



**Nderitu & another (Both t/a Gatuhi & Onyare Associates) v Registered Trustees of Sheikh Fazal Ilahi Noordin Charitable Trust & another (Tribunal Case E075 of 2023) [2023] KEBPRT 420 (KLR) (Civ) (19 July 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 420 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
CIVIL  
TRIBUNAL CASE E075 OF 2023  
A MUMA, MEMBER  
JULY 19, 2023**

**BETWEEN**

**MICHAEL NDERITU ..... 1<sup>ST</sup> APPLICANT**

**ISAAC MOSE ..... 2<sup>ND</sup> APPLICANT**

**BOTH T/A GATUHI & ONYARE ASSOCIATES**

**AND**

**THE REGISTERED TRUSTEES OF SHEIKH FAZAL ILAHI NOORDIN  
CHARITABLE TRUST ..... 1<sup>ST</sup> RESPONDENT**

**MAMALO AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**A. Parties and Representatives**

1. The applicants Michael Nderitu & Isaac Mose both trading in the name and style of Gatuhi & Onyare Associates are the tenants and rented space (office number 200, New Wing, 2<sup>nd</sup> Floor located at Shankardass House) for the business in the suit property (hereinafter known as the ‘Tenant’).
2. The firm of Gatuhi & Onyore Advocates represents the Tenant in this matter. gatuhionyare@gmail.com
3. The 1<sup>st</sup> respondent the Registered Trustees of Sheikh Fazal Ilahi Noordin Charitable Trust is the is the Landlord and rented out space to the tenant for the business in the suit property (Hereinafter known as the ‘Landlord’)



4. The firm of S.N Thuku & Associates Advocates represents the Landlord in this matter. snthukuandassociates@gmail.com

## **B. The Dispute Background**

5. The tenant moved this tribunal by way of reference dated January 24, 2023 and a Notice of Motion application of even date. The tenant sought among others, orders to restrain the Landlord from repossessing, attaching, interfering, alienating or otherwise disposing of tenant's movable properties and an order to stay attachment of the tenant's property.
6. The Tenant filed a reference and Notice of Motion Application dated January 24, 2023 and was granted injunctory orders
7. Vide an Order of this Tribunal issued on January 27, 2023, this honorable Tribunal restrained the Landlord and/or his agent from repossessing, attaching, interfering, alienating or otherwise disposing of tenant's movable properties until when the application was heard and determined and stayed attachment of the Tenant's movable property slated for February 1, 2023.
8. The landlord filed a replying affidavit dated March 29, 2023.

## **C. Tenant's Case**

9. The Tenant deponed that the landlord has failed to provide proper and accurate records for rent payments.
10. It is their case that their movable property has been wrongfully proclaimed pursuant to an illegal notice dated and issued by the 2<sup>nd</sup> respondent on the January 18, 2023.
11. They further deposed that they solely rely upon the proclaimed movable properties which assist them to raise money to pay rent and fend for other daily needs.

## **D. 1st and 2nd Respondents' Case**

12. The Landlord deponed that he provides a rent statement of account to every tenant in the suit property.
13. He stated that the tenant has never raised any query in the amounts appearing on the statement.

## **E. Jurisdiction**

14. There is no dispute as to the jurisdiction of this Court.

## **F. Issues for Determination**

15. I have carefully perused all the pleadings and evidence presented before this honourable court by the parties. It is therefore my respectful finding the sole issue that fall for determination by this Tribunal is whether proclamation and the intended attachment of the Tenant's movable property is valid.

## **G. Analysis And Findings**

16. The issue of whether proclamation and the intended attachment of the Tenant's movable property is valid shall be dispense with in two limbs as follows: whether the tenant is in rent arrears; and whether the Landlord can proclaim tenant's movable property without the order of this Tribunal.

a. Whether the tenant is in rent arrears



17. The Tenant at paragraphs 8 & 9 of their supporting Affidavit dated January 24, 2023 and sworn by Isaac Mose admitted to be in rent arrears (KShs 172,632.00). They however disputed the amount of arrears fronted by the Landlord as KShs 231,757.60) in their proclamation notice.
18. I note that the Tenant filed various copies of receipts of rent payments in the following manner:

No.	Date of Payment	Amount Paid (KSh)
1.	4 <sup>th</sup> April 2022	40,000.00
2.	4 <sup>th</sup> April 2022	40,000.00
3.	7 <sup>th</sup> June 2022	40,000.00
4.	8 <sup>th</sup> July 2022	40,000.00
5.	8 <sup>th</sup> August 2022	35,000.00
6.	29 <sup>th</sup> September 2022	70,000.00
Totals		265,000.00

19. The above payment has not been disputed by the Landlord. It is trite law as previously settled by various Courts that evidence of payment shall be form of receipts. In lieu of challenge of the receipts produced before this Tribunal as evidence of rent payment, this Tribunal therefore considers the said payment to have been made duly and received by the Landlord as the rent.
20. However, the above receipts of rent payments do not reveal the amount of rent arrears owed by the Tenant as stated in their case.
21. On the other hand, the Landlord in their Replying Affidavit dated March 29, 2023 and sworn by Benard Mutua Muthuka deposed at paragraph 3 that the tenant is in rent arrears of an amount equal to KShs. 231,757.60.
22. From the above, it is evident that the tenant is in rent arrears for the suit property. The same has been admitted by both parties. The egress of their unity in mind is the amount owing in terms of the rent arrears.
23. In determining the amount owed by the tenant to the Landlord as rent arrears, I have made a comparison of the statement of rent payment filed by the tenant and the statement of rent account filed by the Landlord. I have also considered the rent arrears in admittance by the tenant. They are as follows:
- Tenant admitted to be in rent arrears amount equal to KShs. 172,632.00.
  - Amount paid by the Tenant as per the undisputed receipts of rent payment is KShs. 265,000.00
  - Rent arrears owing to the Landlord as per the statement of Rent Account is KShs. 161,172.00
  - No statement filed by the Landlord to prove or demonstrate rent arrears of amount KShs. 231,757.00



24. In view of the foregoing and in respect to issue of whether the tenant is in rent arrears, this Tribunal finds that the tenant is in rent arrears and as such owes the Landlord. The rent Amount owed is hereby found to be KShs. 172,632.00

b.whether the Landlord can proclaim tenant's movable property without the order of this Tribunal

25. The Landlord through their instructions dated January 13, 2023 to the 2<sup>nd</sup> Respondent sought to levy distress by proclaiming and attaching various movable assets owned by the Tenants. This is the import of the present reference before me.
26. It is important to note that, the operating law that governs exercise of rent distress is Landlord and Tenant (Shops Hotels and Catering Establishment) Act, Cap 301 laws of Keya.
27. The said Act empowers this Tribunal to grant orders relating to the levying distress by the Landlord. Section 10 provides as follows:

12 Powers of Tribunals

- (1) A Tribunal shall, in relation to its area of jurisdiction have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in addition to and without prejudice to the generality of the foregoing shall have power — to permit the levy of distress for rent.
28. In light of the foregoing, it is the finding of this Tribunal that distress to be exercised by any landlord in the case where the Tenant is in arrears like in the present case can only be excused under law if it is originated and activated by this Tribunal. Thus, it is the respectful finding of this Tribunal that the Landlord herein cannot proclaim and/or levy distress without the authority of this Tribunal.
29. Having made the above two-pronged findings, I now turn to the prayers made by each party in these proceedings and make the following orders in the upshot.

## **H. Orders**

30. The tenant's reference dated January 24, 2024 and the notice of application of even date are allowed in the following terms:
- The tenant to pay the landlord amount equal to KShs. 172,632.00 being rent arrears within 30 days from the date hereof.
  - Failure by the tenant to comply with order (a) above, landlord shall be at liberty to levy distress for rent.
  - Each party shall bear their own costs.

**HON A. MUMA**

**MEMBER**

**BUSINESS PREMISES RENT TRIBUNAL**

**Ruling** dated, signed and delivered virtually by **Hon. Muma** this **19<sup>th</sup>** day of July **2023** in the absence of parties.

**HON. A MUMA**

**MEMBER**



**BUSINESS PREMISES RENT TRIBUNAL**

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