



**Mukaya & another v Gathoni (Tribunal Case E123 of 2024)  
[2024] KEBPRT 1423 (KLR) (25 September 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 1423 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E123 OF 2024  
N WAHOME, CHAIR & JOYCE MURIGI, MEMBER  
SEPTEMBER 25, 2024**

**BETWEEN**

**EVANCE BOSIRE MUKAYA ..... 1<sup>ST</sup> APPLICANT**

**JACINTA KERUBO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**ESTHER GATHONI ..... RESPONDENT**

**RULING**

1. This Ruling pertains to the Tenants/Applicants notice of motion Application dated the 8.07.2024. The same sought for the following reliefs;-
  - a. That this Application be and is hereby certified as urgent and service be dispensed with in the first instance and the same be heard ex-parte.
  - b. That this Honourable court be pleased to order the Landlord to immediately re-open the business premises and grant the Tenant access.
  - c. That this Honourable Court be pleased to order the Respondent/Landlord to pay a sum of Kshs. 100,000/= per day being the daily income of the Tenant for a period the business has been locked.
  - d. That this Honourable court be pleased to order the Landlord to accept rent or make any other orders with regards to payment of rent.
  - e. That the OCS, Busia (K) police station do ensure compliance of these orders.
  - f. That the costs of this Application be paid by the Respondent/Landlord.
  - g. That this Honourable court do grant any other relief it deems fit or just to grant.



2. The 2<sup>nd</sup> Applicant filed a further affidavit sworn on the 2.08.2024 whereas the 1<sup>st</sup> Applicant filed the supplementary affidavit dated the 19.8.2024 and closed their pleadings.
3. On her part, the Landlady filed the Replying affidavit sworn by herself on the 23.7.2024 and the supplementary sworn Affidavit on the 19.8.2024. The case for the Tenant is that;-
  - a. The Landlord closed their shop on the 1.8.2024 when the only rent in arrears was for the month of July, 2024 at Kshs. 30,000/=.
  - b. The shop was only opened under the supervision of the OCS Busia police station on the 23.7.2024.
  - c. During the time the shop was closed, they suffered daily losses of Kshs. 100,000/=.
  - d. They only came to court after the Landlady declined to reach an amicable solution with them.
  - e. Asked that the Application be allowed, they be compensated for the lossess suffered and be paid costs.
4. On the other hand, the evidence of the Landlord was that;
  - a. The tenancy relationship was terminated when the Tenants fallen into rent arrears.
  - b. She required vacant possession of the premises and the Tenants were free to take away their properties on paying the rents in arrears.
  - c. The Tenants broke into the premises in her absence so that they could claim compensation for the alleged losses.
  - d. Tenants were in rent arrears of Kshs. 90,000/= and could not have fell into arrears of rent if indeed they were earning Kshs. 100,000/= per day as alleged.
5. Having perused all the pleadings herein and the brief oral submissions by the Tenants, it is our view that the issues for determination in this matter are the following;-
  - A Whether the Applicants' Application has merit.
  - B Who should bear the costs of this Application
6. Before we even delve into the determination of the identified issues, it is important to confirm that there has not been availed any evidence that the Landlady had issued any notice to the Tenants to alter the terms of their tenancy. Therefore, the demand by the Landlord that the Tenants do evacuate their properties from the demised premises and vacate the same has no foundation in law or at all.
7. For the Landlady to be entitled to her demands, she must have first been in strict compliance with Sections 4(2), 4(4) and 7(1) of the [Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#) hereinafter "the Act and Regulation 4(1) of the Regulations to the Act.
8. There is no iota of evidence of such compliance and therefore the Landlady's insistence on the Tenants vacating the demised premises is without any basis nor foundation in law and the same is declined.
9. Going back to the issue of whether the Applicants' Application dated 8.07.2024 has merit, the Landlady has admitted that she had locked up the premises, there is also no dispute that the same was only re-opened on the 23.7.2024 on the intervention of the OCS Busia police station. By closing the Tenants shop, the Landlady was in clear breach of the law as such action is unknown to the governing Act. The Tenant therefore deserved to move this court for their protection and preservation.



We therefore find that the Tenants have established a prima facie case with high probability of success. In the case of; Mrao vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125, the court held that;-

“A prima facie case in a Civil Application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”

10. We have no doubt that the action of the Landlady of locking the Tenants shop was an infringement on their rights and calls for the intervention of this court.
11. In our view also, the payment of damages may not compensate the Tenants adequately in the present matter where their rights were being trampled on. It is the grant of an injunction that would allow the Tenants to continue with their daily business which had otherwise been halted without any legal protocols being employed. Such a scenario as actioned by the Landlady would obviously occasion the Tenants irreparable injury if allowed to prevail.
12. In this matter though not in any doubt on the question that the Tenants case has a prima facie probability of success and irreparable injury or harm would be occasioned to them if orders of injunction are not if granted, we also find that the balance of convenience do tilt in their favour. In the case of; Pius Kipchirchir Kogo vs Frank Kemei Tenai Eldoret ELC No. 221 of 2017 [2018] eKLR, the court had this to say;

“The meaning of balance of convenience in favour of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiffs, the inconvenience would be greater than that which would be caused to the defendant if an injunction is granted but the suit is ultimately dismissed.”

13. In our view therefore, the Tenants have satisfied all the requirements in the grant of injunctions as laid down in the case of; Giella vs Cassman Brown & Co. Ltd [1973] EA 358 where the court held that;

“First, an Applicant must show a prima facie case with a probability of success, secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable harm, which would not adequately be compensated by an award of damages. If the court is in doubt, it will decide an application on a balance of convenience.”

14. We therefore proceed to grant the Application in terms that the Tenants shall be allowed quiet possession of the demised premises until the hearing and final disposal of the Reference herein.
15. It is our view that the question of the compensation as raised in the Application herein may not be effectively addressed in an environment of an Application. Parties may require to first comply with order 11 of the Civil Procedure Rules and possibly call oral and documentary evidence in support and equally in opposition to the same.
16. On the issue of costs, we are persuaded to conform with Section 27 of the [Civil Procedure Act](#) and the proviso thereof and award the same to the Tenants who are the successful parties in this Application.
17. In the final analysis, the orders that commend to us are the following;-



- a. That the Application dated 8.07.2024 is granted on the terms that the Tenants shall be allowed quiet possession of the demised premises pending the hearing and determination of the Reference.
- b. That the Tenants shall continue paying rent as and when the same falls due.
- c. That costs are awarded to the Tenants.
- d. The parties have thirty (30) days within which to comply with order 11 of the Civil Procedure Rules and exchange their respective evidence and documents

Those are the orders of the court.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**HON. NDEGWA WAHOME, MBS - PANEL CHAIRPERSON**

**BUSINESS PREMISES RENT TRIBUNAL**

AND

**HON. JOYCE MURIGI - MEMBER**

**BUSINESS PREMISES RENT TRIBUNAL**

Ruling delivered in the presence of Tenants/Applicants in person and in the presence of Mr. Ashioya for the Landlord/Respondent

Court: Mention on the 28.10.2024 to confirm compliance with order 11 of the Civil Procedure Rules and take a date for hearing.

