



**Ogodo v Washiali (Tribunal Case E035 of 2024)
[2024] KEBPRT 1518 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 1518 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E035 OF 2024
CN MUGAMBI, CHAIR
OCTOBER 11, 2024**

BETWEEN

HELLEN ADHIAMBO OGODO TENANT

AND

LINET WASHIALI LANDLORD

RULING

1. The Tenant's notice of motion dated 7.08.2024 seeks the following orders:-
 - a. That pending the hearing and determination of this suit, the Tenant be granted unconditional access to the rental premises known as Green Life Resort & SPA located on the parcel of land known as Kisumu/Municipality/BLXO 12/392 (hereinafter referred to as the suit land).
 - b. That pending the hearing and determination of the suit, the termination notice dated 9.05.2024 and the eviction of the Tenant from Green Life Resort & SPA (the suit premises) be suspended.
 - c. That the Landlady be restrained from in any manner interfering with the Tenant's peaceful use and occupation of the suit premises pending the hearing and determination of this suit.
 - d. That the OCS, Kisumu Central police station do supervise the implementation of these orders.
 - e. That the Reference filed herewith be settled in terms of the final orders of the Application filed herewith.
2. The Tenant's notice of motion dated 15.5.2024 seeks orders that pending the hearing and determination of the Reference filed herewith, an order of interim stay of attachment and sale of the Tenant's proclaimed goods be issued. The Application has sought an order allowing the Tenant to access and secure her goods that are in danger of damage and wastage pending the hearing of the said Application.



The Tenant's depositions in support of both Applications

3. The Tenant's affidavits sworn on 7.08.2024 and 15.08.2024 may be summarized as follows hereunder:-
- a. That the tenancy between the parties over the suit premises is a controlled tenancy.
 - b. That on 27.07.2024, the Tenant herein and her hotel guests were thrown out of the suit premises by goons sent by the Landlady over alleged unpaid rent and a notice alleged to have been sent to the Tenant.
 - c. That after the Tenant saw the notice dated 9.05.2024 emanating from the Landlady, she informed the Landlady that the notice was irregular and unlawful.
 - d. That on the said 27.07.2024, the goons forcefully threw out the Tenant and locked the gate to the premises, the Tenant reported this incident to the police but got no assistance.
 - e. That several properties belonging to the Tenant were destroyed and left in the compound where they are exposed to the elements of the weather.
 - f. That the Landlady has denied the Tenant access to the suit premises which has forced the Tenant to hire another compound at the cost of Kshs. 75,000/= per month.
 - g. That the Tenant has since the unlawful eviction, lost business to the tune of Kshs. 200,000/= per month which is her monthly profit.
 - h. That the Tenant stands to lose her licenses since she cannot file her returns as all her documents and computers are locked in the premises.
 - i. That the eviction of the Tenant is unlawful for failure to follow the due process and the properties of the Tenant were never proclaimed by any auctioneer on or before 27.07.2024.
 - j. That having realized that she had done an unlawful act, the Landlady on 6.08.2024 sent auctioneers on the premises to proclaim the goods in the absence of the Tenant.
 - k. That the Tenant's goods in the premises are worth over Kshs. 2,000,000/=.
 - l. That the Landlady's actions are malicious as she intends to carry out a hotel business in the same premises.
 - m. That even after the Tribunal issued directions on the hearing of the Application dated 7.08.2024, M/S Ikimwanya Auctioneers on behalf of the Landlady have threatened to take possession of the Tenant's goods and to auction them.
 - n. That the Tenant is apprehensive that the said auctioneers may sell the goods even as the Reference is still pending.

The Respondent's depositions

4. The Replying affidavit sworn by the Landlady on 30.8.2024 may be summarized as follows:-
- a. That the Tenant (who the Landlady refers to as her former Tenant in all the paragraphs of the Replying affidavit) is no longer in the suit premises having left the same on 27.7.2024.
 - b. That prior to the vacating the premises, the Tenant had been served with a notice to vacate which the Tenant has acknowledged in her affidavit.



- c. That prior to her vacating the suit premises, the Tenant had accumulated rent arrears amounting to Kshs. 360,000/= and caused wanton destruction of the suit premises and constructed illegal structures thereon.
- d. That the Tenant had previously accepted her indebtedness to the Landlady and had even sought time to settle her rent arrears.
- e. That the Tenant has not shown any evidence that she was conducting any business in the suit premises as the suit premises is a residential premises.
- f. That the proclaimed items are the ones the Tenant left in the premises on 27.7.2024 and for which the Landlady will be levying storage and security charges separately.

The Tenant's supplementary affidavit

- 5. That the inventories of the Tenant's properties in the suit premises are annexed to the supplementary affidavit and marked "HAO-1".
- 6. That on 2.09.2024, both parties and their representatives together with the auctioneers visited the suit premises to inspect the Tenant's goods.
- 7. That to the shock of the Tenant, the goods were bundled in a single room without due care and in utter abandonment.
- 8. That two gazebos and the washrooms and partitions which the Tenant had constructed were all destroyed.
- 9. That the Landlady was using the Tenant's fridges, tables and chairs.
- 10. That some of the Tenant's goods were missing and could not be traced.
- 11. That the Landlady declined the taking of all full inventory even after the parties had agreed to it and consequently many of the Tenant's properties are lying in waste and the perishable ones going bad.
- 12. That some of the goods locked up by the Landlady are school examination papers and books belonging to students.
- 13. That the Tenant has cleared all her rent arrears and does not owe the Tenant any rent arrears at all.

Analysis and determination

- 14. The issues that arise for determination in this Application are in my view the following:-
 - a. Whether the notice to vacate dated 9.05.2024 was legal and valid
 - b. Whether the Tenant voluntarily vacated the premises or was forcefully evicted from the suit premises on 27.07.2024.
 - c. Whether the proclamation by Ikimwanya Auctioneers dated 6.08.2024 was valid.
 - d. Whether the Tenant is entitled to the orders sought in her Application.

Issue A: Whether the notice to vacate dated 9.05.2024 was legal and valid

- 15. In her replying affidavit, at paragraph 5, the Landlady depones that prior to her vacation of the suit premises, the Tenant had been served with a written notice to vacate the premises as acknowledged at paragraph 7 of the Tenant's supporting affidavit sworn on 7.08.2024. The notice referred to by the



Tenant in her said affidavit is the one dated 9.5.2024 and which the Tenant deponed that she informed the Landlady that the same was irregular and illegal for the reasons that it did not originate from the Tribunal.

16. I have perused the notice to vacate dated 9.05.2024 and it is true that it does not amount to the notice to terminate or alter terms of tenancy contemplated under Section 4(2) of Cap 301. The notice under Section 4(2) of Cap 301 is to be in the form provided for under Schedule A in the Act and the form being mandatory, I do find that the form adopted as a notice by the Landlady is defective. The notice dated 9.05.2024 could therefore not be the basis for the termination of a controlled tenancy. In the case of; Manaver N. Alibhai t/a Diani Boutique vs South Coast Fitness & Sports Centre Ltd, Civil Appeal No. 203 of 1994, the court held;

“The Act lays down clearly and in detail the procedure for the termination of a controlled tenancy. Section 4(1) of the Act states in very clear language that a controlled tenancy shall not 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 specified provisions of the Act. These provisions include the giving of a notice in the prescribed form. The notice shall not take effect earlier than two months from the date of receipt thereof by the Tenant. The notice must also specify the ground upon which termination is sought. The prescribed notice in Form A also requires the Landlord to ask the Tenant to notify him in writing whether or not the Tenant agrees to comply with the notice.”

17. The notice to vacate dated 9.05.2024 does not meet the mandatory formal requirements of a notice under Section 4(2) of the Act, offends Section 4(1) of the Act and is therefore illegal, irregular, invalid and of no legal consequence, and I so hold.

Issue B: Whether the Tenant voluntarily vacated the premises or was forcefully evicted from the suit premises on 27.07.2024

18. The Tenant has deponed in her affidavit that on 27.07.2024, she was thrown out of the premises together with her hotel guests by goons hired by the Landlady. The Tenant has further deponed that the goons locked the suit premises and she has been denied access to the suit premises since then. The Landlady in response to this deposition by the Tenant only states at paragraph 4 of her Replying affidavit that the Tenant is no longer in occupation of the suit premises having vacated on 27.7.2024. The Landlady has not bothered to explain how the Tenant vacated the suit premises and has indeed not denied the deposition by the Tenant that she was forcefully removed from the suit premises which was thereafter locked and the Tenant has been denied access therein since 27.7.2024.
19. If indeed the Tenant had vacated the premises voluntarily, then one would have expected the Tenant to have peacefully moved out with her properties. The fact that her properties remain in the suit premises and she cannot access them to date nor use the suit premises only points to the irresistible conclusion that she was forcefully removed from the suit premises. If evidence is needed for this conclusion, one only needs to read paragraph 10 of the Landlady's replying affidavit where it has been deponed that the Tenant knew her occupation of the suit premises had become untenable as she could not afford it and was in arrears of rent on her own admission. Further, at paragraph 14 of the replying affidavit, the Landlady confirms being in possession of the Tenant's proclaimed goods and which she claims to hold for purposes of levying storage and security charges. If the Tenant had indeed left voluntarily on 27.7.2024, it beats logic that she could have left her goods in the hands of the Landlady.
20. On this issue, I therefore do find that the Tenant was forcefully and illegally evicted from the suit premises.



Issue C: Whether the proclamation by Ikimwanya Auctioneers dated 6.08.2024 was valid.

21. The proclamation by M/S Ikimwanya Auctioneers is dated 6.08.2024. The Tenant has deponed in her affidavit that after her unlawful eviction, her properties were destroyed and some were left in the compound. These events took place on 27.7.2024 which is largely not disputed by the Landlady. The Tenant has also deponed that before her unlawful eviction on 27.7.2024, her properties had not been proclaimed by any auctioneer. So it is obvious that as at the time the Tenant was illegally evicted from the suit premises, no legal process for distress for rent had been commenced by the Landlady. I am constrained to agree with the Tenant that the proclamation done on 6.08.2024 was only done to sanitize the illegal acts of the Landlady. It was an afterthought. The Tenant was already out of the premises by the time the alleged proclamation took place. It makes mockery of the statement in the proclamation that;

“...you are hereby notified that the movable property described in the Schedule hereof is hereby duly attached/repossessed/distrained and left in your custody for seven (7) days from today...”

22. I have no difficulties in finding that the purported proclamation by the said auctioneers was illegal and an afterthought and smacks of a conspiracy between the Landlady and the Auctioneer to defeat the interests of the Tenant in the allegedly proclaimed goods.

Issue D: Whether the Tenant is entitled to the orders sought in her Application.

23. Although none of the parties has filed a clear statement of accounts, I do note that the Tenant has deponed in her supplementary affidavit that she has paid all her rent arrears and currently does not owe the Landlady any arrears. I will not make any conclusive finding on the issue of rent at this juncture, I will leave this issue to the full hearing of the Reference. I have already found the notice to vacate issued by the Tenant, the eviction of the Tenant and the purported proclamation of her goods, were/are all illegal, irregular and of no legal consequences. The actions of the Respondent/Landlady in forcefully evicting the Tenant in the manner that she did was illegal and brutal and flew on the face of good order and the clear provisions of Cap 301 in termination of tenancies. Put in a clearer manner, the Landlady literally took the law into her own hands and threw caution to the wind.
24. In the circumstances of this case and based on my findings above, I am convinced that the Application by the Tenant dated 7.08.2024 has merits and I proceed to allow the same in its entirety.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 11TH DAY OF OCTOBER, 2024.

HON. CYPRIAN MUGAMBI - CHAIRPERSON

BUSINESS PREMISES RENT TRIBUNAL

Delivered in the absence of the parties and Counsels

