



REPUBLIC OF KENYA



**Bihi v Omar (Environment and Land Appeal E075 of 2023)  
[2024] KEELC 1585 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 1585 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E075 OF 2023  
EK WABWOTO, J  
FEBRUARY 22, 2024**

**BETWEEN**

**MOHAMED BIHI ..... APPELLANT**

**AND**

**OMAR MOHAMED OMAR ..... RESPONDENT**

*(Being an appeal from the orders of the Vice Chair (Hon. Gakuhi Chege) made on the 21st June, 2023 in Business Premises Rent Tribunal (Nairobi), BPRT Case No. E456 of 2023)*

**JUDGMENT**

1. This appeal arises from the Orders of the Vice Chairperson Hon. Gakuhi Chege given on the 21<sup>st</sup> June, 2023 in Business Premises Rent Tribunal (Nairobi) BPRT case No. E456 of 2023 wherein the Tribunal issued the following orders:
  - i. The tenant is granted 7 days to file and serve further affidavit.
  - ii. The tenant shall thereafter have 14 days to file written submissions in response.
  - iii. The interim orders are extended for a period of 14 days within which the tenant shall pay the sum of Kshs 468,850.00 to the Landlord pending hearing of the application and determination thereof.
  - iv. In the event of the tenant's default to pay the amount, the landlord shall be at liberty to use lawful means to recover the same and the interim orders shall stand automatically vacated.
  - v. Mention on 1<sup>st</sup> August, 2023 to fix ruling date.



2. The Appellant was aggrieved by the said orders and specifically order No. (4) and No. (5) and filed an appeal to this Court vide a Memorandum of appeal dated 29<sup>th</sup> June, 2023 which raised the following grounds:
  - a. That the amount of Kshs. 468,850.00 was still disputed the same having been occasioned by an illegal increment of rent by fifty percent.
  - b. That the Respondent's justification of the rent increment by fifty percent stated at paragraphs 2, 3 and 4 of his Replying Affidavit sworn on 15th June, 2023 was a clear indication of real mischief in the disputed rent increment.
  - c. That the Appellant had continued to pay the undisputed rent of Kshs. 50,000.00 per month and was up to date with the payment.
  - d. That the conditional orders of 21<sup>st</sup> June, 2023 being in the interim were punitive to the Applicant and in the event of default the entire interim orders of 10th May, 2023 would lapse thereby exposing the Applicant to the impending eviction while the Reference was still pending for determination before the Tribunal.
  - e. That the Applicant would suffer real prejudice as the said orders of 21<sup>st</sup> June, 2023 materially predetermined the Applicant's application dated 5th May, 2023 seeking to restrain the Respondent from proceeding with the illegal distress and eviction pending the hearing of the Reference.
  - f. That the Applicant had met the threshold warranting extension of the orders of 10th May, 2023 pending the hearing and determination of the application dated 5th May, 2023.
3. The Appellant thus prayed that the Orders issued on 21<sup>st</sup> June, 2023 be set aside with costs and substituted with an order staying the proclamation and restraining the Respondent from evicting the Appellant from the demised business premises pending the hearing and determination of the Reference.
4. The appeal was canvassed by way of written submissions. The Appellant filed written submissions dated 28<sup>th</sup> August, 2023 while the Respondent filed written submissions dated 15<sup>th</sup> September, 2023.
5. The Appellant submitted on the following two issues:
  - a. Whether the Vice Chairperson exercised his discretion judiciously on the orders issued on 21<sup>st</sup> June, 2023.
  - b. Whether the Appellant is entitled to the reliefs sought.
6. It was submitted that the Appellant being dissatisfied with the orders of 21<sup>st</sup> June, 2023 appealed to this Honourable Court on the main ground that the Learned Vice-Chairperson erred in law and in fact in failing to exercise his discretion judicially by not considering relevant factors and apply the correct principle of law in granting the said orders.



7. It was argued that the Learned Vice Chairperson failed to consider relevant facts leading to the dispute thereon to wit:
- a. The amount of Kshs. 468,850.00 which the Learned Vice Chairperson ordered the Appellant to pay within fourteen (14) days was still disputed the same having been occasioned by an illegal increment of rent by fifty percent by the Landlord.
  - b. That the Respondent's justification of the rent increment by fifty percent stated at paragraphs 2, 3 and 4 of his Replying Affidavit sworn on 15th June, 2023 was a clear indication of real mischief in the disputed rent increment.
  - c. The Appellant had continued to pay the undisputed rent of Kshs. 50,000.00 per month and was up to date with the payment.
  - d. The conditional orders of 21<sup>st</sup> June, 2023 being in the interim were punitive to the Applicant and in the event of default the entire interim orders of 10th May, 2023 would lapse thereby exposing the Applicant to the impending eviction while the Reference was still pending for determination before the Tribunal.
  - e. The Applicant would suffer real prejudice as the said orders of 21<sup>st</sup> June, 2023 materially predetermined the Applicant's application dated 5th May, 2023 seeking to restrain the Respondent from proceeding with the illegal distress and eviction pending the hearing of the Reference.
8. Relying on the case of *United India Insurance Co. Ltd -vs- East Africa Underwriters (Kenya) Ltd [1985] E.A.*, the Appellant urged this Court to hold that the Tribunal erred in Law and in fact in failing to exercise its discretion judicially by not taking into account relevant factors and apply the correct principle of Law. The Court was urged to grant the reliefs sought.
9. The Respondent on the other hand submitted on the following two issues; whether the Honourable Vice Chairperson exercised his discretion judiciously on the orders issued on 21<sup>st</sup> June, 2023 and whether this Court should interfere and/or set aside the orders issued on 21<sup>st</sup> June, 2023.
10. It was argued that the Appellant is a Tenant of the Respondent of the demised business premises where rent payable was at the inception Kshs 50,000.00 per month since August 2019 with the rent being subjected to a 5% increment every year.
11. The new terms of the tenancy as of March 2021 were that the rent payable per month was Kshs 75,000 with the rent being subjected to a 5% increment every year.
12. It was contended that the tenant agreed to these new terms by paying the new rental amount. He however stopped paying the new rent and all over sudden reverted back to the old amount of paying Kshs 50,000.00 per month. Consequently, the monthly rent payable under the tenant tenancy were as follows:
- i. March 2021 to February 2022; Kshs 75,000.
  - ii. March 2022 to February 2023: Kshs 78,750.
13. It was argued that despite the said agreement, the Appellant has failed to pay the rent as and when they fall due, with most of the time the tenant paying the rent late and not paying the full rental amount.



As a result of the non-payment of rent by the Appellant, the amount due and owing as rent as of September 2023 Kshs 644,285.

14. The Appellant failed to pay the rent amount due despite sufficient demand notice to do so hence compelling the Respondent to distress for rent.
15. The Appellant failed to disclose the said critical information thereby misrepresenting the Honourable tribunal vide its application dated 5th May 2023.
16. Finally, the Respondent submitted that the Honourable learned Vice Chairperson exercised his discretion judiciously on the orders issued on 21st June, 2023.
17. The Respondent urged this Court to dismiss the appeal with costs on the basis that no justification had been made to warrant the setting aside of the orders of the Tribunal.
18. The Court has considered the appeal and submissions filed by the parties and the main issue for determination is whether the learned Vice Chairperson of the Business Premises Tribunal erred in Law and in fact in issuing the orders dated 21<sup>st</sup> June, 2023. In determining the issues raised in the Appeal this court is cognizant of its duty on a first appeal as set out in the case of *Selle & Another –Vs- Associated Motor Boat Co. Ltd & others* (1968) EA 123 cited with approval in *China Z Hogxing Construction Company Ltd –Vs- Ann Akeru Sophia* (2020) eKLR.
19. The Court has powers to set aside and or vary any orders issued. The Court of Appeal in *Pithon Waweru Maina v Thuka Mugiria* [1983] eKLR and in *Toshike Construction Company Limited v Harambee Co-operative Savings & another* [2019] eKLR stated as follows;-
  - “(a) Firstly, there are no limits or restrictions on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just ... The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 at 76 C and E
  - (b) Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. *Shah v Mbogo* [1967] EA 116 at 123B, *Shabir Din v Ram Parkash Anand* (1955) 22 EACA
  - (c) Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. *Mbogo vs Shah* [1968] EA 93.”
20. As has also been restated in the case of *United India Insurance Co. Ltd V East African Underwriters (Kenya) Ltd* (1985) E.A a court sitting on Appeal will not interfere with a discretionary decision appealed from simply on the ground that the court, if sitting at first instance, would or might have given different weight to that given by the court to the various factors in the case. This court sitting on Appeal is only entitled to interfere if one or more of the following matters are established; first, that the court misdirected himself in law; secondly, that the court misapprehended the facts; thirdly, that the court took account of considerations of which he should not have taken account; fourthly, that the



court failed to take account of considerations of which he should have taken account, or fifthly, that the court's decision, albeit a discretionary one, is plainly wrong.

21. In the instant appeal, it is evident that there is a dispute as to the rent arrears due. The Appellant has maintained that he has overpaid the rent to the tune of Kshs 472,520/= while the Respondent maintains that the rent arrears is Kshs 468,840/=. This is indeed an issue that can only be resolved during trial. In the circumstances, this Court finds merit in the appeal and hereby proceeds to set aside Orders 4 and 5 of the Learned Vice Chairperson of the Tribunal issued on 21<sup>st</sup> June, 2023 and substitutes the same with the following orders:
- a. That pending the hearing and determination of the Reference, an Order is hereby issued staying the proclamation and restraining the Respondent from evicting the Appellant from the business premises.
  - b. The Appellant is hereby directed to continue paying the initial rent of Kshs 50,000/= per month as and when it falls due until the final determination and disposal of the Reference.
  - c. Each Party to bear own costs of the appeal.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22<sup>ND</sup> DAY OF FEBRUARY, 2024.**

**E.K. WABWOTO**

**JUDGE**

**In the virtual presence of:**

Mr. Otinga for Appellant.

Mr. Dayib for Respondent.

Court Assistant: Caroline Nafuna.

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