



**Jambo Caterers Limited v Care for Care Limited & another (Tribunal Case E1104 of 2022) [2023] KEBPRT 361 (KLR) (Civ) (22 May 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 361 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
CIVIL  
TRIBUNAL CASE E1104 OF 2022  
A MUMA, VICE CHAIR  
MAY 22, 2023**

**BETWEEN**

**JAMBO CATERERS LIMITED ..... TENANT**

**AND**

**CARE FOR CARE LIMITED ..... 1<sup>ST</sup> LANDLORD**

**JOSEPH KIMANI ..... 2<sup>ND</sup> LANDLORD**

**RULING**

**a. Parties and Their Representatives**

1. The Applicant is the tenant of the suit premises in this matter, who runs a bar and restaurant situated on the parcel of land known as Grant No. L.R 21905 at Industrial Area (hereinafter the “Tenant”).
2. The firm of Otwal & Manwa Associates Advocates represents the Applicant in this matter.
3. The Respondent is the landlord and owner of the suit premises Grant No. L.R. 21905 at Industrial Area rented out to the tenant (hereinafter the “Landlord”).
4. The firm of Wilfred K. Babu & Co. Advocates represents the Respondent in this matter.

**b. The Dispute Background**

5. The Tenant and Landlord entered into lease agreements dated 23<sup>rd</sup> December 2013, 8 January 2014 and 10<sup>th</sup> January 2014 respectively. Pursuant to the three aforesaid agreements, the Landlord agreed to lease spaces in the suit premises to the Tenant, at a total monthly rent of Kenya Shillings One hundred and five thousand (Kshs. 105,000.00).



6. The present dispute concerns the rented space pursuant to the lease agreement dated 10<sup>th</sup> January 2014. The Tenant issued the Landlord with a demand letter dated 24<sup>th</sup> March 2020, disputing the Landlord's allegation that the Tenant was in electricity arrears. Further, the Tenant demanded, inter alia, that the Landlord immediately reconnects the electricity supply to the Tenant's premises and assumes responsibility for the electricity arrears cited by the Kenya Power and Lighting Company.
7. On 9<sup>th</sup> November 2021, the Tenant moved this Tribunal by way of Reference and a Notice of Motion Application under Certificate of Urgency in Case No. E663 of 2022 and the complaint therein concerned the Landlord's termination of supply of electricity to the suit property and closure of access to the main switch.
8. The Tenant sought among other orders, that pending the hearing and determination of the Application herein, the Respondent/employees/servants be compelled to switch on the electricity supply from the main switch and/or open the business premises unconditionally and allow the Tenant to continue occupying the business premises and carry out her business without any threats and/or conditions.
9. The Tribunal pronounced itself with regards to the above-mentioned matter vide a Ruling dated 26<sup>th</sup> September 2022 wherein it dismissed the Tenant's Reference and Application.
10. In addition to dismissing the reference the Tribunal also accorded the Landlord the liberty to distress for rent.
11. The current suit was instituted by the Tenant vide a Reference and a Notice of Motion Application under Certificate of Urgency dated 23<sup>rd</sup> November 2022 under section 12(4) of the [Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#) cap 301. The tenant was seeking orders that the Landlord be compelled to allow the tenant to continue occupying the premises as well as that the respondents be restrained from auctioning and selling the attached property.
12. The matter came up for hearing before the Tribunal on 29<sup>th</sup> November 2022 where the Tribunal gave orders compelling the landlord to grant access to the tenant and restraining them from selling of the property they had attached.
13. In response to the Tenant's application, the respondents filed an application dated 5<sup>th</sup> December 2022 requiring that the orders issued on 29<sup>th</sup> November be set aside for reason that there was material non-disclosure of fact by the tenant.
14. The Respondents have also filed a Preliminary Objection dated 11<sup>th</sup> January 2023 on the grounds that the present suit is res judicata having already been determined in Case No. E663 of 2022.

#### **c. Jurisdiction**

15. The jurisdiction of this Tribunal is not in dispute.

#### **d. The Tenant/applicant's Claim**

16. The Tenant Filed A Reference And a Notice of Motion application under Certificate of Urgency and supporting affidavit dated 23<sup>rd</sup> November 2022 which pleadings form the basis of this claim.
17. The Tenant obtained restraining orders as against the Respondents on 29<sup>th</sup> November 2022 restraining them from auctioning and selling the property of the Tenant pending the hearing of the application inter partes.



18. The Tenant has also filed an Application dated 29<sup>th</sup> March 2023 seeking to stay the orders issued by the Tribunal on 10<sup>th</sup> March 2023 which granted the Respondents the liberty to distress for rent.

**e. The Landlord/Respondent's Claim**

19. The Respondent filed a Notice of Motion application dated 5<sup>th</sup> December 2022 requiring that the orders issued by the Tribunal on 29<sup>th</sup> November be set aside for reason that there was material non-disclosure of facts by the tenant.
20. The Respondents have also filed a Preliminary Objection dated 11<sup>th</sup> January 2023 on the grounds that the present suit is res judicata having already been determined in Case No. E663 of 2022.

**f. Issues for determination**

- a. Whether the distress conducted by the landlord was lawful?
- b. Whether the issues raised by the Tenant amount to Res Judicata?

**g. Analysis and Determination**

**a. Whether the distress conducted by the landlord was lawful?**

21. Having already dealt with this matter in the previous matter E663 of 2022, the Tribunal is familiar with the relationship between the parties and shall therefore proceed to deal with the crux of the current reference.
22. The lease agreement between the parties was entered into on 10<sup>th</sup> January 2014 for a term of five years three months. As per the said term, the lease was to expire in April 2019. I have perused the file and I observe that upon the lapse of the said term, the parties did not enter into another written agreement.
23. As such the tenancy devolved into an unwritten tenancy which suffices as a controlled tenancy as defined under section 2(1)(a) of CAP 301. Going by this, any actions taken in relation to the tenancy should be in accordance with the provisions of the Act.
24. Section 12(h) accords this Tribunal the power to allow a landlord to levy distress for rent. As such, prior to levying distress, the landlord must seek leave of the Tribunal.
25. In the present case, the tenant's reference seeks to have the landlord restrained from auctioning and selling the tenant's property.
26. According to the Ruling delivered on 26<sup>th</sup> September 2022 order C provided that;
- Issue of arrears- Tenant ought to pay rent as and when it falls due failure to which the landlord is at liberty to distress and/or apply to the Tribunal for reliefs available to him under cAP 301
27. The main issue in the previous suit was with regards to the tenant's electricity bill arrears. The Tribunal held that the Tenant was to clear their arrears and sort out the connection issues with KPLC.
28. In the current suit, in their application dated 24<sup>th</sup> November 2022 the tenant is seeking orders to have the landlord restrained from auctioning or selling their attached property and that the landlord be restrained from levying distress.



29. In response the Landlord has filed a Preliminary Objection and avers that the present suit is Res Judicata. This is premised on the grounds that the previous suit in E663 of 2022 involved the same parties and raised the same issues, being the issue on rent arrears.
30. Before addressing the issue on Res Judicata, this Tribunal deems it fit to address the question on the levying of distress by the Landlord. According to the aforementioned Ruling delivered on 26<sup>th</sup> September 2022, this Tribunal through order C accorded the Landlord the liberty to distress for rent in the event that the tenant was in default.
31. At the time when the landlord carried out the distress, the above ruling had neither been appealed against or orders given to review, stay or set aside the orders granted. As a result, the said orders remained in force and the landlord was exercising their right as granted by the Tribunal.
32. In light of this, I find that the process of levying distress by the landlord was carried out lawfully.
33. With regards to the question of the current suit being Res Judicata as highlighted by the Landlord the Tribunal shall analyze the facts and issues in the previous suit as well as those in the current suit. Both parties are in agreement that indeed the parties to the suits are the same and that is not in dispute.
34. The main issue in E663 of 2022 as highlighted earlier, was in relation to disconnection of electricity. While the main issue in this suit is in relation to rent arrears whereby the landlord has attached the tenant's goods in an attempt to levy distress for rent.
35. Section 7 of the [Civil Procedure Act](#) cap 21 provides that:
- “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”
36. In the case of [Kennedy Mokua Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende](#) [2022] eKLR was stated that;
- According to Black Law Dictionary 10th edition, res judicata means- An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”
37. I have perused the documents presented and will proceed to evaluate the three essentials as presented in the case above to determine whether the current suit suffices as being res judicata.
38. First, we have already established that the suit is between the same parties, I shall therefore proceed to analyze the issues raised in the suit.
39. In the lease agreements between the parties, Clause 3 speaks to the obligations of the Tenant. Clause 3 (a) and (b) speak to the fact that the tenant is expected to pay rent as outlined in the earlier provisions of the agreement and also that the tenant is expected to pay all the electric lighting and water charges.
40. It is my finding that both clauses speak to what is expected of the tenant, regardless of the distinction between rent and electricity, the two are obligations of the tenant. Additionally, in determining the issues in E663 of 2021, the Tribunal addressed itself to both issues, being rent as well as electricity.



41. The order requiring the tenant to pay rent when it falls due failure to which the landlord would be at liberty to distress for rent spoke to the future obligation of the tenant to pay rent. It also gave directions as to what recourse would be available to the landlord in the event the tenant defaulted.
42. As highlighted earlier the said orders have not been appealed against, set aside or reviewed and hence remain in force. Asking the Tribunal to pronounce itself again on the matter would indeed amount to res judicata. What is expected from the previous ruling is that the tenant is supposed to fulfill their obligation to pay both rent and electricity as and when the obligation arises.
43. Consequently, I am persuaded to agree with the Landlord that this matter is indeed Res Judicata having already given orders to the same issues.

#### **h. Orders**

- a. The upshot is that the Landlord's Preliminary Objection dated 11<sup>th</sup> January 2023 is hereby upheld.
- b. The Tenant/Applicant's Reference and Notice of Motion application dated 24<sup>th</sup> November 2022 are hereby struck off for being Res Judicata.
- c. Each party shall bear their own costs.

**HON A. MUMA**

**VICE CHAIR**

**BUSINESS PREMISES RENT TRIBUNAL**

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY BY HON A. MUMA THIS 22<sup>ND</sup> DAY OF MAY 2023 IN THE PRESENCE OF CHUMO HOLDING BRIEF FOR MANWA FOR THE TENANT AND IN THE ABSENCE OF THE LANDLORD.**

**HON A. MUMA**

**VICE CHAIR**

**BUSINESS PREMISES RENT TRIBUNAL**

