



Carton Experts Limited v Hi-Plast Limited & another (Tribunal Case E855 of 2022) [2023] KEBPRT 39 (KLR) (Civ) (10 February 2023) (Ruling)

Neutral citation: [2023] KEBPRT 39 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
CIVIL
TRIBUNAL CASE E855 OF 2022
GAKUHI CHEGE, VICE CHAIR
FEBRUARY 10, 2023**

BETWEEN

CARTON EXPERTS LIMITED APPLICANT

AND

HI-PLAST LIMITED 1ST RESPONDENT

I&M BANK LIMITED 2ND RESPONDENT

RULING

1. This case involves a tenancy dispute between the Tenant/Applicant and the Respondents over a business premises situate on L.R No. 209/8611/2.
2. The tenant entered into a lease agreement with the 1st Respondent on 1st January 2020 over the said business premises for a period of 5 years 3 months which is exhibited as annexure 1. The lease was for the period 1st January 2020 to 31st March 2025.
3. The tenant accuses the 2nd Respondent of storming into the business premises on 26th September 2022 in the company of police officers from Industrial area police station seeking to evict it on the basis of a court order given in Nairobi BPRT Case no. E505 of 2022 which directed the tenant to vacate therefrom within 21 days from 13th July 2022 and in default, the landlord to move in and acquire vacant possession.
4. As a result, the applicant's properties were removed together with its employees as the 2nd Respondent sought to take control of the business premises. The order aforesaid was issued against the 1st Respondent who was described as a tenant. The tenant herein contends that it was not notified of any change of ownership of the suit property.



5. The tenant therefore came to this Tribunal seeking restraining orders against the Respondents and return of its properties. Interim orders were given on 27th September 2022. The application was fixed for hearing inter-partes on 26th September 2022.
6. Through a motion dated 27th October 2022, the 2nd Respondent moved this Tribunal seeking for discharge and/or setting aside of the *ex-parte* orders given on 27th September 2022 and all consequential orders arising therefrom on grounds set out on the face thereof and the supporting affidavit of Peris Chege Wairimu of even date.
7. What comes out of the said affidavit is that the suit property was sold to the 2nd Respondent in an auction conducted on 4th May 2021 pursuant to exercise of statutory power of sale and the proceeds thereof went towards repayment of a debt owing by the 1st Respondent secured by a charge over the property. The 2nd Respondent was subsequently registered as proprietor of the suit property in terms of annexure 'PCW6'.
8. The 2nd Respondent as the registered owner of the suit property filed Nairobi BPRT No. E505/22 against the 1st Respondent and was granted orders of vacant possession and assistance by the OCS Industrial Area Police Station.
9. Prior to the filing of the aforesaid application, the 1st Respondent had been served with notice to terminate or alter terms of tenancy and an affidavit of service filed accordingly in terms of annexures "PCW8 and 9" respectively. The application was not opposed and the Tribunal proceeded to grant the order of vacant possession marked as annexure "PCW10".
10. It is on that basis that the 2nd Respondent contends that there is no landlord/tenant relationship between it and the applicant and the latter should vacate the suit premises forthwith. It is contended that the applicant is an unprotected tenant and the orders given herein ought to be discharged and/or set aside.
11. It is further contended that this Tribunal has no jurisdiction to hear and determine the applicant's notice of motion dated 26th September 2022 as the claim does not fall within the ambit of the [landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#).
12. The applicant is accused of being in illegal occupation of the suit property and as such barred from claiming any breach of law and should not use this Tribunal to derive benefit from an illegality.
13. It is therefore deposed that the applicant does not have a *prima facie* case with a likelihood of success and the same should be dismissed for being an abuse of court process.
14. The 2nd Respondent in response to the application dated 26/9/2022 also filed a replying affidavit sworn by Peris Chege Wairimu on 27th October 2022 whose contents are on all fours similar to the supporting affidavit analysed above and I need not rehash the contents thereof.
15. The applicant filed a further affidavit sworn by Chilaal Mahesh Dodhia on 7th November 2022 reiterating that it was still a tenant in the suit premises as the lease agreement was still in force and is expected to expire at the end of 5 years 3 months from 1st January 2020.
16. The Applicant reiterates that the eviction carried out against it was illegal and without notice of change of ownership having been paying rent to the 1st Respondent in terms of the lease agreement. It is deposed that the relationship between the applicant and the 2nd Respondent being not in writing creates a controlled tenancy under section 2(1)(a) of [Cap. 301](#), Laws of Kenya and it ought to be issued with notice under section 4(2) of [Cap. 301](#) Laws of Kenya.



17. The tenant filed submissions dated 22nd November 2022 and subsequently thereto also filed a replying affidavit to the application by the 2nd Respondent which was sworn by Mahesh Havakhchand Dodhia on 15th December 2022. The contents thereof are a replica of the previous affidavits referred to above and I therefore need not reproduce the same herein.
18. The 2nd Respondent filed submissions dated 21st December 2022 together with supplementary affidavit of Andrew K. Muchina sworn on 21st December 2022.
19. It is deposed therein that the 2nd Respondent's consent was never sought nor obtained for the creation of the lease in terms of clause 11 of the charge dated 20/11/2016 and Section 88(f) of the Land Act. The charge is annexed as 'AKM1'. In any case the lease created is for 5 years 3 months which removes it from definition of a controlled tenancy under Section 2 of Cap. 301, Laws of Kenya. This Tribunal therefore lacks jurisdiction to hear and determine the matter in issue. Consequently, the 2nd Respondent had no obligation to serve notice of termination of tenancy under the said Act.
20. I am required to determine the following issues:-
 - a. Whether this Tribunal has jurisdiction to hear and determine the dispute herein.
 - b. Whether the Applicant is entitled to the reliefs sought in the reference and application dated 26th September 2022.
 - c. Whether the 2nd Respondent is entitled to the reliefs claimed in the application dated 27th October 2022.
 - d. Who is liable to pay costs?
21. The Applicant herein entered into possession of the suit premises by dint of a lease agreement dated 1st January 2020 for a period of 5 years 3 months in respect of four (4) Go-downs and office block erected on LR. 209/8611/2 (I.R 48914) effective from the said date until 31st March 2025 in terms of clause 3 of the agreement.
22. The tenant argues that as there is no lease agreement between it and the 2nd Respondent and as such, the tenancy is controlled within the meaning of Section 2(1) (a) of Cap. 301, Laws of Kenya.
23. The 2nd Respondent on the other hand argues that there is no landlord/tenant relationship between it and the applicant capable of being protected by this Tribunal which has no jurisdiction over the matter in line with the decisions in the case of New Solta Limited – vs- Naivasha South Lake Sacco Limited (2021) eKLR, Republic – vs. Chairperson Business Premises Rent Tribunal & Another ex-parte Albert Kigera Karume (2015) eKLR, Patrick Kariuki Githinji t/a Cindy Caterers – vs- Power General contractors & 2 Others (2021) eKLR and JNN – VS- Naisula Holdings Limited (2018) eKLR.
24. I have looked at the provisions of Section 2(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap. 301 and noted that a controlled tenancy is defined as 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.
25. I have thoroughly gone through the lease agreement entered into between the applicant and the 1st Respondent and noted that it has no termination clause other than for breach of covenant which removes it from the definition of a controlled tenancy under the foregoing legal provision. It therefore means that this Tribunal has no jurisdiction to adjudicate upon the dispute and the interim orders given on 27th September 2022 were made without jurisdiction and ought to be discharged and/or set aside.
26. In the case of *Phoenix of E.A Assurance Company Limited – vs- S.M. Thiga t/a Newspaper service* (2019) eKLR, the court of appeal had the following to state at paragraph 2 of its judgment on the issue of jurisdiction:-
- “2. In common English parlance, ‘jurisdiction’ denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination.. if a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex-debito justitiae”.
27. Guided by the foregoing decisions, it is my firm view that this Tribunal cannot arrogate itself jurisdiction through judicial craft by separating the relationship between the Applicant and the 1st Respondent so as to hold that it has no impact on the relationship between the former and 2nd Respondent. Such an exercise would amount to splitting hair and does not help any of the parties herein.
28. It has been argued that the lease agreement was entered into contrary to Section 88 (f) of the *Land Act* as the consent of 2nd Respondent was not sought by the parties thereto. Having held that this Tribunal has no jurisdiction in the first place to entertain this case, I find and hold that the issue is moot and its determination lies elsewhere.
29. In the premises, the applicant is disentitled to the reliefs claimed in the reference and application dated 26th September 2022.
30. On the other hand, the 2nd Respondent is entitled to the reliefs claimed in the application dated 27th October 2022.
31. Costs of any action are in the discretion of this Tribunal under Section 12(1) (k) of *Cap. 301*, Laws of Kenya but always follow the event unless for good reasons otherwise ordered. I have no reason to deny costs to the 2nd Respondent.
32. In conclusion, the final orders which commend to me are as follows:-
- The tenant’s/applicant’s reference dated 26th September 2022 and the application of even date are dismissed for want of jurisdiction.
 - The 2nd Respondent’s application dated 27th October 2022 is allowed and the ex-parte orders given on 27th September 2022 are hereby discharged and set aside for want of jurisdiction.
 - The tenant shall pay the 2nd Respondent’s costs assessed at Kshs.50,000/- all inclusive.
- It is so ordered.

RULING DATED, SIGNED & DELIVERED VIRTUALLY THIS 10TH DAY OF FEBRUARY 2023.



HON. GAKUHI CHEGE

VICE CHAIR

BUSINESS PREMISES RENT TRIBUNAL

Ruling delivered in the presence of:

Gakungu holding brief for Miss Akonga for the 2nd Respondent

Mrama for the 1st Respondent

Kiprono holding brief for Sang for the Applicant/Tenant

