



Gikara v Maina (Tribunal Case E153 of 2023)
[2023] KEBPRT 1176 (KLR) (19 December 2023) (Ruling)

Neutral citation: [2023] KEBPRT 1176 (KLR)

REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E153 OF 2023
N WAHOME, MEMBER
DECEMBER 19, 2023

BETWEEN

LUCY WANGECI GIKARA TENANT

AND

PETER MAINA LANDLORD

RULING

1. The Tenant filed the reference herein and the notice of motion both dated 18th August, 2023 with the following main grievances;
 - a. That the landlord had issued her with an illegal notice to increase rent from Kshs. 60,000/= per month to Kshs. 85,000/=.
 - b. That the landlord has been harassing her by disconnecting power and water from the demised premises which was a hospital.
 - c. Complained that the landlord was charging penalties for late rent payment.
2. The Tenant sought for orders that the landlord be restrained from effecting the unlawful and defective notice to increase her rent, be barred from charging penalty fees on late payment of rent and generally from in anyway, interfering with her tenancy.
3. On his part, the landlord filed a replying affidavit sworn on the 13.9.2023 and in it sought to demonstrate that the Tenant was a serial rent defaulter. He stated that the penalties he charged on late rent payment was in an agreement entered into between the parties. The landlord offered that the Tenant had never had any issue on payment of the penalties on rent arrears.
4. The landlord contended that the proposed increment of rent to Kshs. 85,000/= from Kshs. 60,000/= was reasonable as no rent increment had ever been effected on the tenant for the last 9 years. The landlord therefore sought for the dismissal of the tenant's entire application.



5. Both parties agreed to canvass this application by way of written submissions and the Tenant filed his submissions dated 18.10.2023 whereas those for the landlord are dated 3.11.2023. I have also given due consideration to the Tenant's further affidavit sworn on the 29.9.2023 just as to the respective parties submissions.
6. From all the materials placed before me as aforesaid, I determine that the issues for determination are the following:-
 - A: Whether the landlord's notice dated 1.08.2023 to increase rent is lawful.
 - B: Whether the Tenant's application is merited.
 - C: Who should bear the costs of this suit

Issue A: Whether the landlord's notice dated 1.08.2023 to increase rent is lawful

7. I` On whether the landlord's notice dated 1.08.2023 to increase rent is lawful, I would find ready reliance on the [landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#), Cap 301 (hereinafter the Act). Section 4(2) thereof provides that;

“A landlord who wishes to terminate a controlled tenancy or to alter, to the detriment of the Tenant, any term or condition in, or of any right or service enjoyed by him, under, such a tenancy, shall give notice in that behalf to the tenant in the prescribed form.”
8. The prescribed form alluded to above is to be found in the [landlord and Tenant \(shops, hotels & Catering Establishments\) \(Tribunal\) \(Forms and Procedure\) Regulations](#), 1966 (hereinafter Regulations) and in particular Regulation 4(1) thereof which provides that;-

“A notice under Section 4(2) of the [Act](#) by a landlord shall be in Form A in the schedule to this Regulations.”
9. Further, Section 4(4) of the [Act](#) provides that:-

“No tenancy notice shall take effect until such date, not being less than two months after receipt thereof, by the receiving party, as shall be specified therein.”
10. It is plain that the purported notice to alter the terms and conditions of the tenancy herein and dated 1.8.2023 did not meet the threshold of the plain reading of the law.
11. In the case of; [Ann Mwaura & 9 Others v David Wagatwa Gitau & 2 Others](#) [2010] eKLR, (Maraga J 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 *Caledomia Supermarket Ltd v 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.”



12. In the case of; *Fredrick Mutua Mulinge t/a Kitui Uniform v Kitui Teachers Housing Sacco Ltd* ELC Appeal No. 197 of 2015, the court held that;

“It is clear from the foregoing authorities that 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.”

13. The provisions of Sections 4(2) and (4) and Regulation 4(1) thereof are mandatory. Any notice that contravenes them, is defective and/or invalid in law. The upshot of this is that, the landlord’s notice dated 1.8.2023 was unlawful and therefore null and void.
14. From the foregoing, it therefore follows that, the question of the proposed rent increment does not arise. The notice of alteration of the terms and/or conditions of the tenancy in respect of the proposed rent increment had to accrue legitimacy first before any other step is taken in consideration of the content of the notice.
15. The said notice does not therefore attract the requisite attention of this court to effect consideration on the expectations therein.

Issue No. B: Whether the Tenant’s application is merited

16. The effect of the landlord’s notice dated 1.8.2023 which has been determined to be unlawful had the effect of increasing the tenant’s rent on the demised premises from Kshs. 60,000/= to Kshs. 85,000/=. It also had a demand of Kshs. 12,000/= in rent penalties.
17. The notice having been illegal, defective, null and void, the tenant had the right and reason to approach this court and her application is properly before this court. The purported notice was in clear breach of the law and the Tenant was entitled to seek the protection and other remedies that this court may avail to her within the law. In the case of; *Mirao Ltd v First American Bank of Kenya Ltd* [2003] eKLR while the court was determining on the principle of prima facie in the grant of injunctions it held 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 a call for an explanation or rebuttal from the latter.”

18. The court in considering the principle of irreparable injury, the court in *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR, the court stated that;-

“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 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.”

19. On the balance of convenience, the court in the case of *Pius Kipchirchir Kogo* (*supra*) further held that:-

“...Although it is called balance of convenience, it is really the balance of inconvenience and it is for the plaintiff to show that the inconvenience caused to them to be greater than the inconvenience caused to the defendants inconvenience or that if equal it is the plaintiff who suffers ...



In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting.”

20. The above looked at together with the locus classicus case of *Giella v Cassman Brown*, I am of the finding that the Tenant has established a case for the grant of orders restraining the landlord from in anyway whatsoever interfering with her tenancy unless otherwise it is authorized by the law.
21. The tenant has further sought that she be allowed to pay rent by 20th of each month for reasons that she heavily relies on payment by the NHIF to meet most of her obligations; including payment of rent. I note that, that issue was raised in the Tenant’s further affidavit and that the landlord had no opportunity to respond to the same.
22. I however note that the component of penalties charged on late payment of rent is very huge and punitive. This is likely informed by the reliance on NHIF releases to the Tenant. I would therefore invoke the powers of this court under Section 12(4) of the Act and permit the Tenant to pay rent to the landlord as it falls due in any event on or before the 20th day of each month.
23. There is the question of an agreement between parties on the payment of penalties in the case of delay in payment of rent. Neither the tenant nor the landlord produced such an agreement. A look at the Act and the Regulations thereof do not provide for the same. In my view, the same is not tenable when contrasted with the clear provisions of the law on recovery of rents that have fallen due. Simply rents in arrears.
24. I therefore find merit on the complaint by the Tenant that the purported penalty charges are unlawful and at the same time punitive. The only legitimate payments that may be due to the landlord by the Tenant is the Kshs. 60,000/= monthly rent.
25. The Applicant’s application dated 18.8.2023 is therefore found to be heavy in merit and the same is allowed in terms of prayers 2, 3, 4 and 5.

Issue No. C: Who should bear the costs of this suit

26. Section 27 of the Civil Procedure Act provides that costs should follow the event. The event in this matter is the success of the Tenant’s suit and there is no compelling reason to deny her costs. In this regard, I award her costs.
27. In conclusion and in view of the above findings and analysis, I make the following orders:-
 - a. That having allowed the Applicant’s application in terms as herebelow, the Reference herein is fully compromised and also settled.
 - b. That the termination notice dated 1.8.2023 is declared illegal, null and void.
 - c. The tenant shall continue with payment of rent at Kshs. 60,000/= monthly, payable on or before the 20th day of each month and free and/or devoid of any penalties and/or other charges.
 - d. The landlord is at liberty to invoke the provisions of the Act and the Regulations thereof to resuscitate his aborted intentions.
 - e. The tenant is awarded costs assessed at Kshs. 20,000/= to be offset against the rent.Those are the orders of the court.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF
DECEMBER 2023.**

HON. NDEGWA WAHOME, MBS

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

