



**Nyambura v Mwangi & 2 others (Tribunal Case E1131 of 2023)
[2024] KEBPRT 1128 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 1128 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E1131 OF 2023
M MAKORI, MEMBER
APRIL 25, 2024**

BETWEEN

JUDY NYAMBURA APPLICANT

AND

SIMON MWANGI 1ST RESPONDENT

NDOTO INVESTMENTS 2ND RESPONDENT

BONIFACE MUVUNZYA 3RD RESPONDENT

RULING

1. The present claim was filed vide a claim dated 15th November 2023 and an application dated 8th November 2023 by the Applicant and which application was opposed vide a Replying Affidavit dated 8th December 2023 by the Respondents.
2. The Counsels, however, consented to the application and the replying affidavit be disposed of by way of written submissions.
3. From the totality of the pleadings filed by parties and made, only two issues emerge for determination:
 - I. Whether the tenant is entitled to the orders sought?
 - II. Whether the Termination of tenancy was served?
 - III. Whether there are arrears by the Tenant and who is to pay?

a. Whether the tenant is entitled is entitled to injunctive orders?

4. The principles of injunctions were settled in the locus classicus case of Giella – vs- Cassman Brown & Co. Ltd (1973) EA 358 as follows: -



- i. An applicant must show a prima facie case with a probability of success.
 - ii. An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.
 - iii. When the court is in doubt, it will decide the application on the balance of convenience.
5. A prima facie case was defined in the case of *Mrao – vs- First American Bank of Kenya Ltd & 2 Others* (2003) eKLR at page 8/10 as follows: -
- “So what is a ‘prima facie’. I would say in civil cases, it is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right that has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter”.
6. It is not in dispute that by the time the landlord instructed added another padlock to lock the Tenants business occasioned to distress, the tenant was in rent arrears.
 7. Tenant submits that the goods proclaimed are his tools of trade and his rights were infringed by that reason. The tenant further submits that she will suffer irreparable damage if the proclaimed goods are sold or if he is evicted as he relies on the said goods to earn a living.
 8. The tenant relies on the decision in *Giella vs Cassman Brown* to support its contention that the proclaimed goods are tools of trade.
 9. The tenant submits that she was willing to pay the arrears for Kshs. 20,000/- of which the same amount was to be paid by the 3rd Respondent who had rented the veranda as agreed between them to amount to the stated amount had the Landlord not evicted the 3rd Respondent, However, the 3rd Respondent has refused to pay the rent accrued upon eviction hence amounting to arrears.
 10. On the other hand, the landlord submits that the tenant is guilty of breach of contract and she could not be faulted for taking action to recover the rent arrears since the Tenant had stated to remove items from the business premises indicating that he was moving out without fully paying the rent owed to the Landlord.
 11. The Tenant refutes by stating that the Veranda constructed by herself was not in the discretion of the Landlord to take action and evict the 3rd Respondent, she proceeds to state that the same was never compensated for by any of the Landlords, however the Landlord disputes and avers that the Tenant was allowed to use the veranda for four years whose contract of terms has been attached and the same amounted to full settlement of the veranda costs.
 12. I therefore refuse to be invited to determine whether the Landlord is entitled to the rent of the veranda or the Tenant as the same is not clearly disputed in either of the parties’ pleadings. It has been raised in submissions which has held above do not constitute pleadings.
 13. As to whether the tenant is entitled to the order of permanent injunction sought, I find that being in default of rent payment, she cannot benefit from the discretion of a court of equity.



14. I rely in this regard on the decision in the case of *Kyangavo -vs- Kenya Commercial Bank Ltd & Another* (2004) e KLR at page 13/12 where it was held as follows:

“Secondly, the injunction sought is an equitable remedy. He who comes to equity must fulfill all or substantially, all his outstanding obligations before asserting on his rights. The plaintiff has not done that. Consequently, he has not done equity”.

15. However, the Tenant has the right to resume with the business if agreeable to remit the amount she has been paying to the Landlord.

Whether there was a notice of termination to the tenant?

16. Section 4(2) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* Cap 301 Laws of Kenya (hereinafter referred to as the “Act”) provides that;

“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.” Section 4(2) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* Cap 301 Laws of Kenya (hereinafter referred to as the “Act”) provides that

17. Additionally, Section 4(4) provides that no tenancy notice shall take effect until such date, not being less than two months after the receipt thereof by the receiving party, unless the terms and conditions of the tenancy provide for a period exceeding two months or the parties to the tenancy agree in writing to a lesser period of notice.
18. The two requirements therefore for a valid notice of termination of the tenancy is first, that the notice shall be in the prescribed form and secondly, that the notice shall not take effect until after expiry of two months, or such notice period as may be agreed by the parties.
19. This was emphasized in the case of *Munaver N Alibhai T/A Diani Boutique v South Coast Fitness & Sports Centre Limited* [1995] eKLR, where the Court of Appeal at Mombasa in finding that the notice of termination of the tenancy was void for failing to comply with Section 4 of the Act stated as follows;

“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 2 months from the date of receipt thereof by the tenant. The notice must also specify the grounds on 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.”

20. Based on the evidence tendered before this Honorable Court, it is evident that the parties in their agreement did not make provision for the period of notice required before termination of the tenancy agreement. As such, section 4(4) of the Act as mentioned above applies, thus the default notice period for termination of the tenancy herein is two months.



21. The Landlords filed its Replying affidavit dated 8th December 2023, however it is not clear in his affidavit and submissions there was no notice to vacate or distress for rent to the Tenancy, which subsequently no notice for the termination was issued. Additionally, none is exhibited in his affidavit.
22. I have however noticed that there is a demand by the Respondent. Additionally, there is rent arrears of Kshs 35,000/- and the landlord threatens to initiate debt recovery process to levy distress for the outstanding rent as stated by the landlords in their submissions however the tenant does not dispute the existence of the debt but contends that the amount was to be settled by the 3rd Respondent.
23. Putting focus on the provisions of Shops, Hotels and Catering Establishments) Act on termination of a tenancy.

Section 7 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* establishes the grounds upon which a landlord can terminate a tenancy as follows;

1. Where under section 4 of this Act served a notice of termination of a controlled tenancy on the tenant, the grounds on which the landlord seeks to terminate such tenancy may be such of the following grounds as are stated in the aforesaid notice—
 - a. where, under the tenancy under which the tenant holds for the time being, the tenant has any obligations in respect of the repair and maintenance of the premises comprised in such tenancy, that the tenancy ought to be terminated in view of the state of repair of the premises, being a state resulting from the tenant's failure to comply with the said obligations;
 - b. that the tenant has defaulted in paying rent for a period of two months after such rent has become due or payable or has persistently delayed in paying rent which has become due or payable;
 - c. that the tenant has committed other substantial breaches of his obligations under the tenancy, or for any other reason connected with the tenant's use or management of the premises comprised in the tenancy;
 - d. that the landlord has offered and is willing to provide or secure the provision of alternative accommodation for the tenant, that the terms on which the alternative accommodation is available are reasonable having regard to the terms of the tenancy and to all other relevant circumstances, and that the accommodation and the time at which it will be available are suitable for the tenant's requirements (including the requirement to preserve goodwill) having regard to the nature and class of his retail trade or business or enterprise and to the situation and extent of, and facilities afforded by, the premises comprised in the tenancy;
 - e. that the tenancy was created by the subletting of part only of the premises comprised in a superior tenancy of which the landlord is the owner of interest in reversion expectant on the termination of that superior tenancy, and that the aggregate of the rents reasonably obtainable on separate lettings of such premises in parts would be substantially less than the rent reasonably obtainable on a letting of such premises as a whole, and that on the termination of the tenancy the landlord requires possession of such premises as a whole for the purpose of letting or otherwise disposing of the same as a whole;
 - f. that on the termination of the tenancy the landlord intends to demolish or reconstruct the premises comprised in the tenancy, or a substantial part thereof, or to carry out



substantial work of construction on such premises or part thereof, and that he could not reasonably do so without obtaining possession of such premises;

- g. Subject as hereinafter provided, that on the termination of the tenancy the landlord himself intends to occupy for a period of not less than one year the premises comprised in the tenancy for the purposes, or partly for the purposes, of a business to be carried on by him therein, or at his residence.

- 24. From the above provision it is clear that the prescribed form is the one found in form A of the schedule to the Act however the tribunal notes that the landlord only issued a demand letter and verbal notices which are not contemplated by the Act.
- 25. Further if in the event any proper notices had been issued, the notices ought to have been filed by the Landlord, and therefore the Tenant is not obligated to be evicted until a proper notice has been served.
- 26. I verily state that the Landlord lacks prerequisite authority to evict the Tenant without having served the notice.

Whether there are arrears by the Tenant and who should pay?

- 27. The Landlord has alleged that the Tenant has constantly been paying the Kshs 20,000/- to the 2nd Respondent and hence defaulted in payment of rent and currently has arrears amounting to Kshs. 35,000/-. I note that the issue of rent arrears has also been admitted by the Tenant, however, she denotes that the amount accrued was on the failure of the 3rd Respondent who stopped paying for the rent of the veranda which amounted to Kshs. 8,000/-.
- 28. A close observation on the statement produced by the Landlord it is clear that the 3rd Respondent has been paying to the 2nd Respondent directly hence the Landlord was aware of the same transaction.
- 29. I reiterate that the Landlord ought to have notified the Tenant of the ground at the earliest and especially at the point of evicting the 3rd Respondent and issuing the notice of termination of the tenancy to the 3rd Respondent.
- 30. The thrust of the Tenant's complaint is therefore the alleged illegal distress for rent by the Landlord. It is the Applicant's case that the rent due is in dispute and therefore the Respondent cannot distress for rent since she was not entitled to pay the whole Kshs. 20,000/= alone.
- 31. It is fair to note that the Tenant has been renting out the veranda which she constructed and hence there should have been new terms with the new owner of the suit property. And having been aware that the 3rd Respondent was contributed equally to the payment of Kshs. 20,000/-.
- 32. Consequently, the Landlord having known that the Tenant and the 3rd Respondent were both paying rent then its fare to state that the 3rd Respondent opt to clear the arrears owed to the Landlord.
- 33. Based on the foregoing, the Tribunal makes the following orders
 - a. That the Landlord, their servants, agents and or employees be and are hereby restrained from evicting, harassing and/or in any way interfering with the Tenant's enjoyment and occupation of his tenancy.
 - b. That the Landlord, to reopen and allow access of business premises to the Tenant and the Tenant to liaise with the 3rd Respondent to pay the Kshs 35,000 /- being arrears owing to the Landlord in two (2) months' time failure to which the Landlord is at liberty to levy for distress.



- c. The Applicant to be allowed to rent the Veranda and new terms to be entered by the parties on issue of settling monthly rent payments.
- d. Each party shall bear their own costs

HON. MIKE MAKORI - MEMBER

BUSINESS PREMISES RENT TRIBUNAL

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY BY HON MIKE MAKORI THIS
25TH APRIL, 2024**

In the presence of Ms. Wanjiru for the Landlord and Ms. Nyambura the Applicant/Tenant.

HON. MIKE MAKORI - MEMBER

BUSINESS PREMISES RENT TRIBUNAL

