



**Rono v Pasaiba Tourmaline Limited (Environment and Land Appeal
4 of 2024) [2024] KEELC 1581 (KLR) (21 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1581 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL 4 OF 2024**

**J OMANGE, J
MARCH 21, 2024**

BETWEEN

NAOMI C RONO APPELLANT

AND

PASAIBA TOURMALINE LIMITED RESPONDENT

(Being an appeal against orders of the honourable Patricia May a member of the Business premises rent tribunal in NAIROBI delivered on 2nd February 2024 in BPRT No E132 of 2024)

RULING

1. Vide Notice of Motion application dated 7th February 2024 the Applicant seeks the following orders:
 - a. Spent.
 - b. An interim order be issued compelling the Respondent to return the goods/items it took away from the auctioneers' warehouse along Kiambu road pursuant to the Order issued by the Nairobi Business Premises and Rent Tribunal in BPRT No. E132 of 2024 on 2nd February 2024 as the same is illegal, unlawful, null and void pending the hearing of this Application inter partes.
 - c. An order be issued compelling the Respondent to return the goods/items it took away from the auctioneers' warehouse along Kiambu road pursuant to the Order issued by the Business Premises and Rent Tribunal in BPRT No. E132 of 2024 on 2nd February 2024 as the same is illegal, unlawful, null and void pending the hearing of the Appeal herein.
 - d. That the directors of the Respondent, one Amos Kipkoech Mongony and Irene Chemutai be committed to jail should they fail to return the goods/items to the warehouse along Kiambu Road within 24 hours from the date of orders being issued in terms of prayers 2 and 3.



- e. A directive be issued that a Magistrate's orders cannot be contradicted by that of Business Premises Rent Tribunal.
 - f. Costs of the application.
2. The application was supported by an affidavit sworn by the Appellant in which she avers that she bought the suit property herein an office block on the ground floor of 4th Ngong Avenue Towers situate on L.R. No. 209/21876 Original Number 209/309/1 (I.R) 189750, Upper Hill within Nairobi County from Stitching Medical Credit Fund on 8th December, 2022 by way of public auction on 8th December 2022. That the auction was occasioned by the defendant's failure to service the loan borrowed from Stitching Medical Credit Fund.
 3. That the Respondent has remained in occupation of the suit property despite being aware that the Appellant has legally acquired rights to the suit property and consequently has occasioned her loss of rental income. This prompted her to move the magistrates court for distress of rent. The Appellant avers that the orders were issued and effected by auctioneers on the 1st February 2024.
 4. That the Respondent herein filed a case in the Business Premises Tribunal and obtained illegal orders in BPRT/E132/2024 from Hon Patricia May that allowed them to repossess the attached goods in spite of the existence of a valid court order that had not been set aside or varied. She deponed that the Tribunal cannot issue parallel Orders against the Orders of a Chief Magistrate's court hence this appeal.
 5. The Respondent did not file any response and such the application is unopposed. The fact that an application is unopposed does not discharge the Applicant of the burden to prove that the orders sought are merited.
 6. It is the Applicant's case that there was an order issued by the Chief Magistrates Court in CMCC No E994 of 2023 instructing auctioneers to levy distress for rent from the Respondent. The Applicant insists that the actions undertaken by the Respondent are in contempt of the said court order and that she stands to suffer great prejudice, financial loss and exposure to unnecessary detriment as well as denial of justice.
 7. From the foregoing, the issue is whether the prayers sought by the Applicant are warranted. The Applicant has attached the court order she relies on dated 22nd December 2023 that gave her rights to levy distress for rent on the Respondent's goods. The court order or her affidavit does not explain how the Respondent became her tenant and what the terms of the tenancy were after the property was auctioned. It is also not clear the material that was placed before the Tribunal before it issued the orders.
 8. It is therefore not clear whether the Tribunal was seized of all the facts as it issued the orders. Furthermore, the Appellant does not indicate that she made any attempt to appraise the Tribunal of the correct situation so that the Tribunal could consider its decision on the basis of full information. While the Appellant faults the Respondent from non-disclosure of material facts, I equally find that she too has been economical with the information she has given this court.
 9. In *Kenya Electricity Transmission Company Limited v Kibotu Limited* [2019] eKLR Justice Odeny stated the following in regards to non disclosure of facts

“The fundamental principles of non-disclosure of material facts that any Applicant must adhere to are as follows:

- a. The Applicant is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge,



- b. The duty of disclosure therefore applies not only to material facts known to the Applicant but also to any additional facts which he would have known if he had made sufficient inquiries.
- c. Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the magistrate or Judge in the application.
- d. The question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the Applicant to make all proper inquiries.

It should be noted that the issue of non-disclosure of material facts to the courts is indeed a serious issue which may warrant a court to set aside or vary an order consider the case being presented”.

10. The Applicant’s application is premised on the ground that there was material non –disclosure by the Respondent in the Tribunal. I find that even in this appeal there is insufficient information that would enable the court reach a decision that is grounded on full information about the case. The proceedings in the Magistrates Court are not attached to the application, neither are the proceedings that took place before the Tribunal. The burden was on the applicant to prove the prayers sought are merited. Considering the multiplicity of suits in various courts between the parties herein, it would be unfortunate for this court to issue orders without the benefit of full information. The application is thus dismissed. The costs shall abide the hearing of the main appeal.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 21ST DAY OF MARCH 2024.

JUDY OMANGE

JUDGE

In the presence of: -

Ms Mumbi for Mr. Onyango for the Respondent

Steve - Court Assistant

