



**Aden v Mohammed & another (Tribunal Case E203 of 2023)
[2023] KEBPRT 462 (KLR) (Civ) (5 September 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 462 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
CIVIL
TRIBUNAL CASE E203 OF 2023
P MAY, VICE CHAIR
SEPTEMBER 5, 2023**

BETWEEN

ISSA ABDI ADEN SUB-TENANT

AND

HASSAN MAALIM MOHAMMED TENANT

AND

DONALD STEPHENSON MAINA LANDLORD

RULING

1. The present proceedings were commenced by the sub-tenant vide the reference dated February 22, 2023 in response to the notice to vacate the premises issued on February 17, 2023. The sub-tenant further filed an application under certificate dated an even date which sought for a plethora of orders including an order of temporary injunction against the landlord.
2. The application was placed before the Tribunal on February 27, 2023 where an ex-parte order of temporary injunction in favour of the sub-tenant was issued pending the inter partes hearing. The sub-tenant was ordered to serve the application upon the other parties. The landlord responded to the application by filing the Replying Affidavit sworn on March 27, 2023.
3. The parties elected to canvass the application which is the subject of this ruling by way of written submissions. I have considered the submissions on record, the affidavits and annexures thereto and would proceed as follows:



Sub-tenant's case

4. The gist of the sub-tenant's case is as elucidated in the supporting affidavit February 22, 2023. The sub-tenant stated that the landlord had entered into a tenancy agreement with the landlord for a period of 5 years commencing January 1, 2020. The sub-tenant averred that the landlord consented to the head tenant handing over the premises to him under the same terms as those between the landlord and the head tenant. The sub-tenant therefore proceeded to pay goodwill to the head tenant and took over the demised premises.
5. The sub-tenant proceeded to obtain consent from the relevant authorities to carry out the necessary improvements on the demised premises. The sub-tenant was therefore taken aback when the landlord contrary to his legitimate expectations issued what he termed as an irregular notice to vacate. This prompted the filing of the present proceedings.
6. The sub-tenant in his submissions stated that he has met the requisite conditions for the grant of orders of temporary injunction.

Landlord's case

7. The landlord in their response to the application stated that he was the registered proprietor of the demised premises. He admitted to having entered into a tenancy agreement with the head tenant and having consented to the sub lease. He however stated that he was unaware of the goodwill paid and the costs incurred in undertaking renovations. He maintained that he was not opposed to the sub-tenant completing the term of the tenancy. The landlord was evasive on the issue of the validity of the notice of termination issued.

Analysis

8. The submissions filed by the parties have addressed the issues of grant of temporary orders of injunction as sought by the sub-tenant. The parties buttressed their respective positions on the triple requirements which were set for the grant of temporary orders of injunction in the celebrated case of *Giella V Cassman Brown & Company Limited*, (1973) 358 EA as follows:
 - (i) The applicant must establish a prima facie case with a probability of success.
 - (ii) The applicant must then demonstrate that he or she stands to suffer irreparable loss or damage which cannot be adequately compensated by an award of damages.
 - (iii) Where there is doubt on the above, that the balance of convenience tilts in favour of the applicant
9. A prima facie case was defined in the case of; *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others* (2003) eKLR at page 8/10 by Bosire JA (as he then was) to mean:-

“So what is a “*prima facie* case”. I would say that 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 which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.
10. Guided by the foregoing decisions, I am required to determine whether the sub-tenant has brought himself within the principles of granting an injunction based on the materials presented before me.



11. The present dispute as stated earlier was precipitated by the notice to vacate issued by the landlord. The parties herein do not dispute that the sub-tenant is a protected tenant and it is therefore expected that the Landlord would comply with the prerequisites set out in sections 4(1), (2), (4) & (5) of the [Landlord and Tenant \(Shops, Hotels and Catering Establishment\) Act](#). These provide that:
4. “Termination of and alteration of terms and conditions in controlled tenancy
 - 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 conditions or right or service enjoyed by the tenant of any such tenancy shall be altered, other 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 on the prescribed form.....
 - 4) No tenancy notice shall take effect until such date, not being less than two months after the receipt thereof by the receiving party as shall be specified therein. Provided that—
 - i. where notice is given of the termination of a controlled tenancy, the date of termination shall not be earlier than the earliest date on which, but for the provisions of this Act, the tenancy would have, or could have been, terminated.....
 - 5) A tenancy notice shall not be effective for any of the purposes of this Act unless it specifies the grounds upon which the requesting party seeks the termination, alteration or reassessment concerned and requires the receiving party to notify the requesting party in writing, within one month after the date of receipt of the notice; whether or not he agrees to comply with the notice.”
12. From the assessment of the pleadings and the submissions by the parties, it is not disputed that the Landlord issued a notice to vacate dated February 17, 2023. It is evident that the [Landlord and Tenant \(Shops, Hotels & Catering Establishment\) Act](#) Cap 301 Laws of Kenya lays down clearly and in detail, the procedure for the termination of a controlled tenancy. Section 4(1) of the Act provides that a controlled tenancy shall not terminate or be terminated otherwise than in accordance with specified provisions of the Act. This includes: (i). giving a notice in the prescribed form; (ii). The notice shall not take effect earlier than two (2) months from the date of receipt by the Tenant and (iii). The notice must specify the grounds upon which the termination is sought. The Notice should also be in the prescribed form that is Form A where the Landlord should ask the Tenant in writing whether or not they will comply with the notice.
13. The court in the case of *Lall vs Jeypee Investments Ltd* Nairobi HCCA No 120 of 1971 [1972] EA 512 observed that there is a need for strict compliance with the law in issuance of notices and stated that:
- “The [Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#) is an especially enacted piece of legislation which creates a privileged class of tenants for the purpose of affording them the protection specified by its provisions against ravages of predatory landlords. Such protection can only be fully enjoyed if the provisions of Act are observed to



the letter otherwise the clearly indicated intention of the legislature would be defeated. In order to be effective in this fashion the Act must be construed strictly no matter how harsh the result...”

14. The notice issued by the landlord is not in the prescribed form thus it would automatically be irregular. Besides the landlord conceded to the sub-tenant occupying the premises for the remainder of the term. The sub-tenant has therefore satisfied the Triple requirements for the grant of orders of temporary injunction. The reference stemmed out of the said notice thus this ruling has conclusively dealt with the substratum of the said reference. Any further litigation based on the same notice between the parties herein would be an academic exercise.
15. I will now delve on the issue of who bears the costs of the application. It is trite law that costs follow an event. The sub-tenant having been inconvenienced to file the present proceedings should be compensated.
16. The upshot of the foregoing analysis is that, I shall issue the following orders:
 - a. The Notice to vacate dated February 17, 2023 is quashed for being irregular and illegal.
 - b. The notice of motion dated February 22, 2023 is allowed in terms of prayers c.
 - c. The parties shall remain bound by the terms of the tenancy agreement and consent both dated December 30, 2019 for the remainder of the term of the lease.
 - d. The sub-tenant is awarded the costs of the application and the reference assessed at Kshs 60,000 to be deducted from the rent payable.
 - e. The reference is settled as per the terms above.

RULING DELIVERED VIRTUALLY THIS 05TH DAY OF SEPTEMBER, 2023

HON. P. MAY

VICE CHAIR

09.2023

In the presence of;

Maranga present for the Respondents

Ngunjiri present for the subtenant

