



**Robert Ndirangu Kehiuhi t/a Elester Grand Resort v Kariuki (Tribunal
Case E236 of 2024) [2024] KEBPRT 1112 (KLR) (1 August 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 1112 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E236 OF 2024
A MUMA, MEMBER
AUGUST 1, 2024**

BETWEEN
ROBERT NDIRANGU KEHIUHI T/A ELESTER GRAND RESORT TENANT
AND
JOHN KARIUKI LANDLORD

RULING

A. Parties And Their Representatives

1. Robert Ndirangu Kehiuhi is the tenant of a portion of space located at former Ola Petrol Station along Maai-Mahiu Highway (the “suit premises”) for the business known as Elester Grand Resort (the “Tenant”).
2. The firm of Njuguna J.K. & Co. Advocates represents the Tenant in this matter
3. John Kariuki is the registered proprietor of the suit premises (the “Landlord”).
4. The firm of Omwoyo Masese & Co. Advocates represents the Landlord in this matter.

B. Background Of The Dispute

5. Through a Reference and an Application dated 15th February, 2024 canvassed through Certificate of Urgency of even date, the Tenant moved this Honourable Tribunal seeking the following orders inter-alia: temporary injunction restraining the Landlord from interfering with the suit premises and that the premises be unconditionally opened pending hearing and determination of the Application and the suit herein.
6. Upon perusal of the Tenant’s Application, this Honourable Tribunal, on 20th February, 2024, issued the following orders ex-parte: a temporary injunction restraining the Landlord from interfering with the suit premises, that the suit premises be opened unconditionally and the OCS Maai-Mahiu Police



Station to effect the said orders. Additionally, the Tribunal directed the matter be heard on 7th March, 2024.

7. In response to the Tenant's Application, the Landlord filed Grounds of Opposition dated 19th March, 2024 and a Replying Affidavit sworn by the Landlord on even date.
8. On 16th May, 2024, the Honourable Tribunal directed the parties to file Submissions. The Parties, consequently, complied as the Landlord filed its Submissions dated 20th May, 2024 while the Tenant filed a Further Affidavit sworn by the Tenant on 10th June, 2024 and Submissions of even date.
9. Therefore, it is the Tenant's Application and Reference dated 15th February, 2024 that are the subject of this Ruling.

C. Tenant's Case

10. The Tenant avers that he is a controlled Tenant of the suit premises in which he has been operating a Restaurant and Bar business. He further avers that he has been paying rent diligently to the Landlord.
11. Vide his sworn Affidavit dated 15th February, 2024, the Tenant swears that the Landlord without any reason or colour of right unilaterally decided to lock the suit premises without prior notice.
12. The Tenant further testified that as a result of the malicious interference and closure of the suit premises, he has suffered loss.

D. Landlord's Case

13. The Landlord acknowledged entering into a Lease Agreement with the Tenant, which commenced on 3rd April, 2019 for a period of 5 years. He, however, averred that the Tenant has always been in rent arrears.
14. He testified that on 8th February, 2024, he served the Tenant with a Demand Letter for rent arrears of Kshs. 400,000.00. He informed the Tribunal that despite receiving the Demand Letter the Tenant was yet to settle the rent arrears or any part thereof.
15. The Landlord avers that the rent arrears has accumulated to Kshs. 450,000.00 as at March, 2024.
16. The Landlord's Response was accompanied by a sworn Affidavit of Dennis Elima Kariuki, a security guard at the suit premises, who avers that the Landlord had not closed the suit premises and that the Tenant's business was still operational.

E. Jurisdiction

17. The Jurisdiction of this Honourable Tribunal is not contested by either party and therefore is not in dispute.

F. List For Issues For Determination

18. Having carefully perused the Pleadings presented before this Honourable Tribunal by the parties, it is therefore my respectful finding that the issues for determination before this Honourable Tribunal are:
 - i. Whether there exists a controlled tenancy relationship between the Tenant and the Landlord.
 - ii. Whether this Honourable Tribunal should be pleased to grant injunctive orders against the Landlord herein.



G. Analysis And Determination

Whether there exists a controlled tenancy relationship between the Tenant and the Landlord.

19. This Honourable Tribunal notes from the Pleadings filed that the Tenancy agreement between the parties expired in March, 2024. As such, it begs the question whether there exists a tenancy relationship between the parties herein.
20. Section 2 of [Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#), Cap 301 provides that:
- “Controlled tenancy” means 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 the commencement thereof;
21. An examination of Section 2(a) of [Cap 301](#) denotes that a controlled tenancy could include a tenancy of a shop, hotel or catering establishment which has not been reduced into writing.
22. Being that the Tenant has continued to occupy the premises even after the expiry of the tenancy agreement, there is a presumption that the nature of tenancy between the parties herein is unwritten. Consequently, the relationship between the parties herein is controlled tenancy.

II Whether this Honourable Tribunal should be pleased to grant injunctive against the Landlord herein.

23. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the locus classicus case of *Giella v Cassman & Co. Ltd* (1973) E.A 358. This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of [Nguruman Limited v 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.”.
24. The three principles to be considered when issuing temporary injunctive orders as follows:

Whether the Tenant has a prima facie case

25. The Court in *Mrao Ltd v 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 or 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”



26. The Tenant herein seeks a temporary injunction restraining the Landlord from interfering the peaceful enjoyment of the suit premises and that the suit premises be opened. The foundation of the Tenant's prayer is that the Landlord had locked suit premises with an intention to terminate the tenancy relationship without prior notice.
27. The Landlord, in response, does not deny the claim of closing the premises but affirms that he served the Tenant with Demand Letter dated 8th February, 2024 for the rent arrears of Kshs. 400,000.00 through their Advocates on record.
28. Guided by Section 4 (2) that mandates the Landlord to issue a termination Notice should he wish to terminate or alter terms of a tenancy agreement. Cap 301 provides as follows:
- (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.
29. The Landlord and Tenant (Shops, Hotels and Catering Establishments) (Tribunal) (Forms and Procedure) Regulations, 1966 sets out the prescribed form of a Landlord's Notice to Terminate or Alter of Tenancy under Form A in the First Schedule.
30. The Demand Letter issued by the Landlord's Advocates to the Tenant does not confirm to the setout form under the Landlord and Tenant (Shops, Hotels and Catering Establishments) (Tribunal) (Forms and Procedure) Regulations, 1966. It is therefore sufficient to say that the Landlord did not serve the Tenant with proper Notice as required by Cap 301.

Whether the Tenant shall suffer irreparable damage

31. The Tenant has to demonstrate that unless this Honourable Tribunal issues an injunctive order, he will suffer an irreparable injury. The Honourable Court in Pius Kipchirchir Kogo v Frank Kimeli Tenai (2018) eKLR pronounced itself on what is meant by irreparable injury and it 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 (Emphasis added).
32. The Tenant submits if the injunction is not issued the Landlord will proceed to close the premises and distress and/or demand for outstanding rent as claimed. This in turn will cause the Tenant to suffer irreparable losses. On the other hand, the Landlord avers that the Tenant's Application herein is a means of denying him the rent due to him and to frustrate him.
33. This Honourable Tribunal appreciates that the Tenant remained operational even after the Landlord had closed the petrol station (Ola Petrol Station). Therefore, allowing for his eviction at this stage without determining and settling the root cause of the conflict herein which Kshs. 450,000.00 claimed by the Landlord as rent arrears would serve to cause harm to the Tenant.
34. In my view, the Tenant has established that he stands to suffer irreparable harm as he stands to being evicted, losing profit and the Landlord distressing for rent.



Balance of Convenience

35. The Tenant has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting. This Honourable Tribunal is guided by the pronouncement of the Court in *Pius Kipchirchir Kogo Vs Frank Kimeli Tenai* (2018) EKLR where the Court defined the concept of balance of convenience as:

‘The meaning of balance of convenience will favour of the Plaintiff’ is that if an injunction is not granted and the Suit is ultimately decided in favour 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.”

36. The Tenant contends that balance of convenience tilts towards the preservation of the status quo until both parties are heard on the merits of the Application and the main suit. He further avers that the Landlord shall not suffer any prejudice.

37. Further guided by the decision of *Amir Suleiman v Amboseli Resort Limited* [2004] eKLR where the learned judge offered further elaboration on what is meant by “balance of convenience” and stated;

“The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”

38. Bearing this in mind, this Honourable Tribunal is convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the Reference on its merits.

H. Orders

39. In the upshot, the following orders shall abide:

- a. The Tenant’s Application dated 15th February, 2024 is hereby allowed in terms of prayers 3 and 4;
- b. A Temporary injunction is hereby issued restraining the Landlord whether by himself, his agents and/or his servants from entering, closing, alienating, constructing and/or interfering with the suit premises and that the premises be unconditionally opened pending hearing and determination of the main suit;
- c. The Tenant is hereby ordered to pay rent for the month of August 2024 and subsequently every month thereafter on or before the 5th day.
- d. The Landlord is hereby order to furnish this Honourable Tribunal with a copy of the statement of accounts in 14 days, the Tenant to respond in 14 days of service; and
- e. The matter is fixed for reference hearing on 22nd August, 2024

HON A. MUMA

MEMBER

BUSINESS PREMISES RENT TRIBUNAL



Ruling dated, delivered and signed at Nairobi on this 1st day of August 2024 in the presence of Thuku for the Tenant and Masese for Landlord.

HON A. MUMA

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

