



**Kimani v Kiarie (Environment and Land Appeal E004 of 2024)  
[2024] KEELC 1121 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1121 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E004 OF 2024**

**JO MBOYA, J**

**FEBRUARY 29, 2024**

**BETWEEN**

**THOMAS KIMANI ..... APPLICANT**

**AND**

**SAMUEL KIARIE ..... RESPONDENT**

**RULING**

**Introduction And Background**

1. The Applicant herein has approached the Honourable court vide Application dated the 5<sup>th</sup> January 2024; brought pursuant to the provisions of Order 42 Rule 6 of the *Civil Procedure Rules* 2010; as well as Section 15 of The *Landlord & Tenants (Shops, Hotels & Catering Establishment) Act*, Chapter 301 Laws of Kenya, and same has sought for the following reliefs; [ verbatim]:
  - i. Respondent to reconnect Electricity power supply in the Applicant’s Business premises.
  - ii. Respondent be restrained from increasing rent, intercepting and evicting the Applicant.
  - iii. Respondent to compensate the Applicant for the sum of Kes. 834,200 Only, on account of Loss of business.
  - iv. The costs of this Application be provided for.
2. The instant Application is premised and anchored on various grounds which have been enumerated in the body thereof. Furthermore, the Application is supported by the affidavit of the Applicant sworn on even date; and in respect of which, the Deponent has annexed two [2] documents.
3. Upon being served with the subject Application, the Respondent filed a Replying affidavit sworn on the 24<sup>th</sup> January 2024; and in respect of which the Respondent has contended, inter-alia, that the



subject Appeal is incompetent and contravenes the provisions of Order 42 Rule 1 of the Civil Procedure Rules, 2010; and hence the Application premised thereon is equally incompetent.

4. Furthermore, the Respondent has also averred that the orders sought by and on behalf of the Applicant herein are substantive orders and thus same cannot issue and/or be granted on the basis of the instant Application or at all.
5. Be that as it may, the instant Application came up for hearing on the 30<sup>th</sup> January 2024; whereupon the advocates for the respective Parties covenanted to canvass and dispose of the Application by way of written submissions. Consequently and in this regard, the Honorable court circumscribed the timelines for the filing of the written submissions.
6. Moreover, the Applicant herein proceeded to and filed written submissions dated the 12<sup>th</sup> February 2024; whereas the Respondent filed written submissions dated the 13<sup>th</sup> February 2024.
7. Both sets of written submissions are on record.

#### **Parties' Submissions:**

##### **Applicant's Submission:**

8. The Applicant herein filed written submissions dated the 12<sup>th</sup> February 2024; and in respect of which same has adopted and reiterated the grounds contained at the foot of the Application, as well as the averment in the body of the Supporting affidavit.
9. Furthermore, the Applicant has therefore ventured forward and highlighted three [3] salient issues for determination and consideration by the court. Firstly, the Applicant has submitted that same filed a reference before the Business Premises Rent Tribunal [B.P.R.T] complaining against the actions by and on behalf of the Respondent, who had sought to evict the Applicant from the demised premises.
10. It was the further submissions by the Applicant that the reference before the tribunal was thereafter heard and disposed of vide Judgment rendered on the 7<sup>th</sup> December 2023, wherein the tribunal [sic] dismissed the Applicant's reference.
11. Arising from the foregoing, the Applicant herein has contended that being aggrieved by the Judgment and decision of the tribunal, same was vested with the right to file and/or mount an appeal in accordance with the provisions of Section 15 of the Landlord and Tenant [Shops, Hotels and Catering Establishment] Act, Chapter 301, Laws of Kenya.
12. Consequently and in the premises, the Applicant herein has submitted that the Appeal beforehand is lawful and competent and thus same is properly before the Honourable court. Simply put, the Applicant has contended that the appeal has legs to stand on.
13. Secondly, the Applicant herein has submitted that same has established and demonstrated the requisite grounds to warrant the issuance of an order of Temporary injunction, to restrain and/or prohibit the Respondent from evicting the Applicant from the demised premises.
14. Additionally, the Applicant herein has contended that the Respondent has exhibited various endeavors geared towards evicting the Applicant from the demised premises and that unless the orders sought are granted, the Applicant is exposed to unlawful eviction by and or at the instance of the Respondent.
15. In support of the submissions that the Applicant has demonstrated the requisite basis to warrant the grant of the orders of temporary injunction, the Applicant has cited, inter-alia, the case of *Giella v Cassman Brown* (1973) EA 358; *Mrao Ltd v First American Bank* (2003)eKLR; *Nguruman Ltd v*



*Jan Bode Nielsen & Others* (2014)eKLR and *John Njue Nyaga v Nicholas Njiru Nyaga & Another* (2013)eKLR, respectively.

16. Thirdly, the Applicant herein has submitted that the Respondent herein has since taken the law unto own hands and proceeded to lock the demised premises contrary to and contravention of the orders of the Tribunal. Consequently and in this regard, the Applicant has contended that the Respondent cannot be allowed to take advantage of his own misdeeds.
17. In support of the foregoing submissions, the Applicant has cited and relied upon the decision in the case of *Nabro Properties Ltd v Sky Structures Ltd* (2002)eKLR.
18. Arising from the foregoing, the Applicant has invited the Honourable court to find and hold that same has established and demonstrated a basis to warrant the grant of the orders sought.

### **Respondent's Submissions:**

19. The Respondent has filed written submissions dated the 13<sup>th</sup> February 2024; and in respect of which same has raised, canvassed and highlighted two [2] salient issues for consideration by the Honourable court.
20. First and foremost, Learned counsel for the Respondent has submitted that the Appeal by and on behalf of the Applicant herein is contrary to and in contravention of the provisions of Order 42 Rule 1 of the *Civil Procedure Rules*, 2010 and thus same is incompetent.
21. To the extent that the Appeal by and on behalf of the Applicant is incompetent, Learned counsel for the Respondent has contended that the instant Application, which is anchored thereon, is equally incompetent.
22. Secondly, Learned counsel for the Respondent has submitted that the Applicant herein has neither demonstrated nor established any basis or at all, to warrant the grant of the orders sought at the foot of the current Application.
23. In particular, Learned counsel for the Respondent has contended that the Application by and on behalf of the Applicant is based and/or premised on misconception and misunderstanding of the import and tenor of the orders that were issued and/ or granted by the tribunal.
24. Based on the foregoing submissions, Learned counsel has submitted that the Applicant has therefore failed to demonstrate a basis to warrant the grant of the orders sought. In the premises, Learned counsel for the Respondent has proceeded to and invited the Honourable Court to find and hold that the Application beforehand is devoid of merits and thus ought to be dismissed with costs.

### **Issues For Determination:**

25. Having reviewed the Application beforehand and the Response thereto; and upon taking into account the written submissions filed by and on behalf of the Parties, the following issues do emerge and are thus worthy of determination;
  - i. Whether the Applicant has established and demonstrated a basis to warrant the grant of orders on Temporary Injunction or otherwise.
  - ii. Whether the Applicant herein is entitled to an order for reconnection of electricity to the suit premises, either in the manner sought or at all.
  - iii. Whether the Applicant herein can partake of and/or obtain an order for Compensation for loss of business on the basis of an Interlocutory Application.



## Analysis And Determination

### Issue Number 1 Whether the Applicant has established and demonstrated a basis to warrant the grant of orders on Temporary Injunction or otherwise.

26. It is common ground that the Applicant herein filed and/or lodged a reference before the Business Premises Rent Tribunal [BPRT], and wherein same sought for various reliefs as against the Respondent, who was/is the Landlord of the demised premises.
27. Subsequently, the reference that was filed by the Applicant was heard and disposed of vide Judgment rendered on the 7<sup>th</sup> December 2023; and wherein the Tribunal found and held as hereunder;
  - i. That the Tenant will pay rents as and when they fall due effective the 5<sup>th</sup> October 2023; and on the same date of each succeeding month until when otherwise determined by the law.
  - ii. The Tenant to pay the rents for October, November and December 2023 at Kes.15, 000/= on or before the 10<sup>th</sup> December 2023.
  - iii. That in the event that the landlord would decide to terminate or alter the terms of the tenancy; then Due process of the law to be strictly followed.
  - iv. Each party to bear own costs
28. From the determination by the tribunal, it is evident and apparent that the tribunal [ B.P.R.T] indeed granted a positive order protecting the Applicant herein and his tenancy in the demised premises.
29. Put differently, there is no gainsaying that the tribunal barred and or prohibited the Respondent from interfering with and/or evicting the Applicant from the demised premises, without due compliance with the provisions of the *Landlord and Tenant (Shops, Hotels & Catering) Act*, Cap 301 Laws of Kenya.
30. Notwithstanding the clear protection that was conferred upon the Applicant, same has still approached this court and is seeking for an order of temporary injunction.
31. To my mind, the Applicant herein has in existence a valid and lawful order which protects and preserves his occupation and possession of the demised premises. Consequently, where there is a threat and/or breach of the said order, then it behooves the Applicant to either approach the Business premises tribunal [B.P.R.T] with a suitable application by dint of Section 12(4) of the parent *Act*; or better still, to commence contempt proceedings.
32. Suffice it to point out that the Applicant herein cannot seek to procure an order of temporary injunction, by whatsoever name, during the pendency of the order by the Business Premises Rent Tribunal, which has effectively preserved the Applicant's tenancy.
33. In view of the foregoing, it is my finding and holding that even though this court is seized of the requisite Jurisdiction to grant an order of Temporary Injunction once an Appeal has been filed by dint of the provisions of Order 42 Rule 6(6) of the *Civil Procedure Rules*, 2010; no such order can issue on the face of an existing order by a court of competent Jurisdiction.
34. Premised on the foregoing analysis, I come to the conclusion that the Applicant herein is not deserving of the orders of Temporary injunction, which have been sought for in the body of the Application beforehand.



**Issue Number 2 Whether the Applicant herein is entitled to an order for reconnection of electricity to the suit premises, either in the manner sought or at all.**

35. Pursuant to and by dint of the reference that was filed by the Applicant herein, same [Applicant], had raised various complaints, inter-alia, that the Respondent had illegally and unlawfully disconnected electricity to the demised premises.
36. To the extent that the issue of disconnection of electricity to the suit premises was raised and canvassed in the body of the reference, the tribunal was called upon to interrogate the validity of the said complaint and thereafter render a determination.
37. For coherence, the tribunal [ B.P.R.T], indeed interrogated the Complaint pertaining to and concerning the disconnection of electricity to the demised premises. Instructively, after due evaluation, the tribunal proceeded to and made a determination on the issue of the disconnection of electricity to the demised premises.
38. For the sake of brevity, it is imperative to reproduce the findings by and on behalf of the tribunal, as pertains to (sic) disconnection of Electricity.
39. Same are reproduced as hereunder;
  - (18) the Tenant did not offer any evidence that he had ever rendered any complaint to KPLC about any illegal power disconnection by the landlord. To the contrary, the KPLC electricity bills exhibited in court exhibited huge power bill. I highly doubt that the landlord would arbitrary disconnect power which is obviously his function and not face complaints by the tenant an sanction by KPLC
  - [19]. In court, both parties admitted the reality of huge power bills but could not agree as to who had the responsibility to settle the same. Where both parties' built concurrence was on the fact that the tenant was to pay Kes.1, 500/= per month for the power. Taking cognizance that the tenant took possession of the demised premises in January 2022, that is to say, that to date he has been in the demised premises for the last 23 months. In sum his share of liability to KPLC by December when power was disconnected was Kes.18, 000/= only which he had already paid. I therefore agree that he does not owe KPLC or the landlord any arrears for the power consumed.
40. Having reproduced the holding by the tribunal, what becomes apparent is that the issue of electricity disconnection was duly considered by the tribunal and same proceeded to and made a determination thereon.
41. It may be [I say maybe] that the tribunal did not effectively interrogate and address the person responsible for the disconnection of electricity supply and/or whether electricity ought to be re-connected to the Applicant herein.
42. However, it is important to underscore that the issue as pertains to the disconnection of electricity, the payment of the outstanding of electricity bill and the consequential re-connection, are substantive issues, which can only be canvassed and determined during the hearing of the main Appeal and not otherwise.
43. In my humble view, the Honorable court herein cannot purport to engage with the issue of re-connection of electricity at this juncture, insofar as such an endeavor would culminate into interrogating the merits or otherwise of the question of the disconnection; which this Honourable Court is not authorized to deal with and/ or determine at this juncture.



44. In a nutshell, I hold the humble, albeit firm view that it is premature for this court to entertain and adjudicate upon the contents of the prayer seeking an order to direct the Respondent to clear the electricity bill with KPLC.

**Issue Number 3 Whether the Applicant herein can partake of and/or obtain an order for Compensation for Loss of Business on the basis of an Interlocutory Application.**

45. Other than the question of reconnecting electricity power supply, [which the court has discussed in the preceding paragraphs], the Applicant herein has also sought for an order for compensation for loss of business in the sum of Kes.834, 200/= only.

46. Be that as it may, it is not lost on this Honorable court that what is before the court at this juncture is an interlocutory Application and not the Substantive Appeal.

47. Furthermore, there is also no gainsaying that the issue as pertains to compensation [sic] for loss of business is a substantive matter, which would require to be particularly pleaded and specifically proved, albeit during the substantive hearing of the Appeal.

48. At any rate, even though the Applicant herein has impleaded the sum of Kes.834, 200/= only, as the amount being sought on account of loss of business, same has however not demonstrated how the impugned figure has been arrived at and/or computed.

49. Without belaboring the point, I beg to state and point out that whilst entertaining and adjudicating upon an interlocutory Application, like the one beforehand, the court is precluded from making final and precipitate conclusion[ determinations]. Instructively, such precipitate and final conclusion can only be made and or arrived after substantive hearing and not otherwise.

50. Finally, it is also appropriate to underscore that the claim for loss of business, which has been reckoned at Kes.834, 200/= only, touches on special/liquidated damages; which by law require to, inter-alia, to be particularly pleaded and thereafter, strictly proved.

51. To this end, it suffices to take cognizance of the decision in the case of *Idi Ayub Sabbani v City Council of Nairobi* (1982-88) IKAR 681 at page 684: where the court of appeal stated and held thus;

“....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in *Bonham Carter v. Hyde Park Hotel Limited* [1948] 64 TLR 177 thus:

“Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it”

52. In view of the foregoing exposition of the law, my answer to issue number three [3] is twofold. Firstly, the claim for recompense on account of loss of business has been prematurely impleaded and in any event, cannot be adjudicated upon at the interlocutory stage.

53. Secondly, the claim for recompense on the basis of Loss of business, is a claim for special [ Liquidated] damages which requires strict proof albeit upon production of evidence, which can only be tendered during the substantive hearing.



**Final Disposition;**

54. Having reviewed the various issues that were highlighted in the body of the Ruling, it must have become crystal clear that the Applicant herein has neither established nor proved the claims at the foot of the current Application.
55. Consequently and in the premises, the Application dated the 5<sup>th</sup> January 2024; is devoid of merits and is hereby Dismissed.
56. Nevertheless, I hereby direct that the costs of the Application herein shall abide the outcome of the Main Appeal.
57. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29<sup>th</sup> DAY OF February 2024.**

**OGUTTU MBOYA**

**JUDGE.**

In the Presence of;

Court Assistant: Benson.

Mr. Thomas Kimani – Applicant.

Ms. Munyua for the Respondent.

