



**Kihara v Ihomba & another (Tribunal Case E643 of 2022)
[2024] KEBPRT 1557 (KLR) (6 November 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 1557 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E643 OF 2022
P MAY, MEMBER
NOVEMBER 6, 2024**

BETWEEN

PETER KIHARA TENANT

AND

ISAAC MAINA IHOMBA LANDLORD

AND

SHORT MASTER AGENTS LIMITED RESPONDENT

RULING

1. The present proceedings commenced vide the tenant’s reference dated 18th July, 2022. The tenant challenged the landlord’s alleged actions of locking their business which had perishable goods and their tools of trade. Contemporaneous with the reference, the tenant filed an application under certificate seeking for a plethora of orders among them orders of temporary injunction. The application was premised on the grounds set out on the face of the application and those elucidated in the supporting affidavit.
2. The tenant stated that they entered into a lease with the landlord whose terms were explicit. It was his position that at all times he paid rent and fulfilled his other contractual obligations as they fell due. He stated that sometimes in June, 2022 he fell into rent arrears for a month due to the then prevailing economic situation. The landlord reacted by having the demised premises closed. He states that this was undertaken despite the landlord having received deposit at the time the lease was executed equivalent to 3 months rent. He attempted to approach the landlord for leniency, but the landlord was adamant hence occasioning him loss. It was this that precipitated the filing of the reference.
3. The application was placed before the Tribunal on 21st July, 2022 whereby the Tribunal issued interim orders in favour of the tenant and set a date for inter partes hearing. The 2nd respondent filed a replying affidavit in response to the application sworn on 11th August, 2022.



4. The respondents from the onset termed the application as misconceived and frivolous. They stated that the tenant had misled the Tribunal on the actual rent arrears that had been accrued as the amount was Kshs. 179,200. They maintained that the recovery proceedings that had commenced were lawful and regular as the right to levy distress had crystallized. On the question of the deposit that had been made, they stated that the same was security and was not available to be utilized as rent hence the default persisted.
5. There was a hiatus in the prosecution of the application as it seems the parties were at some point no longer keen with the proceedings. They however filed written submissions in support of their respective positions. The Tribunal has considered the submissions and would proceed as follows:
6. The issues for determination as can be discerned from the pleadings filed by the parties will centrally revolve around the question of whether the tenant was in arrears and the merits of the orders sought. It is prudent to state at this juncture that some of the orders sought such as reopening of the demised premises have now become moot and as such will not be considered.
7. The principles considered by courts in an application for injunction were long settled in the case of *Giella v Cassman Brown & Co Ltd* (1973) EA 358 to wit:
 - i. An applicant must show a prima facie case with a probability of success.
 - ii. An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.
 - iii. When the court is in doubt, it will decide the application on the balance of convenience.
8. In this matter, the tenant is accused of coming to court with unclean hands-on account of failure to pay rent in the sum of Kshs 179,200/- as at 5th August, 2022. This fact has not been controverted by the tenant through a further affidavit.
9. It is the cardinal obligation of every tenant to pay rent as and when the same falls due and payable and for such a tenant to be entitled to an order of injunction, he/she must demonstrate that he/she has fulfilled all obligations under the tenancy contract (see the case of; *Samuel Kipkori Ngeno & another v Local Authorities Pension Trust (Registered Trustees) & another* [2013] eKLR at paragraphs 9 and 12 where it was held as follows:
 - “9. A tenant’s first and main obligation is to pay rent for the landlord has the right to an income from his investment.....
 12. The temporary injunction sought in the present application is an equitable remedy at the court’s discretion. He who comes to equity must come with clean hands. A tenant who is in huge arrears of rent is undeserving of the court’s discretion. The court cannot be the refuge of a tenant who fails to meet his principal obligation of paying rent as and when it becomes dues.”
10. Section 4(1) of Cap 301 Laws of Kenya however provides that no controlled tenancy shall terminate or be terminated nor any term or condition in or right of service enjoyed by the tenant shall be altered otherwise than in accordance with the said act.



11. Section 4(2) thereof provides as follows:-

“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 him under such tenancy shall give notice in that behalf to the tenant in the prescribed form”.

12. In absence of such a tenancy notice therefore, any threatened eviction or eviction is illegal, null and void. This Tribunal having been established to inter-alia protect tenants of controlled tenancies from eviction shall be failing in its cardinal duty if it does not intervene in the circumstances of this case. The landlord is enjoined to follow the provisions of the act and prove the alleged transgressions against the tenant. He cannot wake up one day as it is alleged and decide to terminate his tenancy.

13. I am fortified in that regard by the court of appeal decision in the case of; Aikman & Another v Muchoki & Others [1982] eKLR at page 4/6 where it was held as follows:-“...the court ought never to condone and allow to continue a flouting of the law. Those who flout the law by infringing the rightful title of others and brazenly admit it, ought to be restrained by injunction. If I am adding a new dimension for the grant of an interlocutory injunction, be it so. Equity will not assist law breakers”.

14. The Tribunal is cognizant of the lapse of time since the proceedings were commenced and the fact that the parties did not take it upon themselves to indicate whether rent has been paid or not. As illustrated earlier, the proceedings were dormant for an inexcusable period of time at the instance of the parties. The Tribunal will not prolong the determination any further thus this ruling determines the reference.

15. In conclusion therefore, the following orders commend itself to the Tribunal in this case:

- a. The landlord will allow the tenant peaceful possession of the demised premises.
- b. The parties are at liberty to reconcile the statement of accounts. The tenant will pay any rent arrears due within 14 days after the reconciliation of the accounts.
- c. Each party will bear their own costs

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 6TH DAY OF NOVEMBER, 2024.

HON. PATRICIA MAY

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

Delivered in the presence of Stanley Gathagu for the Tenant and in the Absence of the Landlord/Respondent

