



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L SUIT NO. 932 OF 2012**

**[Formerly Eldoret H C. C. C No. 77 of 2008]**

**HILLARY KIPCHUMBA CHEPKIYENG.....PLAINTIFF**

**VERSUS**

**ELIZABETH LABOSO.....DEFENDANT**

**JUDGMENT**

**Hillary Kipchumba Chepkियeng (hereinafter referred to as the plaintiff)** has come to this court against **Elizabeth Laboso (hereinafter referred to as the defendant)** claiming that the defendant is the registered proprietor of the suit property namely Eldoret Municipality Block 7/19. The said suit parcel of land is situate in Eldoret town and is developed with commercial buildings and other structures which the Defendant and her predecessor in title have been leasing out from time to time.

In or about 1995, the Plaintiff entered possession of one of the building standing on the suit parcel of land for the purposes of running a butchery business thereupon.

The plaintiff has been in peaceful and uninterrupted occupation of the said premises ever since and has never defaulted in the payment of the rent due upon the said premises.

In or about January 2007 and in order to expand his business, the Plaintiff acquired additional premises at a monthly rent of Kshs.18,000 for the purposes of setting up a hotel business thereupon.

The Plaintiff took possession of the additional premises and carried out extensive developments thereupon and purchased tables, seats and other facilities that are required in running a hotel business. The Plaintiff has continued paying the agreed rent of Kshs.18,000 to the Defendant who has received and issued receipts for the said payment.

The plaintiff was in peaceful, uninterrupted occupation of the Hotel Premises until 5<sup>th</sup> June 2008 when the Defendant unlawfully and without any notice whatsoever took possession of the said premises, partitioned it and in the process cut and destroyed chairs and the tables which the plaintiff had installed in the said premises.

The Plaintiff contends that the Defendant's action is unlawful, null and void as *the Defendant did not lawfully terminate the tenancy and that the Plaintiff is not and has never been in arrears of rent. The plaintiff further contends that the Defendant did not issue any notices to the Plaintiff and was not distressing for rent and there would be no legal basis for such distress and that the Defendant was not acting pursuant to any order or decree issued by a court of law.*

*The plaintiff avers that the Defendant used force by breaking doors and windows in order to gain access into the premises. As a result of the Defendant's said unlawful action, the Plaintiff's business has come to a standstill as the Plaintiff cannot now do any business in the said premises due to the destruction of his property and the unhygienic environment caused by the ongoing construction. The Plaintiff further apprehends that the Defendant may lease out the entire or part of the hotel premises to a third party.*

The Plaintiff prays for Judgment against the defendant for a declaration that the Defendants forceful entry into the Plaintiff's hotel standing on land parcel number Eldoret Municipality Block 7/19 is illegal, null and void and amounts to trespass.

The Plaintiff further claim against the Defendant is for general, punitive and exemplary damages and for an order of mandatory injunction directing the Defendant, her servants and or agents to vacate from the said premises and to restore the Plaintiff back into possession of the premises. The plaintiff prays for Costs of this suit plus Interest.

The defendant in reply states that whereas the Plaintiff may have been in occupation of the part of the premises and running a butchery business, there was a change of ownership when the defendant took over and was not bound to retain him. The defendant avers that there was no contract between her and the plaintiff.

The defendant further avers that subsequently after her take over, the plaintiff sold out and or surrendered his said butchery business to one Silas Limo with whom the defendant has entered into a tenancy agreement and the plaintiff has no locus to complain about the premises. The defendant avers that the plaintiff's occupation and use of the said premise was not subject to nor did it have anything whatsoever to do with his Butchery Premises Business.

The defendant categorically denies that any of the 4 chairs and tables and or any other equipment was ever touched or damaged during the renovation.

The defendant denies having forcefully taken possession of the premises as alleged and avers that that the business premises were generally dilapidated with leaking roofs and cracking walls and was almost uninhabitable and the tenants complained of the same. That as the landlady the defendant was duty bound to improve repair, develop and restore them into use. The defendant sought and obtained authority from the Municipal Council of Eldoret.

She avers that she duly notified the tenants including the plaintiff herein who readily agreed to vacate the premises pending the renovation and that the defendant did not charge any rent for the period when the premises were undergoing repair. That the tenant requested the defendant to consider and give them priority to rent the premises after the renovation.

That it was mutually agreed that they would be allowed subject to their acceptance to the new tenancy agreement and increased rent. The plaintiff put away his business facilities during the period.

The tenancy between the plaintiff and the defendant if it has not been terminated and the plaintiff's Hotel Business premise is still intact but only awaiting his acceptance and signing of the new terms of agreement. The defendant action is not a distress for rent at all. The defendant has not used any force nor broken the doors or windows or at all.

The defendant further avers that, whereas she has chosen to give the plaintiff time to accept the terms of the tenancy agreement, she cannot be expected to wait for unreasonable long as the establishment shall run at a loss.

The defendant avers that she has not partitioned the plaintiff's premises but merely changed the location of the doors of the adjacent premises to face the front; as desired by the tenants who has already taken possession.

The defendant avers that she is not in occupation of the plaintiffs Hotel Premises neither is any of her servants and neither can she force the plaintiff back into the premises. The plaintiff has not suffered any losses and it not entitled to any damages as claimed or at all.

According to the defendant, the plaintiff claims if any lies with the Business Premises Tribunal and or with the Lands Dispute Tribunal, and the defendant gave notice to raise a preliminary objection on a point of law.

The defendant further avers that the plaintiff has no *locus standi* to institute the proceedings herein nor a sustainable claim against the defendant and the defendant gave notice to raise a preliminary objection on a point of law. The defendant denies ever receiving any notice of the proceedings herein.

When the matter came for hearing, the plaintiff, **Hillary Chepkinyeng** testified that he is a resident of Eldoret and a businessman who buys and sells cattle. The plaintiff hired the premises on Eldoret Municipality Block 7/19 from one Evanson Laboso. He established a butchery on the premises. Upon the death of Evanson Laboso, the defendant applied for a grant of letters of administration and was registered as the owner of the Plot. The plaintiff expanded his business to include a hotel. He took additional space on the suit land for purposes of running the hotel. He faithfully paid rent until the year 2008. However, on 5<sup>th</sup> June, 2008, the defendant entered into the premises and destroyed his property and started partitioning the building. His business came to a halt. He was not given any notice for the above said repairs or takeover. He had repaired the hotel prior to the destruction to the tune of Kshs.1,045,371. He claims to have lost Kshs.6,523,712.

**On cross examination by M/s Kiplagat** learned counsel for the defendant, he states that when the property was renovated, they were given notice to close the shops. The renovation was to begin on 1<sup>st</sup> April, 2008. The renovation took two months. They were to remove their things from the premises. He paid rent for April and not May. They were to resume occupation after renovation and were to sign new agreements. Rent was increased from Kshs.40,000 to Kshs.50,000 in June, 2008. He was not prevented from going back to the premises. He used to pay Kshs.18,000. When he went back, he found the doors locked. He sold Sila Limo the butchery.

**PW2, Sammy Kipruto Keino** states that he resides in Eldoret. A consultant accountant on tax matters. A member of CPAK Number 13485. He has a Bachelor's Degree in Business Management, Moi University specialized in accounting. He is pursuing Masters in Business Administration at the Celluline University. He has been in the field for twenty years. He is self-employed, Kipruto & Associates. He knows Hillary Kipchumba Chepkinyeng as his client. He was appointed to examine books for 2006, 2007 and 2008. He did the same and prepared a financial report.

The income in 2006 was Kshs.1,078,016, in 2007, it was Kshs.1,391,491, in 2008, the plaintiff operated for only 3 months and therefore, he could not prepare a financial statement.

**On cross examination by Kiplagat**, he states that he did the financial report. He does not have a report for computation of figures.

**DW1, Elizabeth Cherono Laboso** states that she is a business lady and a farmer. She is also a landlady. The plaintiff was one of her tenants in the Eldoret Central Business District in Plot Number 7-19. She did not remove Hillary from the premises but the premises were old and needed repair. She applied for a permit from the Eldoret Municipal Council to renovate the roof. She gave all tenants notice. The plaintiff moved out including the other tenants. When the premises had been renovated, she gave notice to all tenants for a fresh tenancy agreement.

The plaintiff was to pay Kshs.40,000 for the hotel and Kshs.50,000 for the butchery. Many tenants went to sign the fresh new lease agreement.

The plaintiff did not go back to sign the lease but came to court. She states that she never asked any tenant to do renovation of the premises. She wanted to renovate the premises to her standards. The

plaintiff sold the butchery business to Silas Limo who signed a lease.

On cross examination by Mr. Odhiambo learned counsel for the plaintiff, she states that she obtained permission to renovate through the letter dated 28.5.2008. She gave Hillary the original lease but Hillary did not sign. She gave notice to tenants before seeking permission to renovate. She gave 2 months' notice. She agreed with Mr. Odhiambo that the notice was insufficient.

At the close of the testimony by the defendant parties were given directions on submissions.

The gravamen of the plaintiff's submissions is that the tenancy that existed between the plaintiff and the defendant was controlled tenancy by dint of section 2(i) of the landlord and tenant (Shops, Hotel and Catering Establishment Act, Cap. 301, Laws of Kenya. The provision defines the term controlled tenancy as a tenancy of a shop, hotel or catering establishment which has not been reduced into writing.

The plaintiff argues that the tenancy agreement between the defendant and the plaintiff was an oral one and for butchery business and later extended to a hotel business.

The plaintiff argues that the tenancy notice was irregular as it did not comply with section 4 of the Act. The tenant did not even have chance to reply as it was issued on 11<sup>th</sup> March, 2008 and the renovations were to start on 1<sup>st</sup> April, 2008. The notice was short, malicious and callous. The plaintiff further argues that the repossession was illegal as the intention of the defendant was the plaintiff to vacate the premises.

The plaintiff finally argues that the court has jurisdiction to entertain the suit herein as the prayers sought are declaration and mandatory injunction that cannot be issued by the tribunal.

The defendant submits that this court lacks jurisdiction to entertain the dispute as the same fall within the jurisdiction of the business premises Tribunal which is duly established for that purpose. Moreover, that the plaintiff has not proved his case as required by law as there is no evidence of any agreement between the plaintiff and the defendant to demonstrate the terms of the tenancy. According to the defendant the plaintiff has not established the landlord tenant relationship between himself and the defendant. The defendant further submits that the ruling of the court on 16<sup>th</sup> October 2008 clearly exonerates the defendant from any blame on the many issues raised by the plaintiff.

This court has considered the pleadings, evidence on record and submissions of parties and do find that the facts of this case are that the defendant is the registered proprietor of Eldoret Municipality Block 7/19 situated along Elijah Cheruiyot street comprising of business premises developments. The defendant acquired the property through succession of the husband's Estate. The entire premises were occupied by tenants including the plaintiff. The premises became dilapidated and almost uninhabitable and therefore the defendant decided to repair them. She gave notice dated 11<sup>th</sup> March 2008 to all tenants to vacate the premises to enable the repair to be undertaken on 1<sup>st</sup> of April 2008. She obtained the requisite authority from the Eldoret Municipal Council. The tenants including the plaintiff vacated without any complaint or reference to the Business Premises Tribunal. After the repairs, the defendant increased the rent to Kshs.40,000 for the Beehive hotel and kshs.50,000 for the Eldoret Butchery as from the 1<sup>st</sup> of June 2008 vide the letter dated 28<sup>th</sup> May, 2008 and invited the plaintiff to sign the agreement. The plaintiff declined to sign the agreement instead came to court by way of plaint dated 16<sup>th</sup> June 2008 claiming that the defendant took possession of the premises on the 5<sup>th</sup> June 2008 and destroyed the furniture therein. He sold the Butchery business to Silas Limo

This court finds that though there is no written agreement, there was tenancy relationship between the plaintiff and the defendant in respect of parcel number Eldoret Municipality Block 7/19 which existed before the demise of the defendant's husband one Evanston Laboso. The plaintiff operated a butchery on the defendant's parcel of land from the year 2002. The plaintiff expanded his business to include a hotel. He paid monthly rent of Kshs.18,000. However, on 1<sup>st</sup> March, 2008, he was given notice that the premises would be repaired on 1<sup>st</sup> April, 2008. Indeed, the defendant closed the premises for repair until

1<sup>st</sup> June, 2008. After repairs, she informed the defendant to sign a new lease whereby rent had been increased to Kshs.40,000 for the butchery and Kshs.50,000 for the hotel. The plaintiff rejected the offer and came to court.

The 1<sup>st</sup> issue for determination is whether I have jurisdiction to entertain this dispute. This court has original and appellate **jurisdiction** to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of the environment and land court Act or any other law applicable in **Kenya** relating to **environment and land**.

The broad jurisdiction of the Environment and Land Court is donated by Article 162 of the Constitution which establishes the Superior Courts in Kenya. It provides thus:

- 1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2)*
- 2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-*
  - a) employment and labour relations; and*
  - b) The environment and the use and occupation of, and title to, land.*
- 3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2)*
- 4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.*

In the discharge of the mandatory obligation placed on it by the Constitution, Parliament enacted the Environment and Land Court Act and set out in details, the jurisdiction of the Court. Section 13 of the Act outlines the jurisdiction of the court as follows:

### *13 Jurisdiction of the Court*

- 1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) b of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.*
- 2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes-*
  - a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources.*
  - b) relating to compulsory acquisition of land;*
  - c) relating to land administration and management;*
  - d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interest in land; and*
  - e) any other dispute relating to environment and land.*

- 3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom*

*relating to a clean and health environment under Articles 42, 69 and 70 of the Constitution.*

**4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court**

**5) Deleted by Act No. 12 of 2012**

**6) Deleted by Act No. 12 of 2012**

**7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including-**

**a) interim or permanent preservation orders including injunctions;**

**b) prerogative orders;**

**c) award of damages;**

**d) compensation;**

**e) specific performance;**

**f) restitution; or**

**g) declaration; or**

**h) costs**

Parties are bound by their pleadings and to determine whether I have jurisdiction it is imperative to look at the pleadings. The plaintiff claim is for a declaration that the Defendants forceful entry into the Plaintiff's hotel standing on land parcel number Eldoret Municipality Block 7/19 is illegal, null and void and amounts to trespass.

The Plaintiff further claim against the Defendant is for general, punitive and exemplary damages and for an order of mandatory injunction directing the Defendant, her servants and or agents to vacate from the said premises and to restore the Plaintiff back into possession of the premises. The above reliefs can only be granted by the court. This court has jurisdiction to entertain the claim based on forceful entry and trespass and has the power to grant the relief of injunction.

However, the issues of the notice to renovate and increment of rent should have been raised before the Tribunal and not this court as this court can only entertain issues of the notice and increment of rent on appeal from the Business Premises Rent Tribunal.

On the second issue, as to *whether there existed a controlled tenancy between plaintiff and defendant and therefore the plaintiff was a protected tenant*, it is clear that the plaintiff was operating a butchery and hotel on the rented property. **Section 2(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Cap. 301** defines a controlled tenancy as follows: -

**“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; or  
(iii) relates to premises of a class specified under subsection (2) of this section:

Provided that no tenancy to which the Government, the Community or a local authority is a party, whether as landlord or as tenant, shall be a controlled tenancy;

I do find that the plaintiff was a protected tenant under the Act as the tenancy was controlled.

On the third issue as to whether the defendant violated the provisions of the Act, I do find that the notice issued was too short and did not give the particulars of repairs or details as to what was to be done. The notice was unprocedural and contrary to the provisions of Section 2 of the Act which provides:

“**tenancy notice**” means a notice given under subsection (2) or subsection (3) of section (4) of this Act;

The notice did not fulfil the provisions of section 4 of the Act which provides:

**Termination of, and alteration of terms and conditions in, controlled tenancy**  
**(1) Notwithstanding the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be terminated, and no term or condition in, or right or service enjoyed by the tenant of, any such tenancy shall be altered, otherwise than in accordance with the following provisions of this Act.**

**(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.**

**(3) A tenant who wishes to obtain a reassessment of the rent of a controlled tenancy or the alteration of 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 landlord in the prescribed form.**

No notice was given in the prescribed form and that in essence the defendant altered the rent without notice and without assessment. However, this issue should have been referred to the **Business Premises Rent Tribunal** before compliance by the plaintiff. The plaintiff appears to have come to court after realizing that he was going to pay more rent.

I do find that there was no forceful entry by the defendant as she gave notice and the plaintiff vacated the premises.

The allegations by the plaintiff that he renovated the premises cannot be true as he did not seek the written permission of the defendant as required by law.

The upshot of the above is that the plaintiff has not proved on a balance of probabilities that he is entitled to the prayers sought. The suit is dismissed with costs.

**Dated and delivered at Eldoret this 11<sup>th</sup> day of September, 2019.**

**A. OMBWAYO**

**JUDGE**