



**Kanini & another v Taiti & another (Tribunal Case E002 of 2024)
[2024] KEBPRT 771 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 771 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E002 OF 2024
GAKUHI CHEGE, CHAIR & J OSODO, MEMBER
MAY 24, 2024**

BETWEEN

SAMMY MWANGI KANINI 1ST PLAINTIFF

MARGARET WANJIRU KANINI 2ND PLAINTIFF

AND

SIMON W. TAITI 1ST DEFENDANT

MATOSHA EMPIRE (K) LIMITED 2ND DEFENDANT

RULING

1. The Applicants moved this Tribunal vide a motion dated 3rd January 2024 seeking for orders;
 - a. That service of the application be dispensed with in the first instance and the matter be certified as urgent.
 - b. That the Respondents' notice to vacate the suit premises be nullified forthwith and unconditionally and the Applicants be allowed to continue to operate their business.
 - c. That the Respondents be restrained from moving and or dealing with the Applicants goods forthwith and unconditionally till the matter is heard and determined.
 - d. That the 2nd Respondent be restrained from attaching the Applicants' goods forthwith and unconditionally.
 - e. That the Respondents, their servants, employees and/ or agents are hereby restrained from trespassing, breaking into the premises, evicting, harassing the plaintiffs/ applicants and or in any other manner interfering with their tenancy pending the hearing of the application inter-partes.
 - f. That the OCS Ruringu Police Station do ensure compliance.



- g. That the costs of the application be borne by the Defendants/Respondents.
2. The application is based on the following grounds;
- a. That the Respondents have served a two months' defective notice to vacate the suit premises and have threatened to deny the Applicants access to operate their business contrary to the law.
3. The application is further supported by the affidavit of Sammy Mwangi Kanini wherein it is deposed that he took over the premises at Ruringu with a mutual agreement to run a Bar and Restaurant business and have been paying rent diligently on monthly basis.
4. The monthly rent payable is Kshs 18,500/= and there were no rent arrears whatsoever.
5. The Applicants have been operating the business for 15 years paying rent diligently but on 14th November 2023 the Respondents served the Applicants with a two months' defective notice to vacate the suit premises by 1st February 2024 claiming that they wanted to undertake renovations of the suit premises.
6. The Respondents are accused of claiming non-existent rent arrears of Kshs 55,500/ for which they served a 14 days' proclamation notice.
7. The Applicants claim to have done renovations to the premises and that the same was in good condition and that the renovations sought to be undertaken by the Respondents was just a way of evicting them from the suit premises.
8. The Applicants seek that the defective notice be nullified as it will greatly affect their business if allowed to stand as they had already paid for the Nyeri County Government license for the whole year.
9. They therefore seek for this Tribunal's protection to enable them operate their business in peace with the Respondents being restrained from any form of harassment in the sui premises.
10. Interim orders were granted at the ex-parte stage on 5th January 2024 pending hearing inter-partes on 29th January 2024.
11. The application is opposed through the affidavit of Catherine Karimi Wambugu as Guardian to the 1st Respondent pursuant to her appointment as such vide annexure marked "CKW 1".
12. It is deposed that the depositions by the Tenants/Applicants are untrue, misleading and calculated to conceal the truth from this Tribunal and attract undue sympathy.
13. The Applicant is a tenant occupying the 1st Respondent's business premises on a parcel of land known as Plot No. Aguthi/Gatitu/667/149.
- The Tenant has leased the premises aforesaid at a monthly rent of Kshs.18,500 which rent is payable through the 1st Respondent's Bank account. The said rent is payable every month in advance and in any event not later than the 5th day of every month. The Applicants have not been paying their rent consistently and had accumulated a sum of Kshs 378,500 in rent arrears as at June 2019.
14. The 1st Respondent allowed the Applicants to continue using the premises aforesaid on the understanding that they would pay an additional sum of Kshs 10,000/= every month to clear the arrears. The Applicants continued to pay a monthly sum of Kshs 28,500/= (being the monthly rent due and the sum of Kshs.10,000/= up to August 2023 when they cleared the arrears.
15. However, contrary to legitimate expectations that rent would be paid as and when it was due, the Applicants have consistently defaulted on timely payment of rent as evidenced by the 1st Respondent's



- bank statement. The Applicants only paid for August rent and the arrears on or about 28th August 2023. The Applicants did not pay their rent for September 2023.
16. In November 2023, the Applicants defaulted in paying their monthly rent despite their continued occupation, possession and use of the 1st Respondent's premises aforesaid.
 17. The 1st Applicant deposited a sum of Kshs.18,500/= into the 1st Respondent's Bank Account on or about 2nd December 2023 being the rent for December 2023. Contrary to the assertion by the Applicants that they paid all rents as and when it fell due, the Applicants never paid the rent for September and November 2023.
 18. On account of non-payment of the rent, the 1st Respondent instructed the 2nd Respondent to levy distress for rent. The 2nd Respondent wrote to the Applicants on or about 22nd December 2023 demanding payment of Kshs. 55,500/= being rent for the months of September and November 2023 as well as January 2024 which amount (for January 2024) would have been due within the 14 days' window of opportunity granted to the Applicants to clear the arrears.
 19. On or about 29th December 2023, the Applicants deposited into the 1st Respondent's bank account a sum of Kshs 18,500 which was presumed to be rent for November 2023. On or about 10th January 2024, the 1st Applicant deposited a sum of Kshs. 18,500/= into the 1st Respondent's bank account being rent for January 2024.
 20. According to the 1st Respondent, the Applicants' failure to pay rent on time is in breach of their core obligation as Tenants and that they are seeking equity without doing equity and thus not deserving of any equitable relief as sought in their application. The Applicants are accused of approaching this Tribunal with unclean hands and are thus undeserving of any equitable relief.
 21. The 1st Respondent deposes that the suit premises are dilapidated and that on or about 7th November 2023, the 1st Respondent filed with this Honorable Tribunal a valid notice to terminate the tenancy between himself and the Applicants herein. The notice is attached as annexure "CKW 3". The said notice was for a period of three (3) months.
 22. The 1st Respondent required the Applicants to notify him within one (1) month of the receipt of the said notice of their desire to comply with the terms of the Notice. The Applicants were served with the said notice on or about 19th November 2023.
 23. Despite the clear terms of the notice aforesaid and the timelines to inform the 1st Respondent of their desire to comply, the Applicants never informed him of their concurrence but ran to this Tribunal after the 2nd Respondent wrote a demand for payment of rent arrears. As such, this Tribunal, as a temple of justice cannot be the refuge for tenants who fail to meet their core obligation of paying rent as and when it falls due.
 24. According to the Respondents, the instant application and reference is an afterthought, made in bad faith, an abuse of due process which is calculated to delay and/or prevent the 1st Respondent from renovating and taking over the premises aforesaid for personal use thereby violating his property rights. In the circumstances, it is only fair and in the interest of justice that the instant application and reference be dismissed with costs.
 25. On 29th January 2024, the Applicants were granted leave to file and serve a supplementary affidavit and submissions within 14 days and the matter was therefore slated for mention on 29th February 2024. On the latter date, the Tenants' Counsel indicated that he had filed a supplementary affidavit and submissions.



26. According to the 1st Applicant's supplementary affidavit sworn on 8th February 2024, it is deposed that he entered into a lease agreement with the landlord on 10th May 2022 for a term of five years with an option to renew which provides for an option to terminate the tenancy with a one month notice and which provision places the tenancy under the realm of the controlled tenancies. The lease agreement is marked as annexure "SMK-I".
27. He further deposes that the rent arrears alluded to under paragraph 8 of the replying affidavit arose out of the closures during the Covid-19 crisis and the tenant and the landlord agreed on the mode of settling the same by adding Kshs 10,000 to the monthly rent until the arrears were cleared. The said arrears were cleared and the issue is therefore moot.
28. The Applicants contends that the landlord reason for intended termination of tenancy is that they either want the property back for personal use or for renovation. In regard to the issue of personal use there are empty premises on the same plot and as such, the only reason to evict the tenant of over 15 years is to take advantage of the numerous improvements done on the premises. The Applicants have attached and marked "SMK-3 & 4" being copies of landlord's notice to terminate tenancy and assorted photographs of unoccupied premises.
29. Based on the requirements for granting an order of temporary injunction, the 1st Applicant deposes that he has been a tenant for over 15 years and the business is his main source of income that supports him, his mother the 2nd Applicant which was sufficient to warrant the exercise of discretion in their favor.
30. The 1st Applicant deposes that if he was to be evicted from the premises as per the reference, he would lose his livelihood overnight and that injury cannot be compensated by damages/costs. He further deposes that the balance of convenience clearly favors him since he has been at the premises for 15 years and there is no prejudice to the landlord if the orders sought are granted as he shall continue paying rent as directed by the court.
31. According to the 1st Applicant, the purpose of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* is to protect the tenants from undue harassment by landlords of small businesses such as his and as such this Tribunal ought to restrain the landlord from interfering with his use and possession of the premises until the expiry of the lease dated 10th May 2022.
32. The 1st Applicant admits that he has been a few days late in regard to payment of rent but have always settled the arrears in good time and as such the claim that he is in breach is far-fetched as he had paid rent for January 2024 and was up to date on payments and undertakes to continue paying rent as always.
33. He further deposes that he has extensively developed the premises to make them fit for the purpose since he had a legitimate expectation that he would occupy the premises until at least up to 2027 and which legitimate expectation is now in danger of being ended by the landlord. He attaches as annexure "SMK-7" assorted photographs of various improvements.
34. The following issues arise for determination in this case;
- Whether the Applicants are entitled to the reliefs sought in the application dated 3rd January 2024.
 - Whether this Tribunal ought to nullify the tenancy notice issued by the Landlord against the Tenants on 7th November 2023.
 - Who is liable to pay costs of the application?



35. What is before us is an application for injunction against the Respondents from interfering with the Applicants tenancy over the business premises situate on LR No. Aguthi/Gatitu/667/149. The said tenancy was created vide a lease agreement dated 10th May 2022 between Catherine Wambugu as the appointed guardian of the 1st Respondent and the 1st Applicant. The term of the lease is 5 years with an option to renew. It is attached to the supplementary affidavit as annexure “SMK-1”.
36. The said lease being for a period of 5 years constitutes a controlled tenancy within the meaning and intendment of Section 2(1) of [Cap. 301](#). Under Section 4(2) of the said [Act](#), a landlord who wishes 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 behalf to the tenant in the prescribed form.
37. The principles considered by courts in application for injunction were settled in the celebrated case of *Giella v Cassman Brown & Co. Ltd* (1973) EA 358 as follows; an applicant must establish a prima facie case with a probability of success; an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury; when the court is in doubt, it will decide the application on the balance of convenience.
38. There is no dispute that the 1st was served by the Landlord with a tenancy notice dated 7th November 2023 seeking to terminate his tenancy with effect from 1st February 2024. The 1st Applicant did not file a reference as stipulated under Section 6(1) of [Cap. 301](#), which provides as follows;
- “
- “(1) A receiving party who wishes to oppose a tenancy notice, and who has notified the requesting party under section 4(5) of this Act that he does not agree to comply with the tenancy notice, may, before the date upon which such notice is to take effect, refer the matter to a Tribunal, whereupon such notice shall be of no effect until, and subject to, the determination of the reference by the Tribunal:
- Provided that a Tribunal may, for sufficient reason and on such conditions as it may think fit, permit such a reference notwithstanding that the receiving party has not complied with any of the requirements of this section”.
39. In absence of a reference under the foregoing provision, Section 10 of the said [Act](#) kicks in. The said statute stipulates as follows;
- “ 10. Effect of notice where tenant fails to refer to Tribunal, etc.
- Where a landlord has served a notice in accordance with the requirements of section 4 of this [Act](#), on a tenant, and the tenant fails within the appropriate time to notify the landlord of his unwillingness to comply with such notice, or to refer the matter to a Tribunal then subject to section 6 of this Act, such notice shall have effect from the date therein specified to terminate the tenancy, or terminate or alter the terms and conditions, thereof or the rights or services enjoyed thereunder”.
40. In view of the foregoing, it is clear that the Applicants having failed to file a reference under Section 6(1) of the said [Act](#) cannot by any stretch of imagination be deemed to have established a *prima facie* case with a probability of success. Termination of a controlled tenancy being a lawful process envisaged under Section 4 of [Cap. 301](#), Laws of Kenya cannot be stopped through issuance of an injunction by



this Tribunal. It is therefore clear that an order of injunction cannot issue in favor of the Applicants in the circumstances of this case.

41. The Applicants contend that there are empty premises within the Landlord's building and that the reasons given in the termination notice do not suffice. However, once a tenancy notice comes into effect, the reasons for termination cannot be interrogated in absence of a reference under Section 10 of [Cap. 301](#).
42. We are fortified in that regard by the court of appeal decision in the case of [Saheb v Hassanally](#) (1981) eKLR at page 4/7 where it was held as follows;

“In my opinion, it is clear that under the terms of section 10 if a valid notice is not referred the landlord is entitled to possession without having to prove any of the statutory grounds relied upon in the notice.

To be valid a tenancy notice must comply with the provisions of section 4, including the requirements of the use of the prescribed form, of setting out the statutory grounds for relief and of due service. The learned judge was wrong in this case to investigate the grounds relied upon in the notice, but even then, he should have given judgment for the appellant on the ground that was conceded, namely that the landlord required the occupation of the premises for the purposes of his business (section 7 (1) (g)). The learned judge was in error in not awarding possession of the premises to the appellant in accordance with section 10, without making any inquiry into the validity of the grounds relied upon. It would appear from the record that Mr Le Pelley took a preliminary point in reliance on section 10.” (emphasis added).

43. In the premises, we find and hold that there is no basis for issuing the injunction sought by the Applicants. We further find that the Landlord's notice to terminate tenancy took effect on 1st February 2024 in absence of a reference to oppose the same.
44. As regards costs, the same are at our discretion under Section 12(1)(k) of [Cap. 301](#), Laws of Kenya but always follow the event unless for good reasons otherwise ordered. We have no reason to deny costs to the Respondents being the successful parties.
43. In conclusion, the following final orders commend to us;
 - a. The Applicants' application dated 3rd January 2024 is hereby dismissed with costs to the Respondents.
 - b. The interim orders earlier issued herein are hereby discharged and/or set aside.
 - c. The Landlord's tenancy notice dated 7th November 2023 is hereby approved in line with the provisions of Section 10 of Cap. 301, Laws of Kenya.

RULING DATED, SIGNED & VIRTUALLY DELIVERED THIS 24TH DAY OF MAY 2024

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HON GAKUHI CHEGE

PANEL CHAIRPERSON

BUSINESS PREMISES RENT TRIBUNAL

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HON JOYCE A OSODO



PANEL MEMBER

BUSINESS PREMISES RENT TRIBUNAL

