



**Lambamo v Esther Thuku t/a Alipai Holdings Limited (Tribunal Case
E833 & E1117 of 2023 (Consolidated)) [2024] KEBPRT 312 (KLR) (5 April 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 312 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E833 & E1117 OF 2023 (CONSOLIDATED)
P KITUR, MEMBER
APRIL 5, 2024**

BETWEEN

ELIAS MUTORE LAMBAMO TENANT

AND

ESTHER THUKU T/A ALIPAI HOLDINGS LIMITED LANDLORD

RULING

A. Parties and Representatives

1. The Applicant Elias Mutore Lambamo is the Tenant and has rented out the suit premises from the Landlord herein (hereinafter known as the Tenant)
2. The Firm of M/S Othieno & Co. Advocates represents the Tenant in this matter.
3. The Respondent Esther Thuku t/a Alipal Holdings is the Landlord and the proprietor of the suit property known as restaurant located at Kiamaiko(hereinafter known as the 'Landlord')
4. The firm of Ndungu Njoroge & Kwach represents the Landlord.

B. The Dispute Background

1. The Tenant Avers that he has been in a tenancy agreement with the Landlord for over 8 years and was paying rent dutifully during the said period.
2. That during the said period, he has operated his business and has attracted a big client base and good will.
3. That in the Month of July 2023, the Landlord demanded that he vacates the premises illegally and without following due process.



4. Apprehensive that the Landlord would evict him, he filed a Reference accompanied by an Application both dated 25th August 2023 seeking for orders of injunction against the Landlord from evicting him.
5. The Landlord filed a Replying Affidavit dated 7th September 2022 alleging that the Landlord issued a Notice to terminate the agreement to the Tenant for breach of contract. She stated that the Tenant had sublet the premises to a third party contrary to the terms of their Agreement.
6. That upon receipt of the said notice the Tenant reported the matter to the Area Chief who mediated over the matter and it was settled by consent that the Tenant would vacate within 6 months from 10th February 2023.
7. That the Tenant paid rent on 25th August 2023, which the Landlord refunded because the 6 months' notice was set to terminate on 31st August 2023.
8. The Landlord further averred that he lawfully notified the Tenant and served the notice to vacate as agreed and that further, the parties consented to the period to vacate before the Chief.
9. Vide case number E117 of 2023, the Landlord filed a complaint against the Tenant accompanied by an Application both dated 9th November 2023.
10. In the said Application, the Landlord reiterated the statements in the Replying Affidavit and sought the following orders interalia:
 - a. That the present Application be heard simultaneously with the Tenants case in BPRT E833 of 2023
 - b. That the Landlord be granted leave to distress for rent.
 - c. That the Tribunal be pleased to give an order for vacant possession.
11. The Landlord filed a further Affidavit stating that she had incurred costs for repairs of the electricity meter box which the Tenant had vandalized on several occasions.
12. She made reference to copies of the statements recorded at Huruma Police Station where the Tenant had been reported.
13. Consequently, the two matters were consolidated.

List of Issues for Determination

- I. Whether the Tenant is entitled to the orders sought
- II. Whether Notice to vacate is valid
- III. Whether the Landlord is entitled to distress for rent.

D. Analysis and Findings

Whether the Tenant is entitled to the Orders Sought?

14. The Tenant vide her Application dated 25th August 2023 seeking orders of injunction against the Landlord to restrain her from evicting him.
15. The orders sought by the Tenant in the Application are equitable remedies and the threshold for the award of such remedies was canvassed in the decision in [*Kyangaro v Kenya Commercial Bank Ltd &*](#)



another [2004] 1 KLR 126 as cited in Patrick Waweru Mwangi & another v Housing Finance Co. of Kenya Ltd [2013] eKLR at page 145 where the Court stated;

“Secondly, the injunction sought is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the Plaintiff in this case betrays him. It does not endear him to equitable remedies. He who comes to equity must fulfil all or substantially all his outstanding obligations before insisting on his rights. The Plaintiff has not done that. Consequently, he has not done equity.”

16. I have considered that the Tenant did not disclose material facts pertaining to the mediation that was facilitated by the Chief and thereafter the parties consented to terminate their Tenancy within 6 months of the date thereof.
17. The Tenant also, alleged that he had been paying the rent dutifully throughout the Tenancy, yet it is the Landlord’s contention which is corroborated by evidence that indeed the Tenant was in arrears. The Landlord made reference to the Demand Letter dated 6th October 2023 and to the Rent statement dated 9th November 2023.
18. Furthermore, as to the injunctive orders sought by the Tenant this Tribunal is guided by the principles in *Giella v Cassman Brown and Co. Ltd* where the Court set out the principles for interlocutory injunctions.

“The conditions for the grant of an interlocutory are now, I think well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury in which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

19. I find that in the foregoing, the Tenant lacks a prima facie case and that the grounds for seeking the injunctions are not supported by evidence. In any case, he is in breach of the contractual terms as he is in arrears.

Whether Notice to vacate is valid

20. The Landlord issued a notice to vacate dated 7th February 2023 requiring the Tenant to vacate by 28th February 2023.
21. In protest, the Tenant reported the matter to the chief and upon mediation, the parties agreed to amend the notice and allow the tenant to vacate within 6 months.
22. The Tenant challenged the legality of the notice stating that it was unlawful.
23. I will base my findings on the amended Termination Notice which in effect rescinded the previous one.
24. I refer to Section 4(2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act which provides that, “A landlord who wished to terminate a controlled tenancy, or to alter, to the detriment of the tenant, any term or condition in, or right or service enjoyed by the tenant under, such a tenancy, shall give notice in that to the tenant in the prescribed form.”
25. The form discussed in Section 4(2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act is provided for under Form A of the Regulations. The Key components of the notice includes;



- a) identification of the parties;
 - b) date of termination or alteration;
 - c) grounds on which the termination or alteration is sought;
 - d) requirement of the tenant either to agree or disagree with the notice; and
 - e) the provisions (section 4(2)) under which the notice is being given.
26. I have considered that the Notice herein meets almost all the requirements except it does not allow the Tenant to notify the Landlord whether he agrees to comply with the notice or not.
27. It is therefore my considered view that the Notice does not comply with the provisions of [Cap 301](#) and therefore find that the same is invalid.

Whether the Landlord is entitled to distress for rent.

28. The Landlord vide their Application dated 9th November 2023 and supported by the Affidavit of Esther Thuku sought for orders that this Tribunal do grant leave to the Landlord to distress for rent.
29. I have considered the prayers sought by the Landlord and I wish to be guided by the provisions of Section 3(1) of the [Distress for Rent Act](#), Cap. 293, Laws of Kenya stipulates as follows: - “subject to the provisions of this Act and any other written law, any person having any rent or rent service in arrears and upon a grant, lease, demise or contract shall have the same remedy by distress for the recovery of that rent or rent service as is given by the Common Law of England in a similar case”.
30. Section 12(1) (h) of the [Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#) Cap. 301, Laws of Kenya gives this Tribunal power “to permit the levy of distress”
31. The Landlord made reference to a Demand Notice dated 6th October 2023 which was issued to the Tenant for the sum of Kshs 122,200/= and to a statement of rent dated 9th November 2023 indicating that the arrears were Kshs 113,850/=.
32. On the other hand, the Tenant provided receipts of payment of rent which did not conclusively account for the Tenancy period. The Tenant did not dispute the Landlords statement of account.

Orders

- 33.
- a. The upshot is that the Tenant’s Application and Complaint dated 25th August 2023 is hereby dismissed.
 - b. The Landlords Application dated 9th November 2023 is partly allowed on the following terms:
 - i. The Tenant is ordered to pay the arrears of Kshs 113,850/= as at November 2023 in addition to any rent and incidental costs accrued to date no later than 10th May 2024 of in default the Landlord shall be at liberty to distress for rent.
 - ii. In default, the Landlord is at liberty to proceed to levy for distress of the rent.
 - iii. The Landlord is at liberty to issue a termination notice to the Tenant.
 - iv. The OCS Huruma Police Station to ensure compliance with these Orders.
 - c. Each party shall bear their own costs.



RULING DATED, SIGNED AND DELIVERED VIRTUALLY BY HON P. KITUR ON 5TH APRIL 2024 IN THE ABSENCE OF THE PARTIES.

HON P. KITUR

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

