



**Technik Diesel Limited v Aryan Limited; Concode Auctioneers (Interested Party)  
(Tribunal Case E499 of 2023) [2023] KEBPRT 463 (KLR) (6 September 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 463 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E499 OF 2023  
P MAY, VICE CHAIR  
SEPTEMBER 6, 2023**

**BETWEEN**

**TECHNIK DIESEL LIMITED ..... TENANT**

**AND**

**ARYAN LIMITED ..... LANDLORD**

**AND**

**CONCODE AUCTIONEERS ..... INTERESTED PARTY**

**RULING**

1. The application before me is the notice of motion filed under certificate dated May 23, 2023. The application sought for a plethora of orders amongst them orders of temporary injunction against the landlord and the interested party who had commenced what the tenant termed as illegal levying of distress.
2. The application was placed before the Tribunal on May 24, 2023 whereby the Tribunal issued orders of temporary injunction in favour of the tenant pending the inter partes hearing but ordered the tenant to avail evidence of payment of rent. The tenant complied with these directions by effecting service and filing a further affidavit which contained a bundle of receipts.
3. The landlord entered appearance and filed their response in opposition to the application vide the replying affidavit sworn on June 15, 2023. The parties elected to canvass the application by way of written submissions. I will give a summary of the parties' respective positions hereinbelow:

**Tenant's case**

4. The tenant's application is premised on the grounds set out on the face of it and the further grounds contained in the supporting affidavit. The tenant averred that they entered into a tenancy agreement



with the landlord sometimes in 2010 and the same lapsed on November 17, 2015. It was the tenant's contention that the rent payable was Kshs 248,477.86 inclusive of service charge and the applicable tax.

5. The tenant maintained that they continued to occupy the demised premises upon the lapse of the term of the lease thus a periodic tenancy of month to month was created and which was controlled as envisaged under CAP 301. The tenant stated that the actions of the landlord of increasing rent by 5% was illegal as it contravened the laid down procedure of altering the terms of tenancy as per CAP 301.
6. The tenant accused the landlord of failing to issue any notice to alter the terms of the tenancy so as to increase the rent payable. The tenant stated that they had always paid the undisputed rent as when it fell due thus the landlord's actions of issuing a proclamation notice and the intended auction was unprocedural and illegal at its best thus the Tribunal had no option but to quash the said notice. The tenant therefore urged the tribunal to grant the orders the prayers sought.

#### **Landlord's case**

7. The landlord through the averments set out in the Replying Affidavit opposed the contents set forth in the application. The landlord stated that contrary to the assertion that the parties did not execute a second tenancy agreement, the same was prepared and sent to the tenant but they never executed the same even despite making promises to execute the same.
8. The landlord further stated that the tenant paid rent as per the terms of the second lease agreement. The term of the said second lease agreement had since lapsed and a 3<sup>rd</sup> tenancy agreement had been sent to the tenant for execution but the tenant failed to execute the same and had accumulated rent arrears to the tune of Kshs 4,650,096. The landlord attached an extract of Whatsapp communication in which the tenant had admitted to be indebted to the landlord to the tune of Kshs 4,000,000/- The landlord claimed that the tenant was therefore not entitled to the equitable reliefs sought as they had been in rent arrears.

#### **Analysis**

9. The tenant in their submissions have framed the following as the issues for determination:
  - a. Whether sufficient notice was given to the tenant by the Landlord to increase the rent payable
  - b. Whether the landlord has a right to levy distress for recovery of rent
  - c. Whether there existed a binding agreement between the landlord and the tenant.
10. The Tribunal has however read and considered the instant Application, Affidavits and the relevant provisions of law and finds that the issue for determination is whether the Applicant has established the threshold for grant of interlocutory orders sought .
11. The threshold for grant of interlocutory orders was set out in the case of; *Giella Vs Cassman Brown (1973) EA 358* and was also reiterated in the case of; [Nguruman Limited versus Jan Bonde Nielsen & 2 others CA No 77 of 2012 \(2014\)eKLR](#), where the Court of Appeal held that;

' In an interlocutory injunction application, the applicant has to satisfy the triple requirements to (a), establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction interlocutory or permanent. it is established that all the above three conditions and states



are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially.'

12. Therefore, it is not in doubt that for the Tribunal to find that the Applicant is entitled to the injunctive orders sought, the Tenant has to prove all the three principles.
13. Has the Tenant/Applicant therefore established that he has prima facie case? In the case of; *Mrao Ltd Vs First American Bank Of Kenya Ltd (2003) eKLR*, the Court of Appeal gave a determination on a prima facie case. The court stated 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 legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.'

14. It is not in doubt that the Tenant is in occupation of the demised property and therefore has interest over the said property. The Applicant avers that the landlord has commenced illegal distress proceedings which was preceded by unlawful rent increment. At the interlocutory stage, the Tribunal does not have to look conclusively at the merits of the reference but will only draw a balance on the evidence tendered in support and opposition to the application. The Tribunal finds and holds that the tenant has established a prima facie case as they have interest over the demised property that is apparently threatened.
15. The second limb that the Applicant ought to satisfy the Court is that they will suffer irreparable injury if the injunction is not granted. In the case of; [\*Pius Kipchirchir Kogo Vs Frank Kimeli Tenai \(2018\) eKLR\*](#) the court stated;

' Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.'

16. Further in the case of; [\*Peter Kairu Gitu Vs KCB Bank Kenya Limited & another \[2021\] eKLR\*](#) the Court held that;-

' Having found that the applicant has not established a prima facie case, I find that it will not be necessary to consider if the two remaining conditions for the granting of orders of injunction have been met as it is a requirement that all the three conditions be fulfilled before an order of injunction is granted. I am guided by the decision in *Nguruman Limited V Jan Bonde Nielsen & 2 Others*, CA NO 77 OF 2012, where the Court expressed itself on the importance of satisfying all the three requirements for an order of injunction as follows: -

'In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) Establish his case only at a prima facie level,
- (b) Demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) Ally any doubts as to (b) by showing that the balance of convenience is in his favour.



These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co Ltd V Afraba Education Society [2001] Vol 1 EA 86*. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the Respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the Respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit 'leap-frogging' by the applicant to injunction directly without crossing the other hurdles in between.'

17. The tenant has stated that they have been in occupation of the demised premises for a period exceeding a decade. They have therefore established a goodwill which risks being extinguished should the landlord be allowed to evict them. The tenant has thus satisfied the Tribunal on the second requirement for the grant of temporary injunction. The prayer for temporary injunction is therefore merited. The contentious issues between the parties shall be sufficiently ventilated during the hearing of the reference.
18. The Upshot of the foregoing is that; the Notice of Motion Application dated May 23, 2023 is allowed in the following terms:
  - a. The tenant is granted prayers 2 and 4 of the application.
  - b. The tenant shall continue paying the undisputed rent as when it falls due and promptly file evidence of such payment before the Tribunal.
  - c. The parties to file and exchange updated statements of account and any other documents that they seek to rely on during hearing in a single bundle clearly paginated within 14 days from the date hereof.
  - d. Parties to fix a hearing date on priority basis
  - e. Each party to bear their own costs.

**RULING DELIVERED VIRTUALLY THIS 6<sup>TH</sup> DAY OF SEPTEMBER, 2023**

**HON. P. MAY**

**VICE CHAIR**

PARA 06.

09.2023

In the presence of;

Ms Ndinda holding brief for Tole for the tenant / Applicant.

N/A for the Respondents

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