

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT ELDORET**  
**CIVIL APPEAL No. E041 OF 2024**

**PAULO S. KIBWARE** (Trading as Sagatia House) .....**APPELLANT**

**-VERSUS-**

**ABDIAZIZ IBRAHIM**  
(Trading as Uchumi Supermarket).....  
....**RESPONDENT**

***(Being an Appeal arising from the Ruling of the Business Premises and Rent Tribunal at Eldoret; Hon. Ndegwa Wahome, MBS (Chairperson) and Hon. Joyce Murigi (Member); in BPRT E064 of 2024 delivered on the 29th August, 2024)***

J U D G E M E N T

1. The Appellant herein through a Memorandum of Appeal dated 26.09.2024 (hereinafter referred to as **“the present Appeal”**) did seek the following Orders against the Ruling pronounced on the 29.08.2024 in the proceeding known as BPRT E.064 OF 2024 (hereinafter referred to as **“the Trial Court proceedings”**); -

**A. THAT THE APPEAL BE ALLOWED AND THE RULING AND DECREE OF THE BUSINESS PREMISES RENT TRIBUNAL AT ELDORET (HON.NDEGWA WAHEMO, MBS(CHAIRPERSON) AND HON JOYCE MURIGI (MEMBER) IN BPRT E064 OF 2024 DELIVERED ON THE 29<sup>TH</sup> AUGUST 2024 BE SET-ASIDE AND THE REFERENCE DATED 22<sup>ND</sup> MAY 2024 BE DISMISSED.**

**B. THE RESPONDENT TO BEAR THE COSTS OF THE INSTANT APPEAL AND THE PROCEEDINGS BEFORE THE BUSINESS PREMISES RENT TRIBUNAL.**

**C. THAT THE COURT BE PLEASED TO GRANT ANY OTHER ORDERS AS IT MAY DEEM FIT TO FURTHER THE ENDS OF JUSTICE.**

2. The grounds in support of the above prayers are contained in the Memorandum of Appeal dated 26.09.2024 and can be summarised as follows; -
  - a) The Appellant was aggrieved by the whole decision and Ruling pronounced on the 29.08.2024 by the Business Premises Rent Tribunal (hereinafter referred to as **“the BPRT”**).
  - b) To begin with, the issue that was coming up for hearing before the BPRT was an Application dated 27.05.2024 seeking for Temporary Orders of Injunctions against the Respondent herein.
  - c) However, in the Ruling pronounced on the 29.08.2024 by the BPRT, the Orders therein were for the dismissal of the Notice of Termination issued on the 01.03.2024 by the Appellant and not the prayers sought in the Application dated 27.05.2024 that was pending before it.
  - d) The Appellant is therefore of the view that the BPRT did consider the issue of the Notice of Termination and the Reference dated 22.05.2024 pre-maturely before a proper hearing was undertaken as envisaged in law.
  - e) Further to the above, the Appellant did plead that the BPRT did err in making a finding that the Appellant had a sum of Kenya Shillings Three Million (KShs.3,000,000/-) which he intended to carry out his business on the suit property.
  - f) In essence, the Appellant did plead that the BPRT through its Ruling pronounced on the 29.08.2024 did fail

to do justice to the parties herein based on the Orders issued therein.

3. A Record of Appeal dated 31.10.2024 was duly filed before the Court and duly served on the Respondent.
4. The Record of Appeal was subsequently admitted on 10.12.2205 and the Court did direct that the same would be canvassed by way of written submissions.
5. The Appellant did file his submissions 10.02.2026 while the Respondent did file its submissions on the 11.02.2026.
6. This being a first Appeal, the Court's jurisdiction is premised on the parameters provided in **SELLE-VERSUS-ASSOCIATED MOTOR BOAT CO. LIMITED & OTHERS (1968) EA 123** where the Court of Appeal held as follows: -

***“A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.”***

7. In essence, this Court is under a duty to re-evaluate the evidence before the Trial Court and come up with its own independent decision over the same matter.
8. Thereafter, the Court is to make its findings as to whether or not the Trial Court whose decision is on appeal did apply the correct facts and law to arrive at its decisions or not.
9. For avoidance of doubt, the Ruling pronounced on the 29.08.2024 was in reference to a Notice of Motion dated 27.05.2024 filed by the Tenant who was also the Applicant.

10. In essence therefore, this Court is required to consider the Notice of Motion Application dated 27.05.2024 as well as the Response filed thereof and make its own determination before making its findings on the Ruling pronounced on the 29.08.2024 thereafter.

### **PLEADINGS BEFORE THE BPRT**

11. Based on the Record of Appeal date 31.10.2024, Tenant (who is the Respondent in the present Appeal) did refer a Reference against the Landlord (who is the Appellant in the present Appeal) dated 22.05.2024 opposing the Termination Notice issued on the 01.03.2024.

12. Together with the Reference dated 22.05.2024, the Respondent herein did file a Notice of Motion Application dated 27.05.2024.

13. In the Notice of Motion Application dated 27.05.2024, the Respondent herein did seek the following Orders against the Appellant; -

a) This Matter be certified urgent and be heard ex-parte in the first instance.

b) The Respondent and/or his servants and/or employees be prohibited from unlawfully intercepting/harassing/intimidating and/or evicting, closing or threatening/tampering, and/or in any manner whatsoever interfering with the Applicant's quiet occupation, use and enjoyment of the premises pending the inter-partes hearing of this Application.

c) The Respondent and/or his servants and/or employees be prohibited from unlawfully intercepting/harassing/intimidating and/or evicting, closing or threatening/tampering, and/or in any manner whatsoever interfering with the Applicant's quiet

occupation, use and enjoyment of the premises pending the hearing and determination of this suit/reference.

d) In the alternative, there be an order for maintenance of status quo pending the hearing and determination of this application and thereafter hearing and determination of the suit.

e) Costs of this application be provided for.

14. The grounds upon which the prayers sought herein were premised in the body of the application as well as the Supporting Affidavit attached thereon and can be summarised as follows; -

i) The Respondent did plead the existence of a Landlord Tenant relationship with the Appellant over a property known as CHEPTIRET CENTER along the Eldoret-Nakuru Highway.

ii) The Respondent did aver that as a Tenant, he had fully discharged his obligations of paying rent to the Appellant as mutually agreed.

iii) However, for no justifiable reason, the Appellant herein did issue the Respondent with a Notice of Termination.

iv) The Respondent did state that the grounds relied upon in the Notice of Termination issued by the Appellant was that the property needed renovations and thereafter for personal use by the Appellant.

v) The Respondent was of the considered view that the reasons adduced by the Appellant in the Notice of Termination were malicious and meant to disrupt its business which was doing very well for no justifiable reason.

vi) The Respondent did further plead that the Appellant herein had been issuing threats and disrupting the

business on the premises with a view of forcing his business out of the premises and forcefully evicting him.

- vii) The Respondent did complain that despite the malicious conduct of the Appellant, the rent payable per month was suddenly increased from Kenya Shillings Eleven Thousand Five Hundred (KShs.11,500/-) to Kenya Shillings Seventeen Thousand Five Hundred (KShs.17,500/-), which once again the Respondent did accept paying without any objection.
- viii) Be as it may, the Respondent did plead with the BPRT to be issued with a Temporary Injunction against the Appellant prohibiting his arbitral eviction and/or interference of his business pending the hearing and determination of the Reference dated 22.05.2024.

15. The Notice of Motion application dated 27.05.2024 was duly served on the Appellant who did oppose the same by filing a Replying Affidavit dated 12.06.2024.

16. In the Replying Affidavit dated 12.06.2024 the Appellant did oppose the Notice of Motion application dated 27.05.2024 on the following facts; -

- i) The Notice of Motion application dated 27.05.2024 was filed in bad faith and lacks merit.
- ii) According to the Appellant, the building in issue was developed in the year 1989 and has rental spaces for various business entities.
- iii) The Respondent herein is one of the tenants in the building and runs a supermarket having rented two rooms.

- iv) The Appellant did plead that the relationship between the parties herein was premised on trust since the Respondent was a young and upcoming entrepreneur within the area.
- v) During the tenancy of the Respondent, the Appellant did use to inform him of his intention to expand his soda distribution business and that once he had accumulated sufficient capital, he would require the space occupied by the Respondent herein.
- vi) The Appellant did further aver that the Respondent did at all times commit to vacate the premises he is in occupation upon request by the Appellant.
- vii) However, when the Appellant did issue a Notice to Terminate, the Respondent herein did refuse to comply and instead did refer a Reference to the BPRT.
- viii) The Appellant was of the considered view that the Respondent's actions were merely to frustrate the growth of the Appellant's business.
- ix) The Appellant did state that the Respondent's business of a supermarket was thriving well and there were many possible options for the relocation of the same without interfering with the good will and or turnover of his customers.
- x) Further to the above, the Appellant did plead that the Respondent herein was erratic in the performance of his obligations including payment of rent which is not in line with terms of the tenancy.

- xii) The first reason was to have an opportunity to use the space available for the Appellant's business expansion.
  - xiii) The second reason was to bring the property in issue to be in state that can be in line with the current market needs and rental premiums.
  - xiv) In conclusion thereof, the Appellant did plead that there was no prejudice caused to the Respondent if the Notice of Motion dated 27.05.2024 is dismissed.
17. The Replying Affidavit dated 12.06.2024 was duly served on the Respondent who did file a Further Affidavit 05.07.2024,
18. In the Further Affidavit dated 05.07.2024, the Respondent did state the following facts in response to the Replying Affidavit dated 05.07.2024; -
- (i) The Respondent deponed that the Appellant wanted to run his business from his shop yet he had several rooms/shops unoccupied within the premises which are strategically placed including the shop he used to occupy previously.
  - (ii) The Respondent denied being informed by the Appellant of any intention to establish his own business on the suit premises or speaking with the Appellant about moving out of his premises.
  - (iii) He averred that he filed the application seeking protection of his rights as a tenant who had complied with all the terms and conditions of the tenancy from unlawful termination of the tenancy.

- (iv) The Respondent claimed that he had complied with all the terms of the tenancy and even upgraded the premises by laying tiles and improving the lighting.
- (v) The Respondent deponed that he had been paying rent promptly and always three months in advance in cash but after being served with the Notice of termination, he was advised by his advocate to make the normal 3 months' payment through Mpesa for proof.
- (vi) The Respondent asserted that the landlord is obligated by law to keep a record of rent payment, yet the Appellant kept no records or rent books as required under law and rent was paid in cash with no receipts issued.
- (vii) He refuted the Appellant's claim of renovating the building and claimed that the building had recently been painted and he had laid tiles to keep up with current standards.
- (viii) The Respondent accused the Appellant of discrimination, disdain, envy and jealousy of the progress of his business, as a result of which he had resorted to harassing his customers, employees and people close to him.
- (ix) The Respondent averred that he had been in the suit premises for the past 20 years and thus deserved to claim goodwill.
- (x) The Respondent accused the Appellant of misusing his right to entry into the business premises for regular inspection, and explained that the bad blood between he and the Appellant had arisen when the suit premises was

closed to install CCTV cameras, a move the Appellant translated as being denied access to the property.

(xi) The Respondent further accused the Appellant of denying some of his customers entry into the premises due to their personal differences and embarrassing/ejecting ladies for wearing trousers.

(xii) He denied claiming ownership of the suit premises and added that he stood to suffer loss and damage due to loss of good will and eviction from the premises despite complying with all the terms of the tenancy.

19. From the BPRT proceedings, the Notice of Motion dated 27.05.2024 was canvassed by way of written submissions.

20. The Respondent herein did file his submissions dated 04.07.2024 while the Appellant herein did file his submissions dated 12.07.2024.

21. The court having considered the Notice of Motion Application dated 27.05.2024, the Replying Affidavit therein, the Further Affidavit as well as the submissions hereby identifies the following issues for determination:-

ISSUE No. 1 - WAS THE APPLICATION DATED 27.05.2024 MERITED OR NOT?

ISSUE No. 2 - WERE THE PRAYERS SOUGHT IN THE APPLICATION GRANTED OR NOT?

ISSUE No. 3 - IS THE PRESENT APPEAL MERITED OR NOT?

ISSUE No. 4 - WHO BEARS THE COSTS OF THIS APPEAL?

22. The court having identified the above issues for determination, the same will now be discussed as herein-below.

**ISSUE No. 1 - WAS THE APPLICATION DATED 27.05.2024 MERITED OR NOT?**

23. The first issue for determination is whether the application dated 27.05.2024 was merited or not.
24. As earlier stated, the Application by the Respondent is one seeking for a temporary injunction against the Appellant pending the hearing of the Reference dated 22.05.2024.
25. An applicant seeking a temporary injunction is guided by the provisions of Order 40 Rule 1 & 2.
26. Similarly, the principles of granting an order of temporary injunction were clearly settled in the case of ***Giella vs Cassman Brown Co. Ltd (1973) EA.***
27. For any court to grant an order of temporary injunction, it must consider and establish the existence of a prima facie case, whether the injury is one which can be compensated by way of damages or not, and lastly, if in doubt, on a balance of probability.
28. According to the Notice of Motion dated 27.05.2024, it is not in dispute that the Respondent had filed a reference dated 22.05.2024 challenging the Notice of Termination issued by the Appellant on 01.03.2024.
29. In the Notice of Termination dated 01.03.2024, the Appellant intended to terminate the Respondent's occupation on the property in issue on 01.06.2024.
30. Clearly, therefore, based on the Notice to Terminate dated 01.03.2024 which had been objected by the Respondent, a dispute arose on whether the Notice to Terminate dated 01.03.2024 was illegal or not.
31. This was the cause of action that was entailed in the Reference dated 22.05.2024.

32. For this reason, the Court is of the finding that the Respondent herein had established a prima facie case in his Reference dated 22.05.2024 against the Appellant herein.
33. The next ingredient then would be whether the injury that is likely to be caused by the Notice of Termination dated 01.03.2024, could be compensated by way of damages or not.
34. According to the Respondent, the business which he was running in the property in issue was a supermarket.
35. The Respondent did plead that he had been in occupation of the property in issue for a lengthy period of time and had complied with all his obligations as relates to payment of rent.
36. The Appellant on the other hand did state that the Respondent herein had been erratic in paying rent, which in any event was of a lesser value than the market price.
37. The Appellant did insist that the Notice of Termination issued to the Respondent was to facilitate the renovation of the property in issue so that he would be able to get the proper current rent, as well as occupy a portion of it in expansion of his business.
38. Looking at these two submissions, it is not in doubt that the Respondent was operating a supermarket in the property in issue, which had been in existence for a substantial piece of time.
39. The question that would then arise is, what would be the cost of the Respondent relocating the said supermarket business within a period of sixty days and what would be the potential impact of such a move.
40. A business such as a supermarket is one which deals with both household goods as well as consumable goods.
41. The process of relocating a supermarket would involve an identification of an alternative space, inspection of the

installations or fixtures that would sustain both household goods as well as consumable goods.

42. Such a process involves third parties who are government entities, to issue permits for storage of various household goods and consumables.
43. Clearly, a quick relocation of the Respondent's business without having all these issues in mind would cause substantial losses in terms of cash flow, indebtedness to suppliers and interfere with his business projections.
44. For that reason, this court is of the considered view that the relocation of the supermarket by the Respondent within a period of sixty days as provided in the Notice of Termination would cause irreparable loss, and if not, substantial loss to the Respondent.
45. As such, this court is of the view and finding that the Respondent did demonstrate either an irreparable loss or in the alternative substantial loss by the relocation of the business within the sixty days provided in the Termination Notice.
46. The last principle for consideration is, in whose favour the balance of probability tilts in.
47. Based on the ingredients of prima facie case and substantial loss and/or irreparable loss, the Respondent had succeeded and the balance of convenience did tilt in his favour.

### **ISSUE No. 2 - WERE THE PRAYERS SOUGHT IN THE APPLICATION GRANTED OR NOT?**

48. Based on the Court's finding in relation to the ingredients of granting a temporary injunction, this court is of the considered view and finding that the Notice of Motion Application dated 29.05.2024 was merited and the orders therein should be granted.

### **ISSUE No. 3 - IS THE PRESENT APPEAL MERITED OR NOT?**

49. The third issue is whether the present Appeal is merited or not.
50. The only issue contained in the Memorandum of Appeal filed in this court, is whether the BPRT was right in striking out the Reference dated 22.05.2024 at a preliminary stage while determining the Notice of Motion dated 27.05.2024.
51. This is because in the ruling pronounced on 29.08.2024 the BPRT did grant the Notice of Motion dated 27.05.2024, albeit for their own reasons.
52. The only point of departure by the Appellant is the striking out of the Reference before the same could be heard on merit.
53. In other words, the Appellant is seeking to challenge the striking out of the Reference dated 22.05.2024 by way of a ruling dated 29.08.2024.
54. From the onset, the Respondent herein did file two separate and distinct pleadings before the BPRT.
55. The first pleading was the Reference dated 22.05.2024 seeking to object to the Termination Notice dated 01.03.2024.
56. The second was a Notice of Motion dated 27.05.2024 seeking temporary injunctive orders against the Appellant.
57. The Notice of Motion Application dated 27.05.2024 was the only pleading that was for consideration before the BPRT.
58. In other words, the BPRT was to consider whether to grant the prayers sought in the Notice of Motion dated 22.05.2024 and agree whether to grant those orders or not.
59. The legality of the Reference dated 22.05.2024 was not challenged in the Notice of Motion dated 27.05.2024 by the Respondent herein.

60. It was therefore, erroneous for the BPRT to discuss the legality or illegality of the Reference dated 22.05.2024 in an application seeking for a temporary injunction.
61. If the BPRT were to consider the legality of the Reference dated 22.05.2024 as part of their discussions on the application dated 27.05.2024, it would only be while considering the ingredient of a prima facie case.
62. However, in their ruling dated 29.08.2024, the BPRT was satisfied that there was a valid Reference as anticipated under section 4(5) of the Landlord & Tenant (Shops, Hotels and Catering Establishments) Act CAP 301, and therefore, found that the Notice of Termination was of no effect until and subject to the determination of the reference by the Tribunal.
63. In essence therefore, the Respondent was supposed to enjoy the protection of Section 6(a) of the Act until the Reference was heard and determined.
64. Section 7 of CAP 301 requires the BPRT to evaluate the grounds upon which the Notice of Termination is issued and upon evaluating these grounds, issue its decision under Section 9.
65. Unfortunately, the BPRT did proceed to determine the Reference without considering the grounds contained under Section 7 of CAP 301 and thereafter did purport to issue a decision under Section 9 in a Notice of Motion Application seeking a temporary injunction as provided under Order 40 of the Civil procedure Rules.
66. To this end, this court is the view and finding that the decision to strike out the Termination Notice in its ruling on the Notice of Motion dated 27.05.2024 was misdirected and premature.
67. As such, the present appeal is merited and the order declaring the Termination Notice as unlawful and of no legal effect should be set aside.

#### **ISSUE No. 4 - WHO BEARS THE COSTS OF THIS APPEAL?**

68. Costs are usually awarded to a winning party.
69. However, in this instance, it is the determination of the BPRT declaring the Termination Notice to be unlawful and not the parties herein that did give rise to the present Appeal.
70. As such, the court hereby orders that each party will bear its own costs as relates to the present Appeal.

**Conclusion:**

71. In conclusion, this Court hereby makes the following Orders in determination of the present Appeal:-

**A. THE MEMORANDUM OF APPEAL DATED 26.09.2024 IS MERITED.**

**B. THE RULING PRONOUNCED ON 29.08.2024 AND THE ORDERS ISSUED THEREIN BE AND ARE HEREBY SET ASIDE IN WHOLE.**

**C. THE REFERENCE DATED 22.05.2024 BE AND IS HEREBY REINSTATED.**

**D. THE REFERENCE DATED 22.05.2024 BE HEARD ON MERIT BY THE BUSINESS PREMISES RENT TRIBUNAL ON PRIORITY BASIS.**

**E. EACH PARTY WILL BEAR ITS OWN COSTS AS RELATES TO THE PRESENT APPEAL.**

**DATED, SIGNED & DELIVERED** Virtually at **ELDORET ELC** this **20<sup>TH</sup> DAY OF APRIL 2026.**

**EMMANUEL.M. WASHE**

**JUDGE**

**IN THE PRESENCE OF:**

Court Assistant: Brian

Plaintiff: Mr. Korir for the Appellant

Defendant: Mr. Bundotich for the Respondent