. The Disputes Background

6. On June 22, 2021, the Tenant moved this Honourable Tribunal vide a Reference dated June 22, 2022 and Notice of Motion under certificate both of even date.



7. The Tenant sought among other Orders that pending hearing and determination of the suit the 1st, 2nd & 3rd Respondents be restrained from levying distress, proclaiming and/or interfering with the Tenant's quiet possession, they be restrained from evicting the tenant and that this Tribunal do order for reconciliation of the accounts between the parties.
8. Vide an Order dated June 25, 2021, this honourable Court directed that the application be served for interpartes hearing.
9. On July 7, 2021, when the Application came up for interpartes hearing, this honourable Court ordered that there be stay of attachment and sale of the Tenant's property and that the tenant to clear their rent arrears by depositing sum of Kenya Shillings 200,000.00.
10. On August 16, 2023, the Landlord moved this honourable Court vide a Notice of Motion under certificate of urgency both dated 16th August 2023.
11. They sought among other Orders that the Orders of this Tribunal dated 8th July 2021 be vacated and that the Tenant be compelled to settle the rent arrears in the tune of Kshs 3,224,895.00 failure to which the Landlord to be at liberty to distress.
12. Vide an Order dated August 24, 2023, this Tribunal ordered among others that the Tenant pay Kshs 1,500,000 on or before the hearing date that was to follow.
13. The Tenant filed a Replying Affidavit dated 31st August in respect thereof.

C. Tenant's Case

14. The Tenant contended that the Landlord and the estate agent refused to provide invoice when in need.
15. The Tenant further deponed that there was a mutual understanding between the Tenant and the Landlord that the rent be paid on demand i.e upon issuance of invoice.
16. It is the Tenant's case that the landlord has never availed the invoices requiring for their settlement.
17. Further, the Tenant deposed that there was an intent from the Landlord and Estate Agent to evict the Tenant which explained their deliberate failure to submit invoices as and when rent is due for payment.

D. Landlord's Case

18. The landlord deponed that the Tenant is in arrears and has refused to settle the accrued rental arrears.
19. It is the Landlord's case that the Tenant has deliberately failed to comply with the Orders of this Tribunal, in particular, an order directing that the Tenant continue paying rent as and when they felt due.
20. Further, that the Landlord should be allowed to proceed with the attachment and sale of the Respondents goods to recover the rental arrears currently in the tune of Kshs 3,224,895.00.

E. Issues for Determination

21. I have carefully perused all the pleadings and evidence presented before this honourable Court by the parties. It is therefore my respectful finding the two issues that fall for determination by this Tribunal are: whether the tenant is in rent arrears and whether application dated 16th August 2023 is merited?



Whether the tenant is in rent arrears

22. It is now judicially settled and previously so held by this Tribunal, that a party claiming rent arrears can only convince the honourable conscience of the Court, if receipts, authentic and accountable rent statement is provided.

23. In the case of *Michael Kabuga Njikari Vs. Esther Njeri Njugi*, this honourable Tribunal while faced with similar facts rendered thus:

“26. It is trite law as judicially been settled by various Courts that evidence of payment of rent shall be in form of receipts. “

24. In the present case before me, the Landlord claims that the Tenant is in rent arrears. The tenant admits to be in rent arrears however disputes the tune of arrears put forth by the Landlord.

25. It is in the mind of this Tribunal that on 4th September 2023, this matter coming up for hearing, the Tribunal in bid to ascertain whether or not the Tenant was in deed in arrears and to what extent, directed both parties to file rent statement of account.

26. Accordingly, both the tenant and the Landlord filed their rent statement of accounts.

27. I have a chance to critically analyze statements of rent payment by both parties and shall analyze each below.

28. As per Tenant’s statement, the tenant claims to have paid rent in excess of Kshs 860,871.60. On the other hand, the Landlord statement indicates that the tenant is in rent arrears in tune of Kshs 3,534,389.00.

29. It is imbued in the law of evidence that he who asserts must prove. In particular, section 107 of the *Evidence Act* provides as follows:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

30. The tenant’s rent statement is a mere computation of rent amount claimed to have been paid by themselves. It is my respectful finding that, the only way the Tenant would prove payment of the displayed figures would be by production of approved bank receipts or approved Mpesa statements or proof of payment using any other recognized mode. In the upshot, I find that the statement as is, lacks probative value, I shall therefore distance it from the merit or otherwise of the instant issue.

31. On the other hand, the Landlord attached rent statement of account indicating that the Tenant had accumulated rent arrears to the sum of Kshs 3,534,389.00.

32. Nothing has been adduced before this Honourable Tribunal to competently challenge or successfully dispute the said arrears. The Tenant has had a chance to provide proof of payment of all his arrears. Be that as it may, the mind of this Tribunal is hereby put to rest and convinced that the rent arrears as is in the Landlord’s rent statement of account, is a true reflection of the rent accounts of the parties herein.

Whether application dated August 16, 2023 is merited

33. This application was filed by the Landlord against the Tenant pursuant to this Tribunal’s Orders issued on July 9, 2021.



34. The Landlord in this application sought the Tribunal to set aside its Orders issued on July 8, 2021 where the Landlord was restrained from interfering with the quiet possession of the suit premises. The Tenant on the other hand was correspondingly directed to settle rent arrears and continue rent as and when it falls due.
35. The application allegedly precipitates from the inaction by the Tenant to prosecute his reference to this Court and failure to make good his rent arrears.
36. In substance, the Landlord requests for break in Orders and permission to proceed with levy of distress through attachment and sale of the Tenants goods.
37. Cap 301 gives this Tribunal authority to grant orders of distress for rent. That authority must however not capriciously exercised. This Tribunal must satisfy itself that threshold for allowing distress has been met.
38. In the present case therefore, it is imperative that since the Tenant is in rent arrears in the tune stated at paragraph 31 of this Ruling, that right should be deemed due to the Landlord.
39. Despite the foregoing, this Tribunal wishes to recognize the subsisting tenancy relationship between the parties herein, which relationship has not been disputed.
40. In the Upshot, the Landlord's Application dated August 16, 2023 is partially merited in the following terms as directed in the Orders.

F. Orders

41. The Landlord's Application dated August 16, 2023 is partially allowed:
The Orders of this Tribunal issued on July 9, 2021, are discharged with the following adjustments
 - a. Tenant to defray outstanding arrears of Kshs 3,534,389.00 on or before December 30, 2023.
 - b. The Tenant to continue paying rent as and when it falls due
 - c. In default, Landlord at liberty to break in and distress to recover the rent arrears more specifically the prayers in the application dated June 16, 2023 are allowed as prayed.
 - d. Each party shall bear their costs.
 - e. The said orders settle the reference in similar terms

RULING DATED, SIGNED AND DELIVERED VIRTUALLY BY HON. MUMA THIS 17TH DAY OF NOVEMBER 2023 IN PRESENCE OF ROSANA FOR THE TENANT AND KAGEHA HOLDING BRIEF FOR NYAMANGUA FOR THE LANDLORD.

HON A. MUMA

AG CHAIR/MEMBER

BUSINESS PREMISES RENT TRIBUNAL

