



**Mwangi v Muiruri & another (Tribunal Case E167 of 2024)
[2024] KEBPRT 1119 (KLR) (7 June 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 1119 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E167 OF 2024
M MAKORI, MEMBER
JUNE 7, 2024**

BETWEEN

JAMES MWANGI APPLICANT

AND

JAMES M. MUIRURI 1ST RESPONDENT

WOODLAND AUCTIONEER 2ND RESPONDENT

RULING

1. The present claim was filed vide a claim dated and an application of dated 26th February 2024 and an application 6th February 2024 by the Applicant and which application was opposed vide a Replying Affidavit dated 29th February 2024 and 28th February 2024 respectively by the Respondents.
2. The Counsels, however consented the application and the replying affidavit be disposed of by way of written submissions.
3. From the totality of the pleadings filed by parties and made, only two issues emerge for determination:
 - I. Whether the tenant was in arrears at the time of attachment?
 - II. Whether the distress was lawful?

a. Whether the tenant was in arrears at the time of attachment?

4. Going by the definition, and by inference arising from the payment and acceptance of rent measured by reference to the tenancy agreement, the parties herein were in a tenancy agreement per the tenancy agreement executed by both parties and therefore, the tenant was a lawful tenant of the Landlord.
5. In order to deal with this issue, the question that begs an answer is whether or not the Tenant is in rent arrears. The Tenant had stated in his supporting affidavit and subsequently in the Further



affidavit that he has been paying for rent until the month March where the Landlord distressed for rent, consequently, he has gone ahead to attach documents from cooperative bank showing payments done to the Landlords account.

6. The Landlord on its part has annexed the rent statement for the suit premises. The statement clearly shows that the total amount due from the Tenant to the Landlord is Kshs 72,000/- which has been proved via receipts attached.
7. On the other hand, the tenancy agreement on paragraph 8 provides that the rent amount shall be payable via the bank account and the receipt shall be issued by the caretaker, however I note that the tenant claims he was never issued with the receipt for the month of February.
8. The Landlord has not in any manner challenged the statement of account supplied by the Tenant. I have no reason to disbelieve the same. Noting that the only document produced by the Landlord are the receipts issued to the Tenant. I do find that the Tenant is not in the arrears.
9. The tenant's complaint is that the landlord wanted to evict him with the sole intention of increasing rent exorbitantly for her selfish interests which was illegal and contrary to Cap. 301, Laws of Kenya.
10. The Tenant has further deposed in his affidavit that he has never had any problem with the payment of rent and has been painting the premises for the time he has been leasing the business premises with full knowledge from the landlord.

b. Whether the distress was lawful?

11. In considering this issue, it is important for this court to look at what constitutes illegality of distress for rent. In the case of Cyo Owaya v George Hannington Zephania Aduda T/a Aduda Auctioneers & another (2007) the court of appeal held;

“Under Section 3(1) of the Distress for Rent Act, in looking at what constitutes illegality of distress for rent, the court must not only consider our laws, but must also consider what in England would be considered an illegality in the levy of distress. An illegal distress is one which is wrongful at the very outset, that to say either where there is no right to distrain or where a wrongful act was committed at the beginning of the levy invalidating all subsequent proceedings.” The following are instances of illegal distress;

“A distress by a landlord after he has parted with his reversion; a distress by a person in whom the reversion is not vested; a distress when no rent is in arrears; or for a claim or debt which is not rent; as a payment for the hire of chattels; a distress made after a valid tender of rent has been made; a second distress for the same rent; a distress off the premises or on the highway; a distress in the night that is between sunset and sunrise a distress levied or proceeded with contrary to the Law of Distress.

12. On the other hand, Section 15 of Distress for Rent Act provides thus;

“Where distress is made for any kind of rent justly due, and any irregularity or unlawful act is afterwards done by the party distraining, or by his agents the distress itself shall not be therefore deemed to be unlawful nor the party making it be deemed a trespasser ab initio, but the party aggrieved by the unlawful act or irregularity may recover full satisfaction for the special damage he has sustained thereby in a suit for that purpose;”



13. Turning to the evidence tendered by the tenant that he always pays the rent as it falls due, it is important to examine the documents filed in support of the said claim. The tenant has produced the statement of account from cooperative bank in support of the same statements.
14. The statements produced has not been denied by the landlord but rather tried to address the same by producing the receipts issued to the tenant as argued on his replying affidavit stating that the tenant has not been paying or rather has not paid rent and hence accruing rent arrears of Kshs 75,000/-.
15. The tenant has denied having rent arrears as stated. And I do agree with the tenant that the termination notice was served to the tenant.
16. The Landlord denied that the Tenant has been faithfully paying rent as alleged and stated that the Tenant failed to pay rent on time and had outstanding arrears thus necessitating levying distress against it. Landlord avers that the distress.
17. In determining whether Landlord's right to levy distress had crystallized, I am guided by the decision in *Owayo v George Hannington Zephaniah Aduda t/a Aduda Auctioneers and another* (2007) 2 KLR 140, (2008) EA 287, where the Court of Appeal considered section 3(1) of the *Distress for Rent Act* and the English common law in dealing with the question of what constitutes illegality for distress for rent.

It was stated that an illegal distress is one where there was no right to distrain or where a wrongful act was committed at the beginning of the levy thereby invalidating all subsequent proceedings. The instances of illegal distress were cited , where distress is by a landlord who has parted with his reversion, distress by a person in whom the reversion has not vested, a distress when no rent is in arrears, a distress for a claim or debt which is not rent, distress after a valid tender of rent has been made, a second distress for the same rent, distress off the premises or on a highway, distress at night and a distress carried out contrary to the law relating to Distress.

18. The tenant has in their responses proffered explanations as to why and how he cannot be in arrears. The rent due according to them as of March and he could not pay since the Landlord had already distressed for rent.
19. Based on the foregoing, the Tribunal makes the following orders:
 - a. The distress for rent was illegal.
 - b. That the Landlord, their servants, agents and or employees be and are hereby restrained from evicting, harassing, interfering/tampering, and/or whatsoever interfering with the Tenant quite occupation and lawful enjoyment of suit premises.
 - c. That the Landlord is not entitled to any rent from the Tenant.
 - d. Each party shall bear their own costs

HON. MIKE MAKORI - MEMBER

BUSINESS PREMISES RENT TRIBUNAL

RULING DATED, SIGNED AND DELIVERED VIRTUALLY BY HON MIKE MAKORI THIS 7TH DAY OF JUNE, 2024 IN THE PRESENCE OF THE COUNSEL FOR THE TENANT/APPLICANT AND IN THE ABSENCE THE LANDLORD/RESPONDENTS.

HON. MIKE MAKORI - MEMBER

BUSINESS PREMISES RENT TRIBUNAL

