



REPUBLIC OF KENYA

BUSINESS PREMISES RENT TRIBUNAL

VIEW PARK TOWERS 7TH & 8TH FLOOR

TRIBUNAL CASE NO. E059 OF 2021 (MOMBASA)

PETER MUTHALI.....APPLICANT/APPLICANT

VERSUS

LUCY KAIDA..... RESPONDENT/LANDLORD

RULING

1. By a motion dated 15th September 2021, the tenant/Applicant moved this Tribunal seeking for restraining orders against the landlord/Respondent from interference with his peaceful possession and occupation of the suit premises on a purported fictitious rent arrears of Kshs.983,000/- pending hearing and determination of the suit.
2. By a reference dated 16th September 2021, the tenant complains against the landlord that he was levying distress on fictitious rent arrears which had already been paid in full.
3. The application is supported by the affidavit of tenant sworn on 15th September 2021 and the grounds on the face thereof. The tenant occupies a premises known as Atlanta shop erected on plot no. 95/96, Market Road, Malindi Town. The monthly rent is Kshs.6000/-. He has occupied the same for over 20 years.
4. In the year 2017, the landlord is said to have refused to accept rent from the tenant on allegation that she had sold the premises to a third party. In 2020, there was an attempt to evict the tenant on account of rent arrears as can be seen on exhibit 'PM-1' attached to the supporting affidavit. A suit was filed in CM's court, Malindi and a court order marked 'PM-2' was issued on 16th June 2020.
5. The tenant was directed to deposit rent in arrears within 6 months and fix the matter for hearing within the same period. A sum of Kshs.175,000/- was deposited on various dates into court.
6. According to the tenant, his arrears had accrued to a sum of Kshs.360,000/- as at the date of filing suit and not Kshs.983,000/- claimed by the landlord.
7. The application is opposed through a replying affidavit of the landlord sworn on 12th October 2021. It is denied that the tenant has been paying rent and has never renovated the premises.
8. According to the landlord, the tenant refused to clear rent after the Malindi CM's court ordered him to do so and his suit was dismissed by the said court as per annexure 'LK1' attached to the replying affidavit.
9. The tenant only deposited Kshs.175,000/- into court and stopped doing so after dismissal of the suit. He was in arrears of Kshs.989,000/- after deducting the amount paid.
10. It is the landlord's case that this suit is "Res judicata" as the issues herein were addressed in Malindi CMCC No. 24 of 2020. There was an application in Malindi H.C Civil Appeal No. E001 of 2020 seeking the same orders which he abandoned when orders were not granted as per annexure 'LK-2'.
11. The application was ordered to be canvassed by way of written submissions. Both parties complied.
12. The issues for determination are:
 - (a) Whether the instant suit is res judicata.

(b) Whether the tenant is entitled to the reliefs sought.

(c) Who is liable to pay costs?

13. I have looked at the judgment in Malindi CMCC No. 24 of 2020 marked 'LK-1' and it is clear that the tenant herein sought the following reliefs therein:-

“(a) A declaration that the defendant cannot distress for rent against the plaintiff having sold the premises and having previously refused rent.

(b) A permanent injunction restraining the defendant by herself, her agents, legal representatives, workmen, heirs, servants or anyone claiming interest through her from distressing for rent against the plaintiff.

(c) Costs to the suit.

(d) Interest on 3 above at court rates.

(e) Any other relief this honourable court may deem fit to grant in the circumstances”.

14. The court in its judgment upheld the right of the landlord herein to collect rent until the property passes hand and that the tenant herein had a duty to pay rent. The court proceeded to dismiss the suit and upheld the landlord's right to distress for rent.

15. I agree with the landlord that in the circumstances, the instant proceedings offend the doctrine of 'Res judicata' espoused in Section 7 of the Civil Procedure Act and recently settled by the Supreme Court of Kenya in the case of John Florence Maritime Services Limited & Another – vs- Cabinet Secretary, Transport and Infrastructure & 3 Others (2021) eKLR.

16. The subject matter in the said suit, the parties and reliefs sought are on all fours similar to the present suit. As such this matter is an outright abuse of court process.

17. I also note that a similar application for injunction is pending before Malindi Environment & Land court in ELC appeal no. E001 of 2021 involving the same parties and subject matter herein. As such the matter is subjudice and cannot be litigated herein in line with the decision in Republic – vs- Paul Kihara Kariuki, Attorney General & 2 Others ex-parte Law Society of Kenya (2020) eKLR where at paragraph 23 the court had the following to state:-

“23. The Supreme Court of Kenya in Kenya National Commission on Human Rights – vs- Attorney General Independent Electoral & Boundaries Commission & 16 others (interested parties) had occasion to pronounce itself on the subject of subjudice”. It aptly stated:-

“67. The term 'subjudice' is defined in Black's Law dictionary 9th Edition as “Before the court or Judge for determination”. The purpose of the subjudice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts with competent jurisdiction issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that there is more than one suit over the same subject matter, that one suit was instituted before the other, that both suits are pending before courts of competent jurisdiction and lastly, that the suits are between the same parties”.

18. I note that the suit in Malindi Chief Magistrate's court was heard and determined and that what is pending is an appeal against the judgment arising therefrom and an application for injunction pending appeal. As such, it was a clear abuse of court process for the tenant to file fresh proceedings before this Tribunal over the same subject matter seeking similar reliefs. As such there is no basis for staying proceedings herein pending determination of Malindi ELC Appeal case No. E001 of 2020.

19. In conclusion, the following orders commend to me:-

(i) The application dated 15th September 2021 is dismissed for being res judicata and/or res sub-judice Malindi CMCC No. 24 of 2020 and Malindi ELC Appeal No. E001 of 2021 respectively.

(ii) The ex-parte orders given on 16th September 2021 herein are hereby discharged and/or vacated.

(iii) The landlord is awarded Kshs.50,000/- as costs of these proceedings on the basis of abuse of court process by the tenant.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 16TH DAY OF FEBRUARY 2022.

HON. GAKUHI CHEGE

VICE CHAIR

BUSINESS PREMISES RENT TRIBUNAL

In the presence of:

Otara for the Tenant/Applicant

Miss Mwanja for the Landlord