



**Otieno v Kahwai & another (Tribunal Case E389 of 2023)  
[2024] KERRT 255 (KLR) (24 January 2024) (Judgment)**

Neutral citation: [2024] KERRT 255 (KLR)

**REPUBLIC OF KENYA  
IN THE RENT RESTRICTION TRIBUNAL  
TRIBUNAL CASE E389 OF 2023  
HK KORIR, CHAIR  
JANUARY 24, 2024**

**BETWEEN**

**DAVID OTIENO ..... PLAINTIFF**

**AND**

**ALEX KAHWAI ..... 1<sup>ST</sup> DEFENDANT**

**GERRARD KAMAU ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Dispute Background**

1. Through a plaint dated 7<sup>th</sup> March 2023 and a Notice of Motion Application dated 7<sup>th</sup> March 2023, the Plaintiff herein approached this Tribunal seeking inter alia, orders compelling the defendant to release his confiscated household goods, personal effects and academic documents in the presence of an officer from the Tribunal.

**The Applicants Case**

2. The Plaintiff's Notice of Motion Application dated 7<sup>th</sup> March 2023 above mentioned is supported by various grounds being that the defendants broke into the suit premises and confiscated the plaintiff's household goods and properties to unknown place without any notice.
3. The Application is supported by the affidavit sworn by David Otieno, the Plaintiff on 7<sup>th</sup> March 2023. In the said affidavit the plaintiff stated that he has been residing at the suit premises for a duration of five(5) years paying a monthly rent at Kshs. 4,000/= . He stated that on 3/3/2023 the defendants broke into the suit premises and confiscated his household goods and properties to unknown place without any notice.



4. The tenant filed an amended Notice of Motion Application dated 9<sup>th</sup> March 2023 seeking *inter alia* orders compelling the defendant to reinstate the tenant back to the suit premises, an injunction restraining the defendants from evicting the tenant pending the hearing and determination of the suit.
5. The tenant filed an undated Further Affidavit where he stated that the defendants did not comply with the Tribunal order and did not reinstate him back to the suit premises. He stated that the defendants are still holding his rent deposit of Kshs. 4,000/= and listed things that went missing which include: Kshs. 12,760/=, Video Camera (Canon max 3 5D)- Kshs. 170,000/=, Calcium Glass Spots remover 30 litres- Kshs. 57,000/=, Glass water jug 2 litres- Kshs. 2,500 and Padlocks 3- Kshs. 2,000/=.
6. The tenant stated that he was lawfully occupying the suit premises as he had no outstanding rent arrears. The tenant requested for costs and that the tribunal issues an order restraining the landlord from carrying out any illegal eviction, making threats of eviction or disconnecting water and electricity. The tenant also requested the tribunal to uphold his right to undisturbed occupation of the suit premises until the final determination of the suit.
7. The tenant filed a Replying Affidavit dated 29<sup>th</sup> August 2023 where he stated that he has never been a nuisance to other tenants and that he was never served with a notice to vacate by 28/2/2023. He stated that he currently resides in a store which is not in good condition as it is very cold and has water leaking from the walls causing damage to his goods. He stated that the defendants should comply by reinstating him to the suit premises.
8. A Witness Statement by Catherine Okome Makunda was filed, where she stated that on 3<sup>rd</sup> March 2023 around 1:00pm, she found around four unknown men at the suit premises who had broken in and removed his household goods and some were put in the store while others were carried in backpacks. She stated that she tried to talk to them but they sent her away and they fled after she contacted the Plaintiff.
9. The Plaintiff filed a Supplementary Affidavit dated 19<sup>th</sup> October 2023 where he annexed receipts and photographs for the alleged missing items.

### **The Defendants Case**

10. Counsel for the defendant filed a Notice of Motion application dated 14<sup>th</sup> June 2023 seeking inter alia orders setting aside the orders dated 8<sup>th</sup> March 2023, a temporary injunction restraining the plaintiff from executing the orders dated 8/03/2023 and 14/03/2023 and that the Plaintiff pays the outstanding rent arrears of Kshs. 16,000/= being rent for 4 months.
11. The above-mentioned application is supported by various grounds including that the Defendants were never served with the application dated 7/03/2023 nor the hearing notice for the interparties hearing. That there is no Affidavit of Service on record to show that the Defendants were served as per the provisions of Order 5 Rule 15 of the *Civil Procedure Rules*. That the amended application is fatally defective as it violates the rules of amendment under Order 8 of the *Civil Procedure Rules* as it does not include the date when the amendment was done and the deleted and added words. That the amended Supporting Affidavit should be struck out as Order 8 rule 4 does not provide for amendment of Affidavits.
12. That the Plaintiff offended the rules under *Oaths and Statutory Declarations Act* by stating that he served the court order yet he did not attach any affidavit of service indicating that he served the applications. That the Plaintiff continues to occupy the premises yet he stated that he was never reinstated. That the Plaintiff did not provide any proof of ownership of the alleged missing items and



that an inventory of the items that were in the suit premises was done and the alleged items were not in the suit premises.

13. That unless the Plaintiff is restrained from executing the said orders, the defendants shall be condemned unheard and shall suffer great prejudice.
14. The above-mentioned application was supported by an affidavit sworn by the 1<sup>st</sup> defendant who reiterated the facts in the pleadings.

### **Submissions**

15. The suit proceeded for hearing physically and the parties were directed to file and serve written submissions, which the parties verily did. I shall proceed to consider the same.

### **Tenant's Submissions**

16. The tenant filed written submissions dated 10<sup>th</sup> November 2023 where he presented the Tribunal with one issue for determination being whether the Claimant is entitled to the return of his household goods. On that issue he submitted that the confiscation of his household goods was not based on a valid reason. He stated that the defendants are in contempt for failing to return his household goods as ordered by the Tribunal and as such the landlord should be denied audience under Section 4 of [Contempt of Court Act](#) No. 46 of 2016.
17. The tenant stated that the Landlord failed to adhere to Section 12(2) of Cap 293 which states that:

“Notice of the place where the goods and chattels so distrained are lodged or deposited shall, within the space of seven days after the lodging or depositing thereof in that place, be given to the lessee or tenant, or left at the demised premises...”
18. The tenant stated that the Landlord failed to adhere to Section 16 of Cap 296 which states that:

“No distress for the rent of any premises shall be levied except with the leave of the tribunal.”
19. The tenant submitted that he had proved his case on a balance of probabilities and that he is entitled to the prayers sought in the claim.

### **The Defendants Submissions**

20. Counsel for the Defendant filed written submissions dated 8<sup>th</sup> January 2024. Counsel presented the Tribunal with two issues for determination being whether the Plaintiff proved his case on a balance of probabilities and whether the defendants are entitled to the prayers sought in the counterclaim. Counsel relied on Order 2 Rule 6 of the [Civil Procedure Rules](#) which provides that:

“No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.”
21. Counsel stated that the Plaintiff violated the mentioned order by introducing new evidence in his subsequent pleadings and had not mentioned it in the Plaint. Counsel stated that it is a well settled principle of law that parties are bound by their pleadings and that unless amended; the evidence adduced shall not deviate from the pleadings. Evidence which tends to be variance with the pleadings



is for rejection. To buttress her position counsel relied on the Court of Appeal case of [David Sironga Ole Tukai v Francis Arap Muge & 2 others](#) Civil Appeal No. 76 of 2014 eKLR where the court held that:

“In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other’s case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense.”

22. Counsel also relied on the Court of Appeal Case of [Independent Electoral and Boundaries Commission & Ano. v Stephen Mutinda Mule & 3 others](#) (2014) which cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) v Nigeria Breweries PLC* SC 91/2002 and the Supreme Court ruling on the case [Raila Amolo Odinga & Another v IEBC & 2others](#) (2017) eKLR.
23. Learned counsel stated that the Plaintiff had the opportunity to amend his Plaintiff either before pleadings closed or with the leave of the court which he did not do. Counsel stated that the court is bound by the pleadings of the parties and it is the duty of the court to adjudicate upon the specific matters in dispute.
24. On whether the Plaintiff proved his case on a balance of probabilities counsel relied on Section 107(1) and (2) of the [Evidence Act](#) which states that:
  - “ 1. 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.
  2. When a person is bound to prove the existence of any facts, it is said that the burden of proof lies on that person.”
25. Counsel relied on the case of *Miller v Minister of Pensions* 1947 ALL E.R 372 and the case of [James Muniu Mucheru v National Bank of Kenya Ltd](#) C.A Civil Appeal No. 365 of 2017 [2019] eKLR on burden of proof. Counsel further relied on the case of [CMC Aviation Ltd v Cruisair Ltd](#) No. 1 1978 KLR 103 [1976-80 1 KLR 835] and the case of [Stephen Gachau Gitbaiga v Margaret Wambui Weru & Attorney General](#) 2015 eKLR on the role of pleadings in litigation.
26. Counsel submitted that the Plaintiff has not proved his case on a balance of probabilities and should be dismissed with costs to the Respondents.
27. On whether the defendants are entitled to the prayers sought in the counterclaim counsel stated that the Plaintiff ought to pay rent and the rent arrears as he is still in occupation of one of the premises owned by the 1<sup>st</sup> defendant. Counsel stated that the 1<sup>st</sup> defendant is undergoing losses since the Plaintiff has not been paying rent. Counsel further stated that the Plaintiff has been a nuisance to other tenants which resulted in him being given a notice to vacate.
28. Counsel prayed that the counterclaim be allowed as prayed.

### **Analysis and Determination**

29. I have given full consideration to both parties’ pleadings as filed, the written submissions together with the authorities cited.



30. In my respectful view, I find that the issue for determination is;
- a. Whether the Plaintiff has proved his case on a balance of probabilities.
- I shall proceed to consider and determine the same below:

**Whether the Plaintiff has proved his case on a balance of probabilities.**

31. In *Evans Nyakwana v Cleophas Bwana Ongaro* (2015) eKLR it was held that:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side.”

32. The import of Section 107 (1) of the *Evidence Act* is to the effect that:

- (1). Whoever desires any Court to give Judgment as to any legal right dependent on the existence facts which he asserts must prove that those facts exist.
- (2). When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

33. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in *William Kabogo Gitau v George Thuo & 2 Others* [2010] 1 KLR 526 as follows:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

34. In *Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another* (2015) eKLR, the judges of Appeal held that:

“Denning J. in *Miller v Minister of Pensions* (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.”

35. In the case at bar, the Plaintiff alleged that his household goods were removed from the suit premises and transferred into a store and in the process some of his items were lost. However, the Plaintiff did not



tender any shred of evidence to prove that the items were actually in the house. To come to a conclusive ruling, the tribunal relies on the evidence submitted together with the law. The tribunal cannot rely on mere assertions without prove. In this case I find that the Plaintiff did not discharge his legal burden of proof as required by the law.

36. At the hearing, the Plaintiff was required, as much as the Defendants were required, to adduce evidence to prove his pleadings. Pleadings are mere allegations. Pleading do not prove an allegation which can lead to the entry of judgment unless the allegation/the claim is undefended. In regard to undefended pleadings the court in *CMC Aviation Ltd v Crusair Ltd* (No.1) (1987) KLR 103 stated as follows:-

“The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.” (Emphasis mine)

37. Additionally, the Defendants stated that the Plaintiff has not been paying rent which allegation the Plaintiff denied but did not table evidence to prove the contrary. The Plaintiff had the onus of proving his case against the defendant, whether or not the defendant adduced evidence. It is also worth noting that during the hearing the Plaintiff admitted to delaying in paying rent. Section 14 of Cap 296 provides for the grounds under which a tenant can be evicted. It states as follows:

“14. Restriction on the right to possession

- (1) No order for the recovery of possession of any premises or the ejection of a tenant therefrom shall be made unless—
  - (a) some rent lawfully due from the tenant has not been paid, or some other obligation of the tenancy (whether under the contract of tenancy or under this Act) so far as it is consistent with the provisions of this Act has been broken or not performed.”

38. It would be in the interest of justice that the Plaintiff grants the defendant vacant possession of the suit premises for the reasons above mentioned.
39. I find that the Plaintiff failed to meet the standard of proof with regard to evidential burden. The Plaintiff was required in order to succeed in his claim to discharge an evidential burden in relation to the facts in issue.
40. On the issue of whether the Plaintiff's pleadings are defective for contravening the Civil Procedure rules, in the spirit of Article 159 of the *Constitution*, which makes it clear that substance must be given deference over technical procedure. The tribunal is called upon to consider substantive justice as opposed to procedural technicalities and I hold and find that the Pleadings are not fatally defective.
41. Before I pen off, I would address the question of costs. The Landlord being the successful party is entitled to costs. Costs follow an event.

## Determination

1. In the premises, I make the following final orders in respect of this suit:-
  - i. The Tenant shall render vacant possession of the suit premises on or before 24<sup>th</sup> February 2024. In default execution to issue.



- ii. The Tenant shall continue paying rent and utility bills. In default the Landlord shall have leave to levy distress.
- iii. The Landlord should grant the Tenant peaceful occupation of the suit premises until delivery of vacant possession as above.
- iv. The Plaintiff shall be at liberty to seek redress for damages through the Civil Courts as the Tribunal is not empowered to award the same by dint of Cap 296.
- v. The Plaintiff shall bear the costs.

Orders accordingly.

Right of appeal to lie as provided for under Cap 296.

**JUDGEMENT DELIVERED IN CHAMBERS IN THE ABSENCE OF BOTH PARTIES IN ACCORDANCE WITH THE COVID-19 PROTOCOLS THIS 24<sup>TH</sup> DAY OF JANUARY 2024.**

Certified copies to issue to parties accordingly.

**SIGNED**

**HILLARY K. KORIR**

**CHAIRMAN**

**RENT RESTRICTION TRIBUNAL**

**NAIROBI**

