



**Migiro v Paintmart & Allied Building Equipment (K) Ltd (Tribunal Case
E949 of 2023) [2024] KEBPRT 379 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 379 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E949 OF 2023
N WAHOME, MEMBER
MARCH 14, 2024**

BETWEEN

DAVID MOKAYA MIGIRO TENANT

AND

PAINTMART & ALLIED BUILDING EQUIPMENT (K) LTD LANDLORD

RULING

1. This Ruling is on the Tenant/Applicant's Application dated 28.09.2023. The same was filed under certificate of urgency and it principally sought to have the landlord/Respondent restrained by an order of injunction from evicting the Applicant, altering the terms of the tenancy or in any manner whatsoever interfering with his quiet tenancy on Title No. Nairobi/Block 103/2875 formerly L.R. No. 209/10201 pending the hearing of the Application and the Reference thereafter.
2. The said Application was founded on the Reference of even date which raised the following grievances;-

“That the landlord had issued a notice to terminate tenancy which was contrary to Section 4 of the Act. The Tenant will suffer loss and damage and that the landlord has declined to compensate the Tenant in terms of Section 12(1) of the Act.”
3. In response to the Application, the Respondent through one Catherine Aluvisia Ochoki a director thereof lodged the Replying Affidavit sworn on the 16.10.2023. The Applicant with the leave of this court filed the supplementary affidavit sworn on the 19.2.2024.
4. By consent of the parties and concurrence of this court, it was settled to canvass the Application herein by way of submissions dated the 19.2.2024 whereas the Respondents submissions are dated the 21.2.2024.



5. Having perused the parties pleadings and also the case laws cited in the submissions and the submissions themselves, this matter turns on only one issue and if successful, the entire proceedings will be resolved in favour of the Applicant and in case of failure, then all the other issues come into play.
6. That issue is whether the notice of termination of tenancy issued to the Applicant by the landlord and dated 4.8.2023 is lawful. The said notice is annexed to the Replying affidavit dated 16.10.2023 by Catherine Aluvisia Ochoki. As earlier stated, it is dated 4.8.2023 and was to take effect on the 1.10.2023. Though dated 4.8.2023, there is no material on record on when the same was served to the Applicant.
7. The only evidence that the Applicant received the same is the Reference dated 28.9.2023 filed by the Applicant. Part of his complaint was that the same was not compliant with Section 4 of the Act. I assume this to mean the landlord and Tenant (Shops, Hotels and Catering Establishments Act) Cap 301 hereinafter “the Act.”.
8. The landlord admits the deficiency of the notice in terms of the timelines given but asserts that the same is curable by Article 159 of the Constitution. It also sought reliance to fortify its position in the following decided cases;-
 - i. Dickson Mwenda Kithinji vs Gatirau Peter Munya & 2 Others, Civil Appeal No. 38 of 2013 at Nyeri [2017] eKLR; and
 - ii. Francis Mwangangi Kilonzo vs Independent Electoral & Boundaries Commission & Another [2017] eKLR.
9. However, Section 4(4) of the Act provides that;

“No tenancy notice shall take effect until such date, not being less than two (2) months after the receipt thereof by the receiving party, as shall be specified therein.”
10. A very elaborate jurisprudence has been built on this issue and settled to the effect that a termination notice to be effective, it must be strictly compliant with the Act.
 In the case of; Anne Mwaura & 9 Others vs David Wagatua Gitau & 2 Others [2010] eKLR [Maraga JJ] (as he then was) stated as follows;-

“As regards the period of notice, I concur with the court of Appeal holding in the said case of Caledonia Supermarket Ltd vs Kenya National Examinations Council [2002] 2 EA 357; that.....failure to comply with these mandatory requirements rendered the purported notice(s) null and void and incapable of enforcement.”
11. The holding 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 in similar circumstances as the obtaining ones herein stated that;-

“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...”



12. In the locus classicus case of; [*Fredrick Mutua Mulinge t/a Kitui Uniform vs Kitui Teachers Housing Co-operative Society Ltd*](#) [2017] eKLR on the pre-requisites of a valid termination notice, the court held that:-
- “It is clear from the foregoingthat the tenancy notice dated 28.6.2014 was null and void for failing to give the Appellant two months notice as required under the act and as such was of no legal effect. Life could not be breathed into the defective notice by the letter dated 1.7.2014 through which the Respondent purported to amend the effective date of the notice.”
13. The upshot of all these is that; the Act creates a class of Tenants that is protected. Any disturbance to their interests must be in strict compliance of and with the law and without a fault. That is not the case here and I therefore determine that the notice of termination dated 4.8.2023 was unlawful and of no effect nor consequence in law.
14. I further need to consider whether the Tenant’s Application dated 28.9.2023 is merited. The Tenant moved the court to counter the otherwise illegal termination notice. The notice being in breach of the law, it provided the Tenant with a ground to demonstrate a prima facie case. In the case of; [*Joseph Siro Mosioma vs Housing Finance Company of Kenya Limited & 3 Others*](#) [2008] eKLR the court held that;-
- “Damages is not and cannot be substituted for the loss which is occasioned by a clear breach of the law. In any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystalized right which can be protected by an order of injunction.”
15. I would further in my determination rely on Civil Appeal No. 57 of 2015 [*Said Ahmed vs Manasseh Denga & Another*](#) [2019] eKLR where the court of Appeal held that;-
- “Where it is clear that the defendants act complained of is or may very well be unlawful, the issue of whether or not damages can be an adequate remedy for the plaintiff does not fall for consideration. A party should not be allowed to maintain an advantageous position he has gained by flouting the law simply because he is able to pay for it. Support for this view is to be found in the court of Appeal decision in the case of; [*Aikman vs Muchoki*](#) [1984] KLR 353. See the case of [*Joseph Mbugua Gichanga vs Co-operative Bank of Kenya Ltd*](#) [2005] KLR.”
16. From the foregoing, I determine that the Tenant has in his Application satisfied all the requirements in the grant of an injunction order as sought as laid down in the celebrated case of; [*Giella vs Cassman Brown & Co. Ltd*](#) [1973] EA 358 where it was held that:-
- “The condition for the grant of an interlocutory injunction are now, I think, well settled in East Africa. 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 injury which would not adequately be compensated by an award of damages.
- Thirdly, if the court is in doubt, it will decide an Application on the balance of convenience.”
17. I am of the view that in challenging an unlawful notice of termination, the Tenant had and has high chances to succeed in his claim and in the totality of these proceedings he has infact succeeded. It is



admitted even by the landlord that the notice fell below the threshold of the law. For breach of the Tenant's fundamental rights no damages would suffice and none call for consideration.

Finally, the balance of convenience should be in the favour of the party standing on the right side of the law, and that is the Applicant.

18. I therefore embrace the invitation to allow the Applicant's Application dated 28.9.2023.

19. In conclusion, the orders that then commend to me are the following:-

- i. That the Applicant's Application is allowed in terms of prayer No. 3 and in particular that the Respondent cannot interfere with his quiet enjoyment of the premises known as Nairobi Block 103/2873 (formerly L.R. No. 209/102010 unless in strict compliance of the law.
- ii. That the Applicant's Reference dated 28.9.2023 is fully compromised by the determination on the Application herein and the same is allowed in the same terms thereof.
- iii. That the Tenant/Applicant is awarded the costs of both the Application and Reference assessed at Kshs. 30,000/= to be offset from the rent.

Those are the orders of the court.

RULING, DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 14TH DAY OF MARCH, 2024.

HON. NDEGWA WAHOME, MBS

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

Delivered in the presence of;

M/S Ade for Mr. Khayenga for the Tenant

M/S Guchocho for the landlord

