



**Lenana Archade Limited v Malili & 2 others (Tribunal Case  
E202 of 2023) [2023] KEBPRT 1308 (KLR) (19 May 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 1308 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E202 OF 2023  
CN MUGAMBI, CHAIR  
MAY 19, 2023**

**BETWEEN**

**LENANA ARCADE LIMITED ..... LANDLORD**

**AND**

**PATRICIA AKUMU MALILI ..... 1<sup>ST</sup> TENANT**

**JOSEPH SUNDAY ABALLA ..... 2<sup>ND</sup> TENANT**

**GEORGE STEPHEN OMONDI OGADA T/A SPICED ROCKS LIQUOR  
STORE ..... 3<sup>RD</sup> TENANT**

**RULING**

1. The notice of Preliminary Objection dated 9.3.2023 brought by the Tenants/Respondents is brought on the following grounds:-
  - a. That the Tribunal has no jurisdiction to hear and determine the reference and the application for the following reasons:-
    - i. The underlease dated 24.10.2022, a copy of which has been presented before this Honourable Tribunal as an exhibit in support of the application does not create a controlled tenancy.
    - ii. In the absence of a controlled tenancy, there is no basis upon which this Honourable Tribunal can handle any dispute between the landlord/Applicant and the tenants/Respondents.
  - b. That other than making a determination under Section 12(1)(a) that it has no jurisdiction in this matter, there is nothing else in this matter in respect of which this Tribunal's jurisdiction can be invoked.



### **The Respondent's Submissions**

2. The Respondent has submitted that the lease presented before court does not create a controlled tenancy and in the absence of such tenancy, there is no basis upon which the Tribunal can handle any dispute between the parties.
3. It is further submitted that the only issue the Tribunal can determine is the issue of lack of jurisdiction on its part.
4. It is also submitted by the Respondent that the objection has been properly raised and meets the description of preliminary objections as per the dictum in the often quoted case of; Mukisa Biscuit Manufacturers Co. Ltd Vs West End Distributors [1969] EA 696.
5. Further submitted that the Tribunal having been established by Cap 301 which only applies to controlled tenancies, the Tribunal's jurisdiction can only be invoked and the powers exercised in relation to controlled tenancies; the existence of a controlled tenancy is therefore a pre-requisite/condition precedent to the application of the Act (Cap 301).
6. It is submitted that the tenancy between the parties herein is not a controlled tenancy as can be gleaned from the documents and pleadings of the landlord/applicant.

### **The Applicant's Submissions**

7. The Applicant has submitted that Section 2(1)(b)(ii) of Cap 301 stipulates that if a tenancy agreement contains provision for termination otherwise than for breach of covenant, within five years from the commencement of the term, then it is a controlled tenancy.
8. The Applicant further submits that clause 7(b)(iii) to 7(b) (vii) of the underlease dated 24.10.2022; provides for five situations in which the landlord may re-enter upon the premises and thereupon absolutely determine the lease, other than for breach of the covenants contained at clause 6 thereof. The said situations have been spelt out in the Applicant's submissions.
9. The Applicant further submits that clauses 7(b)(iii) to 7(b)(vii) of the lease agreement are clearly not covenant in the under lease as they are excluded from the list of covenants which are clearly enumerated at clause 6 of the agreement. The Applicant in this regard submits the parties expressly ousted and excluded clauses 7(b)(ii)-7(b)(vii) of the under lease from being covenants of the lease and the court cannot re-write contracts between the parties.
10. The Applicant has further submitted that clauses 7(b)(iii)- 7(b)(vii) of the underlease clearly have nothing to do with the governing of the tenancy or the landlord and tenant obligations towards each other but instead provide for situations whereby the landlord may determine the tenancy on the premise of action by third parties outside the contractual lease between the parties. There is therefore the possibility of the lease being terminated within five years of commencement for reasons other than breach of covenants under the lease, thus rendering the lease a controlled tenancy.

### **Analysis and Determination**

11. The submissions for and against the notice of preliminary objection revolve around the interpretation of the under lease between the Applicant and the tenants. At the center of the submissions is the interpretation of the said under lease and especially clause 7(b) and clause 6(a)-6(d) of the said under lease.



12. Clearly, the interpretation by the parties is at variance and does not give a common position on the status of the tenancy created by the under lease. It remains for example to be determined whether clause 7 contains or does not contain covenants.

It is also a matter for determination whether the parties by executing the under lease ousted and excluded clauses 7(b)(iii) and 7(b)(vii) from being covenant in the lease agreement.

13. These determinations require the consideration of evidence and a perusal of the under lease. A determination of whether or not this tenancy is controlled will therefore require the consideration of the evidence and cannot therefore proceed by way of a preliminary objection whose limits are well known.

14. In the case of; Oraro vs Barak Eston Mbaja [2005] eKLR, the court stated;-

“I think the principle is abundantly clear. A preliminary objection, correctly understood is now well identified and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event liable to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection and yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not as a matter of legal principle a true preliminary objection which the court should allow to proceed.”

15. On the basis of the foregoing analysis and the decision in the above case, I do not find any merits in the notice of preliminary objection dated 9.3.2023 and the same is dismissed.

**RULING DATED, SIGNED & DELIVERED VIRTUALLY THIS 19<sup>TH</sup> DAY OF MAY 2023.**

**HON. CYPRIAN MUGAMBI - CHAIR PERSON**

**19.5.2023**

**In the presence of;-**

Omondi for the Tenants

Lubullelah for the Landlord

