Nairobi Elite Academy v ssociation of Evangelicals in Africa (Tribunal Case E427 of 2024) [2024] KEBPRT 849 (KLR) (14 June 2024) (Ruling)

Neutral citation: [2024] KEBPRT 849 (KLR)

REPUBLIC OF KENYA

IN THE BUSINESS PREMISES RENT TRIBUNAL

TRIBUNAL CASE E427 OF 2024

GAKUHI CHEGE, CHAIR & J OSODO, MEMBER

JUNE 14, 2024

BETWEEN

NAIROBI ELITE ACADEMY ..... TENANT

AND

ASSOCIATION OF EVANGELICALS IN AFRICA ..... LANDLORD

RULING

1. Through a motion dated 4th April 2024, the tenant moved this Tribunal under certificate of urgency seeking for orders:

    i. That the application be certified as urgent and be heard ex-parte in the first instance and that this Honorable Court be pleased to dispense with service in the first instance.

    ii. That pending the hearing and determination of the application inter-parties, there be an injunction directed to the Landlord not to enter, lock, block and/or lease out and/or in any manner interfere with the running of the school (Nairobi Elite Academy).

    iii. That after the inter-parties hearing, the Landlord be restrained from entering, locking, blocking and/or interfering with the running of the school (Nairobi Elite Academy) for a period of nine (9) months to facilitate the relocation of the school.

    iv. That the Landlord be ordered to pay damages as envisaged in the Termination/Renewal Clause of the lease agreement.

    v. That this Honorable Court be pleased to make any other and/or further orders that are just to grant in the circumstances of the case.

    vi. That the Landlord to pay costs of the suit.

2. The application is premised on the affidavit of Simon Teddy Mwangi and the following grounds:

a. That the Tenant/applicant herein entered into a Landlord-Tenant agreement on 18th December, 2014.

b. That the rent payable is Kenya shillings forty-two thousand (Kshs. 42,000/=) per month.

c. That the Tenant seeks an injunction to restrain the Landlord from taking over the school and/or stopping the normal running of the school and also further that the Landlord ought not lock out the Tenant from the property.

d. That the Tenant/Applicant has no other means and/or way of enforcing its rights as enshrined in the lease agreement other than by praying for the assistance by this Honorable Court.

e. That the Tenant shall continue paying rent and/or abide by the conditions set by this Honorable Tribunal in the interest of justice.

f. That in any event and without prejudice to the foregoing, the Tenant shall require time to relocate its school and students' which period ought not be less than nine (9) months. During this period the Tenant shall continue to pay rent.

g. That it is in the interest of justice that the orders sought be granted to forestall a travesty of justice.

2. Interim orders were given ex-parte in favor of the tenant on 23rd April 2024 pending hearing inter-partes on 20th May 2024. The tenant was directed to serve the application upon the landlord/respondent.

3. Through an application dated 7th May 2024, the landlord moved this Tribunal seeking that the orders issued on 23rd April 2024 in favor of the tenant be vacated or set aside and that this Tribunal finds Mr. Simon Teddy Mwangi in contempt for instituting litigation that is frivolous, vexatious and an abuse of the court process.

4. The application is supported by the affidavit of Lilian Wambui Maranga sworn on 7th May 2024 and the grounds on the face thereof. Basically, the landlord contends that this Tribunal lacks jurisdiction to entertain the suit as the subject premises is a school and is neither a shop, hotel or catering establishment as provided under the provisions of *Cap. 301*, laws of Kenya.

5. The landlord further contends that by the time of institution of this suit, there was a subsisting case vide Milimani Commercial Courts MCELC/E103/2024 filed on 26th March 2024 and that the subsequent filing of this suit on 4th April 2024 and the orders given herein on 23rd April 2024 is res sub judice. According to the landlord, a similar application in the said suit had been dismissed by Hon. A. Mukenga on 30th April 2024.

6. It is landlord's case that the tenant was no longer in possession of the suit premises having handed over on 28th March 2024 and that the property had since been leased out to another entity. As such, the application is attacked for being an abuse of court process by the tenant who is engaged in forum shopping and had omitted to make material disclosures to this Tribunal.

7. The application was considered ex-parte and allowed in terms of prayers (a) & (b) thereof thereby vacating the orders granted to the tenant earlier.

8. By another motion dated 13th May 2024, the tenant moved this Tribunal under certificate of urgency seeking for an order of status quo allowing the school to reopen and run pending the hearing and determination of the dispute inter-parties. It also sought that the OCS, Kasarani Police Station ensures the smooth running of the school.

9. The application is predicated upon the affidavit of Simon Teddy Mwangi and the grounds on the face thereof. Principally, the tenant contends that all the previous suits had been withdrawn and that the orders reinstating possession of the suit premises had been enforced by the OCS, Kasarani Police Station. The School was scheduled for reopening on 13th May 2024.

10. The application was considered ex-parte and the tenant was directed to serve the same upon the landlord for hearing inter-partes on 20th May 2024.

11. On 20th May 2024, this Tribunal ordered the parties to maintain the Status quo obtaining at the suit premises until determination of the suit with the OCS, Kasarani Police Station being directed to ensure compliance. The Tribunal's Rent Inspector was also directed to visit the suit premises to determine the status of occupation thereof and file a report within 14 days.

12. The parties were directed to file submissions on the preliminary objection and all the applications on record. The proclaimed motor vehicles were not to be sold until the final determination of the suit.

13. The Rent Inspector visited the suit premises and filed a report which confirmed that the tenant was still in occupation thereof but at the time of the visit had been locked out or denied access by the landlord.

14. Both parties filed their written submissions as directed which we shall consider together with the issues for determination.

15. Based on the foregoing pleadings, the following issues arise for determination;

    a. Whether this Tribunal has jurisdiction to hear and determine this matter.

    b. Whether the tenant's case is res sub judice and if so what orders should issue?

    c. Whether the tenant is entitled to the reliefs sought in the applications dated 3rd May 2024 and 13th May 2024.

    d. Whether the landlord is entitled to the reliefs sought in the application dated 7th May 2024.

    e. Whether the tenant owes any rent arrears to the landlord.

    f. Who is liable to pay costs?

16. The relationship between the two parties herein began with an agreement of lease dated 18th December 2014 wherein the tenant agreed to take on lease land reference No. 11605/4 measuring 0.5523 in Nairobi City for a term of 3 years from 18th December 2014. The tenant thereafter established a school on the suit premises.

17. Despite lapse of the initial lease term, the tenant remained in possession thereby creating a periodic lease in line with Section 57(1(c) of the *Land Act*, 2012 which position is admitted at paragraph 8 of the affidavit of Lilian Wambui Maranga sworn on 7th May 2024 in support of the landlord's application of even date.

18. The fact that the tenant runs a school is the basis of the landlord's contention that this Tribunal lacks jurisdiction to adjudicate the instant dispute in line with the decisions in *Phoenix of East Africa Assurance Co. Limited Vs S.M Thiga t/a Newspaper Service* (2019) eKLR and *Republic Vs Business Premises Rent Tribunal & Another Ex-parte Albert Kigera Karume* (2015) eKLR. The landlord further relies on the provisions of *Cap. 301*, Laws of Kenya to argue that the suit premises is used for running a school which does not fit within the description of a shop, hotel or catering establishment.

19. The tenant on the other hand relies on the definition of a shop in the said *Act* which states at Section 2 as follows;

> " Shop" means premises occupied wholly or mainly for the purposes of a retail or wholesale trade or business or for the purpose of rendering services for money or money's worth."

20. It is therefore argued and we agree with the tenant that the premises render education services for money or money's worth and therefore fits in the description of a shop. There is a myriad of cases disposed of by this Tribunal relating to similar premises and we have no difficulty in dismissing the objection to jurisdiction on the said ground.

21. The second limb of the objection to the tenant's case is that the same is res sub- judice Milimani Commercial Courts MCELC/E103/2024 filed on 26th March 2024 and that the subsequent filing of this suit on 4th April 2024 and the orders given herein on 23rd April 2024 is res sub-judice. The landlord contends that a similar application in the said suit had been dismissed by Hon. A. Mukenga on 30th April 2024.

22. According to the landlord, the tenant was no longer in possession of the suit premises having handed over the same on 28th March 2024 and that the property has since been leased out to another entity. As such, the application is attacked for being an abuse of court process by the tenant who was engaged in forum shopping and had omitted to make material disclosures to this Tribunal.

23. The landlord relies on the Supreme Court decision in *Kenya National Commission on Human Rights Vs Attorney General; Independent Electoral & Boundaries Commission & 16 Others* (2002) eKLR wherein the said Court held that the purpose of the sub-judice 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 court process and diminish the chances of courts with competent jurisdiction issuing conflicting decisions over the same subject matter.

24. At paragraph 22 of the landlord's submissions, it is admitted that the case at Milimani Court was marked as withdrawn on 27th May 2024 but the same happened after the current suit and application had been filed and orders given which amounted to forum shopping. The tenant is accused of having filed another case vide Nairobi ELCLC NO./121/2024 on 22nd March 2024 which was in existence when Milimani Commercial Courts MCELC/E103/2024 was being filed.

25. We note that apart from submissions filed by the parties in Nairobi ELCLC NO. E103 OF 2024 and the case track downloads from the e-filing portal, the pleadings thereof and the ruling allegedly delivered by Hon A. Mukenga are not exhibited. It is therefore difficult for this Tribunal to establish whether the subject matter was on all fours similar to what is before us.

26. In any event, Section 6 of the *Civil Procedure Act*, Cap. 21, Laws of Kenya stipulates as follows;

> " No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed." (emphasis ours)

27. It is admitted that none of the other cases are pending and it is our view that this matter is not res sub-judice. This is more so given the fact that this Tribunal has exclusive jurisdiction to deal with disputes involving controlled tenancies under *Cap. 301*, Laws of Kenya.

28. Although the landlord's case is that the tenant was no longer in possession of the suit premises, the said contention was disapproved by the Rent Inspection report filed pursuant to this Tribunal's order of 20th May 2024 wherein the tenant was confirmed to be still in possession of the premises.

29. As to whether the tenant's applications dated 3rd and 13th May 2024 ought to be granted or not, we are inclined to allow the same. It is clear that the landlord did not serve any notice under Section 4(1) & (2) of *Cap. 301*, Laws of Kenya which provides as follows;

> "(1) Notwithstanding the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be terminated, and no term or condition in, or right or service enjoyed by the tenant of, any such tenancy shall be altered, otherwise than in accordance with the following provisions of this Act.
>
> (2) 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." (emphasis added).

30. In absence of the envisaged notice, the tenancy cannot be deemed to have been terminated. All the notices issued by the landlord herein do not comply with the foregoing provisions of the said Act and are therefore null and void.

31. This Tribunal was established to protect controlled tenants from illegal eviction and exploitation by landlords. It will be an abdication of our duty, if we fail to protect the tenant herein from being evicted by the landlord in absence of a proper notice to terminate its tenancy. Such eviction and the locking out of the tenant from the suit premises by the landlord is illegal, null and void.

32. In the case of *Thomson Smith Aikman & Others Vs Bernard Kimani Muchoki & Others* (1982) eKLR, the Court of Appeal had the following to state under a similar situation;

> "The conditions spelled out above for the grant of an interlocutory injunction were rightly understood but wrongly applied as follows: first, the appellants being lawfully in possession of the estates under the authority of the debentures executed by Mbo and Loresho, and the defendants having unlawfully seized and continuing in possession of the estates, the appellants had shown a clear and overwhelming prima facie probability of success; the court ought never to condone and allow to continue a flouting of the law. Those who flout the law by infringing the rightful title of others, and brazenly admit it, ought to be restrained by injunction. If I am adding a new dimension for the grant of an interlocutory injunction, be it so. Equity will not assist law-breakers." (emphasis added)

33. Similarly, in the case of *Joseph Siro Mosoima Vs Housing Finance Company of Kenya & 3 others* ((2008) eKLR, Justice M.A Warsame, (as he then was) had the following to state at page 8/9 on the principles of injunction;

> "On my part, let me restate that damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be a substitute for the loss, which is occasioned by a clear breach of the law. In any case the financial strength of a party is not always a factor to refuse an injunction. More so, a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction."

34. The tenant has sought for damages under the lease agreement which lapsed after the 3 years stipulated therein. It is our view that no such damages can inure in its favor given that the said lease agreement is already expired and therefore cannot found a cause of action in law. The claim is therefore declined.

35. The landlord's argument that the premises has been leased to another tenant cannot hold any water as the current tenancy is still in force and any other agreement entered into with a third party over the suit premises is null and void in line with the legal maxim of "*Ex-turpi causa non oritur actio*" which was expounded in the case of *Heptulla Vs Noormohamed* (1984) eKLR at page 4/5 where the court of appeal cited the decision in *Mistry Amar Singh v Kulubya* [1963] EA 408 at page 414, letter D, as follows;

> "Ex Turpi causa non oritur actio. This old and well-known legal maxim is founded in good sense and expresses clear and well-recognized legal principle, which is not confided to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the Plaintiff proves the illegality, the court ought not to assist him."

36. On the same token, we find and hold that the landlord is not entitled to the reliefs sought in the application dated 7th May 2024 as it is founded on illegal acts which were intended to evict the tenant without following due legal process.

37. The next issue is whether the tenant owes rent arrears to the landlord in respect of the suit premises. The landlord in a letter marked "LWM-11" annexed to the supporting affidavit of Lilian Wambui Maranga claims that the tenant was indebted to it in the sum of Kshs 509,236/= as at 28th March 2024 accumulated over the years excluding interest and an amount of Kshs 378,000/= that was waived in August 2021 on condition that the arrears be cleared. The tenant on the other hand claims to have overpaid the rent.

38. It is therefore necessary to order both parties to file and exchange within 21 days hereof statements of rent account showing debits and credits for the entire duration of the tenancy from inception to date together with filtered documentary evidence of rent payment to enable us determine whether indeed any rent is owing by the tenant to the landlord.

39. Finally, the issue as to who is liable to pay costs shall be determined together with the issue of whether the tenant owes any rent arrears.

40. In conclusion the following orders commend to us in this matter;

    a. The tenant's applications dated 3rd and 13th May 2024 are hereby allowed in the following terms;

        i. Prayer 3 of the application dated 3rd may 2024 is allowed but prayer 4 thereof is declined.

        ii. Prayers 2 & 3 of the application dated 13th May 2024 are granted.

    b. The landlord's application dated 7th May 2024 is hereby dismissed.

    c. Both parties shall file and exchange within the next 21 days hereof, statements of rent account showing debits and credits for the entire duration of the tenancy from inception to date

together with filtered documentary evidence of rent payments to enable us determine whether indeed any rent is owing by the tenant to the landlord.

d. The issue as to who is liable to pay costs shall be determined together with issue (c) above.

e. The matter shall be mentioned on 4th July 2024 to confirm compliance.

It is so ordered.

RULING DATED, SIGNED & DELIVERED THIS 14TH DAY OF JUNE 2024.

HON. GAKUHI CHEGE - PANEL CHAIRPERSON

BUSINESS PREMISES RENT TRIBUNAL

HON. JOYCE A OSODO - PANEL MEMBER

In the presence of;

Kimathi Kamenchu for the Landlord/Respondent

Prof Wangai for the Tenant