



Burale v Kher (Tribunal Case E150, E151, E152, E153, E154, E155, E156, E157, E072, E073, E074, E205, E206, E207 & E226 of 2024 (Consolidated)) [2024] KEBPRT 373 (KLR) (9 April 2024) (Ruling)

Neutral citation: [2024] KEBPRT 373 (KLR)

REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E150, E151, E152, E153, E154, E155, E156, E157, E072, E073, E074, E205, E206, E207 & E226 OF 2024 (CONSOLIDATED)

P MAY, MEMBER

APRIL 9, 2024

BETWEEN

ASTUR WARSAME BURALE TENANT

AND

HASHIM MOHAMED KHER LANDLORD

RULING

1. By a Notice of Motion Application dated 31st January 2024, the Tenant/Applicant sought for orders that;
 - a. Spent
 - b. That this Honourable Tribunal do issue a restraining Order against the Landlord, whether by himself, servants, and or agents or Auctioneers or any other person(s) whatsoever or whomsoever from illegally terminating the tenant's tenancy, from taking possession of the tenant's Shop Number 94 on LR No 36/VIV406, building popularly known as AL- AMIN Shopping Complex, Eastleigh, Nairobi from evicting, forcefully entering, trespassing, locking up the Tenant's business/ Shop on LR No 36/VIV406, Eastleigh, Nairobi and/or interfering in anyway whatsoever with the Tenant's quiet and peaceful possession, occupation and tenancy within the demised premises pending the hearing and determination of this application.
 - c. That this Honourable Tribunal do issue a restraining Order against the Landlord, whether by himself, servants, and or agents or Auctioneers or any other person(s) whatsoever or whomsoever from illegally terminating the tenant's tenancy, from taking possession of the tenant's Shop Number 94 on LR No 36/VIV406, building popularly known as AL- AMIN Shopping Complex, Eastleigh, Nairobi from evicting, forcefully entering, trespassing, locking



up the Tenant's business/ Shop on LR No 36/VIV406, Eastleigh, Nairobi and/or interfering in anyway whatsoever with the Tenant's quiet and peaceful possession, occupation and tenancy within the demised premises pending the hearing and determination Of the Complaint filed herein.

- d. That the Officer Commanding Station (OCS) Eastleigh North Police Station for that matter do assist to enforce, supervise and ensure compliance with the Orders issued herein.
 - (e) That the costs of this application be provided for.
2. The Application is premised on the grounds stated on the face of the Application and on the Supporting Affidavit of Astur Warsame Burale, who averred; she is a protected Tenant within the meaning of that term in the *Landlords and Tenants (Shops, Hotels and Catering Establishments) (Act Cap 301)* Laws of Kenya in respect of tenancy of business/ Shop No 94 on LR No 36/VIV406, building popularly known as al- Amin Shopping Complex, Eastleigh, Nairobi; She has been paying the monthly rent of Kenya Shillings Eighteen Thousand Five Hundred and Forty (Kshs 18,540/- per month which she has been paying promptly and without fail to the Landlord as directed and has no rent arrears to date. The Landlord had not issued her with the rent receipts; she also paid good will in the sum of US Dollars Eight Thousand (USD 8,000) for shop; that on or about 20th January,2024, she instructed her Advocates to address to the Landlord to desist from interfering with her business; she has been in occupation of the premises for several years but the Landlord has now issued unlawful verbal notice terminating her tenancy despite paying the goodwill to the Landlord to her detriment thereby interfering with her quiet possession and enjoyment of my business; she has been paying the monthly rent regularly and without default to date and had no rent arrears at the time of the purported verbal notice from the landlord and will incur loss as a result of the conduct of the Landlord; she is apprehensive that unless the Landlord is restrained by an order of this Honourable Tribunal he will forcefully enter and take possession, prevent/ obstruct her from her business, deny her access, harass, evict and interfere with her business to her detriment and should the tenancy be terminated contrary to law, she stands to suffer loss; that she has invested all his resources, financial or otherwise on the said business and stand to incur great irreparable loss, prejudice and damage if the un-procedural, malicious and unlawful eviction is not stopped by this Honourable Tribunal.
 3. The Application is opposed through a Replying Affidavit dated the 15th February 2024. The Landlord/Respondent avers that the application dated 31st January 2024 is riddled with material non-disclosure and deliberate misrepresentation. That the Tenant obtained the said orders of 7th February, 2024 by having misled this court through falsehoods and misrepresentation of facts. That the said application and supporting affidavit failed to make disclosure of the material fact that she has never issued a verbal notice to terminate the tenancy and that the Tenant is trading and there are no threats whatsoever and or illegal motives to evict the Tenant as alleged in the supporting affidavit by the Tenant.
 4. The Landlord made an application dated 23rd February, 2024 seeking the consolidation of the following files; BPRT No E205 of 2024, BPRT No E206 of 2024, BPRT No E207 of 2024, BPRT No E155 of 2024, BPRT No E156 of 2024, BPRT No E226 of 2024, BPRT No E157 of 2024, BPRT No E150 of 2024, BPRT No E151 of 2024, BPRT No E152 of 2024, BPRT No E153 of 2024, BPRT No E154 of 2024, BPRT No E072 of 2024, BPRT No E073 of 2024 and BPRT No E074 of 2024. The application was allowed on 26th February, 2024 and BPRT No E150 of 2024 was ordered as the lead file.
 5. The Tenants/Applicants filed a supplementary Affidavit dated 29th February 2024. The Applications were canvassed by way of written submissions. The Tenant/Applicant filed her written submissions dated 12th March 2024, through the Law Firm of Jaafar, Jelle & Co. Advocates and relied on numerous cases in support of her case.



6. The Respondent filed his written submissions dated 1st March 2024, through the Law Firm of Murimi Murango & Associates Advocates and relied on a litany of cases in support of his case.
7. That on 28th March, 2024 by the consent of the counsels for the parties herein consolidated BPRT No E312 of 2024 and BPRT No E313 of 2024 with the lead file BPRT No E150 of 2024 for purposes of determination.

Analysis of Law and Determination.

8. I have carefully analysed all the pleadings before this honourable Tribunal, all Submissions by parties herein and relevant evidence adduced before this Tribunal. There being no contestation as to the jurisdiction of this Court, I shall then proceed to the merit of the applications before me.
9. I considerately find that two main issues fall for determination:
 - a. Whether the tenancy was a controlled tenancy
 - b. Whether the Tenant has provided sufficient evidence to support the claim of receiving a verbal notice to terminate the tenancy.
 - c. Whether the ex-parte orders obtained by the Tenants on 24th January, 2024, 7th February, 2024, 8th February, 2024, 14th February, 2024, and 19th February, 2024 should be discharged

Issue A: Whether the tenancy was a controlled tenancy

10. Cap 301 defines controlled tenancy as a tenancy of a shop, hotel or catering establishment: -
 - a) Which has not been reduced into writing; or
 - b) Which has been reduced into writing and which –
 - i. Is for a period not exceeding five years; or
 - ii. Contains provision for termination, otherwise than for breach of covenant, within five years from commencement thereof; or
 - iii. Relates to premises of a class specified under subsection (2) of this section:

Provided that no tenancy to which the government, the community or a local authority is a party, whether as Landlord or as tenant, shall be a controlled tenancy;
11. Both parties admit that there existed a lease agreement between the parties which included a termination clause under Clause 13. This establishes that the tenancy between the parties is a controlled tenancy, and as such, the tenants qualify as protected tenants within the meaning of Section 2(b)(ii) Cap 301 Laws of Kenya.
12. A close perusal of the Complaints in BPRT No E152 of 2024, BPRT No E154 of 2024, BPRT No E155 of 2024 and BPRT No E205 of 2024 indicates that the Applicants therein do not have a Tenancy relationship with the Landlord from the lease agreement provided as well as the payment receipts. The Applicants did not provide any evidence to rebut this fact.
13. Having determined the first issue, I now turn to the second issue.



Issue B: Whether the Tenant has provided sufficient evidence to support the claim of receiving a verbal notice to terminate the tenancy

14. Having established that the tenancy was a controlled tenancy and that the tenants are protected tenants, I now turn to the second issue on termination of a controlled tenancy.

15. Section 4 of [Cap 301](#) provides:

“ 4. Termination of, and alteration of terms and conditions in, controlled tenancy-

(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 in 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—

(ii) where the terms and conditions of a controlled tenancy provide for a period of notice exceeding two months, that period shall be substituted for the said period of two months after the receipt of the tenancy notice;

(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.

16. The Tenants' case is that the landlord issued them with a verbal notice of termination contrary to the provisions of [Cap 301](#) Laws of Kenya. The Tenants' argument is that the verbal notice provided by the landlord does not meet the mandatory requirements of Section 4(3) of [Cap 301](#) and is therefore, invalid.

17. The Landlord argues that the Tenants have failed to provide sufficient evidence to support their claim of receiving a verbal notice to terminate the tenancy. The Landlord asserts that the absence of specific details such as the time, words used, and intention of the alleged verbal notice raises doubts about the validity of the claim.

18. Under the [Landlord and Tenant Act](#) (Cap 301), the issuance of a notice to terminate a tenancy must adhere to specific requirements, including being in writing and specifying the grounds. The Tenants' claims of receiving a verbal notice lack the necessary specificity required by law.

19. The Landlord cited legal precedents emphasizing the burden of proof on the party making the assertion.

20. The Landlord on the other hand insists that there was no verbal notice issued and that the allegations by the tenant are imagined.



21. On this particular issue I am of the opinion that this has been reduced to a “He said, she said” situation by both parties with the tenant insisting on receiving a verbal notice and the landlord insisting that there was none.

Issue C: Whether the *ex-parte* orders obtained by the Tenants on 24th January, 2024, 7th February, 2024, 8th February, 2024, 14th February, 2024, and 19th February, 2024 should be discharged

22. The Landlord contends that the *ex-parte* orders obtained by the Tenants should be discharged due to a failure to make full disclosure of material facts, misrepresentation of facts, and falsehoods. It is well-established that parties seeking *ex-parte* orders have a duty to make full and candid disclosure of all material facts. The Landlord cited various authorities supporting this position.
23. The Landlord specifically highlighted the following omissions by the Tenants:
- No verbal notice to terminate the tenancy was issued by the Landlord.
 - No threats or illegal motives to evict the Tenants existed.
 - Lack of specific details regarding the alleged verbal notice.
24. These omissions, according to the Landlord, misled the Tribunal and influenced the granting of the *ex-parte* orders. The Landlord argued that the failure to disclose material facts and the abuse of court processes warrant the discharge of the orders.
25. The Tribunal on this issue retreats to the Preamble of [Cap 301](#) which cites the object of the Act as thus, “This is an act for the protection of the Tenants”. The Tribunal has to at all times revert to this objective in dealing with matters brought before it and where there is doubt as to the intentions of parties before it.
26. I am however of the opinion that the Tenant’s Application was premature no matter how threatened he felt of eviction (whether real or imagined).
27. The upshot of this finding is that, the Applications by the Tenants in BPRT No E205 of 2024, BPRT No E206 of 2024, BPRT No E207 of 2024, BPRT No E155 of 2024, BPRT No E156 of 2024, BPRT No E226 of 2024, BPRT No E157 of 2024, BPRT No E150 of 2024, BPRT No E151 of 2024, BPRT No E152 of 2024, BPRT No E153 of 2024, BPRT No E154 of 2024, BPRT No E072 of 2024, BPRT No E073 of 2024, BPRT No E074 of 2024, BPRT No E312 of 2024 and BPRT No E313 of 2024 dated 23rd January, 2024, 31st January 2024, 5th February, 2024 and 7th March, 2024 and 6th March, 2024 consolidated in BPRT No E150 of 2024 must fail. The complaints shall suffer the same fate.
28. For avoidance of doubt and to preserve the integrity of the Tenancy I shall make the following further orders:
- That the Tenancy between the Landlords and Tenants herein is a controlled Tenancy as per the definition in section 2 of the Act.
 - The tenants’ status as protected tenants under [Cap 301](#) Laws of Kenya is recognized.
 - The Landlord if he so wishes, can only alter the terms of this tenancy within the provisions of section 4 of the Act.
 - The complaint is settled in those terms.
 - Each party shall bear own costs.



DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9TH DAY OF APRIL, 2024

HON. PATRICIA MAY

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

In the presence of;

Mr. Murimi for the landlord

Mohamed for the Tenants/Applicants

