



**Mukaisi v Mwenga (Tribunal Case E794 of 2023)
[2023] KEBPRT 690 (KLR) (1 December 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 690 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E794 OF 2023
P KITUR, MEMBER
DECEMBER 1, 2023**

BETWEEN

WASWA KENNETH MUKAISI TENANT

AND

BENEDICT MWENGA LANDLORD

RULING

A. Parties And Representatives

1. The Kenneth Waswa Mukaisi is the tenant and rented out space from the Respondent on the suit property where he operates businesses known as White Calf Rhino Restaurant & Bar, Waskem Butchery, Shadron Fast-food at Malaa Market, Matungulu Sub-County, Machakos County (hereinafter known as the 'tenant')
2. The Tenant is represented by M/s C.B Keya & Company Advocates.
3. The Respondent Benedict Mwenga is the Landlord and the proprietor of the Suit property on which White Calf Rhino Restaurant & Bar, Waskem Butchery, Shadron Fast Food at Malaa Market, Matungulu Sub-county, Machakos County are situate.
4. The firm of M/S Andrew Ombwayo & Co. Advocates represent the Landlord/Respondent in this matter.

B. The Dispute Background

5. The Tenant Avers that the on 8th August of 2023, the Landlord issued a notice demanding rent arrears amounting to Kshs. 164,640 within 7 days' failure to which, the Landlord would lock the premises.



6. Tenant stated that the Landlord has on several occasions threatened to lock up his premises. This has escalated to the point where the Landlord has threatened and even gotten involved in physical fights with some of the Tenants employees.
7. The tenant further avers that the Landlord has denied him peaceful and quiet possession of his premises, since he hangs around his premises from dawn to dusk.
8. The Tenant further claimed that on 6th August 2023, the Landlord tampered with the electricity and locked the meter box leading to a blackout in the business.
9. It is the Tenants assertion that the Landlord is in fact indebted to him to a tune of Kshs. 1,500,000 which is the expenditure incurred for completion of construction. That this was premised on the understanding that the agreed rent of Kshs. 30,000/= per month would be adjudged against the expenditure on construction.
10. The Tenant Further Asserted that he advanced a soft loan to the Landlord for the amount of Kshs. 152,000/= which was to be set off against the rent for the butchery and fast food.
11. As a result of the above, the Tenant has filed a Complaint and a Notice of Motion application dated 15th of August 2023, under section 12(4) of the Landlords and Tenants (Shops, Hotels and Catering) Establishments Act Cap 301.
12. The Tenant was seeking for orders to restrain the Landlord either by himself, his servants or agents from entering the demised premises, locking, tampering with electricity, evicting, assaulting his workers and blocking the entrance to the tenant's business.
13. In his Replying Affidavit, the Landlord claimed that on or about June 2022, he entered into an oral agreement with the tenant whereby he let to him several rooms including Shop No. 5, Waskem Butchery, Shop No. 2 Shadron Fast Food whose arrears are Kshs. 56,000/= and Kshs. 42,000/= respectively as at October 2023.
14. The Tenant further produced a breakdown of room services offered to the Tenants employees and or agents on different dates and months which he alleges were not paid by the Tenant.
15. Tenant later retained the Hall (White Calf Bar and Restaurant) at an agreed rent for Kshs. 30,000/= which he failed to pay and the arrears stand at Kshs. 210,000/=
16. The Landlord further claimed that the Tenant was in arrears of Kshs. 900,000/= which was rent due on the hall for the period of 9 months since July of 2022, which the Landlord however admits was relinquished at the end of March 2023.
17. He further stated that he let out the Hall to the Tenant, which was then in habitable conditions and that the Tenant sought to make additional improvements to the Hall in order to attract his customers at his own costs. He denied that there was any agreement to have the costs of construction adjudged against the Tenant.

List Of Issues For Determination

18. The issues raised for determination are as follows;
 - a. whether the Plaintiff has met the criteria for the grant of an order of temporary injunction pending the hearing and determination of this suit.



C. Analysis And Findings

whether the Plaintiff has met the criteria for the grant of an order of temporary injunction pending the hearing and determination of this suit.

19. The Tenant approached the Tribunal by way of a Reference and Notice of Motion Application under certificated dated 15th August 2023 in opposition to the Landlords Notices for rent arrears and consequent threats to lock up his business premises.
20. He Averred that despite there being a court order, the Landlord has continued to interfere with his business, servants and even blocking the entrance to his business premises.
21. He further Averred that he has taken up great renovations of the premises which was to be adjudged on the rent.
22. On the other hand, the Landlord denies the Tenants allegations stating that the Tenant is in breach of the terms of their oral agreement.
23. He further posited that the Tenant was in arrears of kshs. 210,000/= for shop one and two and also Kshs. 900,000 for the Hall which accrued in the year 2022.
24. With this background, and in considering the prayer for orders for temporary injunction, I wish to rely on the guiding principles for the grant of orders of temporary injunction which are well settled and are set out in the judicial decision of Giella Versus Cassman Brown (1973) EA 358. This position has been reiterated in numerous decisions from Kenyan courts and more particularly 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 rest 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”.

25. Consequently, the Tenant herein need to first prove a prima facie case and in order to do so, has submitted that he entered into an oral agreement with the Landlord, to finish the construction of the premises and take up possession. He further stated that it was agreed that the costs for the construction would be adjudged against the monthly rent of Kshs. 30,000/= until the tenant was fully re-reimbursed for the costs of construction.
26. He therefore averred that the Landlord was indebted to him and therefore the notices for payment of rent arrears were brought in bad faith.
27. In support of their applications, the Plaintiff's attached receipts and a breakdown of all costs for construction.



28. Having considered that the agreement herein is an oral agreement, and that the terms of the same agreement have not been reduced to writing, I wish to rely on the provisions of Section 3 (2) of Cap 301 which provides as follows:
- “(2) The terms and conditions set forth in the schedule to this Act shall be implied in every controlled tenancy which is in the prescribed form.”
29. The said schedule lists the terms and conditions to be implied in tenancies which include;
- i) the premises are fit for habitation and comply with the laws relating to health in all respect
 - iii) The lessee shall have quiet enjoyment of premises provided that he complies with the express or implied terms.
 - v) The lessor shall be responsible for all repairs to roofs, main walls, main drains main electric wirings and structures, and shall be responsible for all necessary renewals to the premises.
 - vi) The lessee shall be responsible for all internal repairs and decorations, fair wear and tear expected.
 - vii) The lessor shall be responsible for the repair, maintenance cleaning and lighting of common parts where building is let.
30. With this in mind, it is my considered view that the tenant has failed to show that they have a prima facie case. The implied terms of the tenancy are clear in the schedule and it would be absurd for the honorable tribunal to purport to re-write the terms of an oral agreement.
31. The tenant has failed to prove that he had the consent of the Landlord to undertake the repairs that should be done by the Landlord. Furthermore, the Landlord has indicated that he let out the premises in a habitable condition which ordinarily should be the case. Costs for the Subsequent modifications to the premises, by the Tenant for the purpose of his business are to be borne by him.
32. Secondly, the Tenant ought to demonstrate that they will suffer irreparable damages if the interlocutory orders are not granted. The judicial decision of Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) eKLR provides an explanation for what is meant by irreparable injury and it states;” 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.
33. The Tenant has indicated that he has undertaken repairs and construction at the suit premises amounting to Kshs. 1,500,000/=. This is evidenced by the different receipts for purchase of construction materials, the same which has been broken down and listed in his documents.
34. It is my considered view that the Tenant is keen on running his business at the premises hence he made the necessary improvements to ensure that the premises were suitable for his nature of business. The Tenant has also taken out the requisite permits and licenses to enable the operation of his business as evidenced in his Supporting Affidavit.
35. I have also considered that the Plaintiff admits not having paid the rent as required subject to an oral agreement to have the rent payable adjudged against the costs for the construction. The Mpesa



statement on record, does not demonstrate payment of rent in full for the months that he claims to have been in operation.

36. The Plaintiff, despite his claims, has failed to demonstrate that the actions of the Landlord have occasioned any loss.
37. It is my considered view that the plaintiff has been running his business without interruptions, but has rather failed to demonstrate that he has been paying rent.
38. It is my considered view that the Landlord, has continued to let his premises to the Tenant and he is therefore entitled to receive rent payments.
39. Thirdly, the Tenant has to demonstrate that the balance of convenience tilts in their favor. In the case of Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) EKLK which defined the concept of balance of convenience as:

"The meaning of balance of convenience will favor the Plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favor of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer."

40. The main suit is premised on the fact that on the 8th August 2023, the Landlord issued a demand notice to the Tenant for the sum of Kshs. 164, 040. The Tenant however claims that he is not indebted subject to the agreement to adjudge the rent against the costs for construction and repair of the premises as well as a loan advanced to the Landlord.
41. I wish to reiterate the provisions of the schedule of Cap 301 the same being implied terms of an oral controlled tenancy. I do observe that the issue of the construction has been sufficiently dealt with and I would therefore refrain from belaboring the same.
42. I wish to also rely on section 12 of Cap 301 which provides for the jurisdiction and the powers of this Honorable jurisdiction and state that the same does not stretch to hearing and determination of matters relating to Loan repayment.
43. It is my considered view that the Tenant has therefore failed to prove that the balance of convenience tilts in their favor.

D. Orders

- a. The upshot is that the Tenant's Application dated 15th August 2023 determined in the following terms;
- b. The tenant shall clear the arrears of Kshs. 164,040 being rent arrears as at August 2023 on or before 31st December 2023 failure to which the Landlord shall be at liberty to distress for rent.
- c. Tenant to continue paying rent as and when it falls due.
- d. The Landlord to grant quiet possession of the premises to the Tenant.
- e. OCS Malaa Police Station to assist in compliance.
- f. Mention on 3rd January 2024 for directions on the Complaint.
- g. Each party shall bear their own Costs.



RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 1ST DAY OF DECEMBER 2023.

HON P. KITUR

MEMBER

