



Miang Enterprises Ltd v Kenya Ports Authority Pension Scheme; Rariga Traders Auctioneers (Auctioneer) (Tribunal Case E326 of 2023) [2024] KEBPRT 848 (KLR) (24 June 2024) (Ruling)

Neutral citation: [2024] KEBPRT 848 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E326 OF 2023
GAKUHI CHEGE, CHAIR & J OSODO, MEMBER
JUNE 24, 2024**

BETWEEN

MIANG ENTERPRISES LTD TENANT

AND

KENYA PORTS AUTHORITY PENSION SCHEME LANDLORD

AND

RARIGA TRADERS AUCTIONEERS AUCTIONEER

RULING

1. By a motion dated 15th January 2024, the Landlord moved this Tribunal under Section 2 of the [Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#), Chapter 301 of the Laws of Kenya, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Section 3A of the [Civil Procedure Act](#), Cap 21 of the Laws of Kenya and all other enabling provisions seeking for orders;
 - i. That this Honorable Court has no jurisdiction to try this suit.
 - ii. That the Plaintiff's suit herein be and is hereby dismissed with costs to the Defendant
 - iii. That the costs of the Application be paid by the Tenant.
2. The application is based on the grounds that;
 - a. The Tenant, Miang Enterprises LTD, is a tenant occupying premises owned by the Applicant/Respondent at Cannon Towers, Lower Ground Floor.
 - b. The Tenant had a rent balance of Kshs. 507,428 as at 15th January 2024.
 - c. On 7th December 2023, the Applicant/Respondent exercised its lawful right of distress for rent in accordance with the terms of the tenancy agreement and the law.



- d. On 19th December 2023, the Tenant filed an application before this Honorable Tribunal seeking for temporary orders to stay the decision of distress for rent.
 - e. The Tenant is not a controlled tenant under the [Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#) as it signed a letter of offer for a term of 6 years beginning 7th July 2023.
 - f. Consequently, this honorable Tribunal lacks jurisdiction to hear and determine the application filed by the tenant.
 - g. The application by the tenant is frivolous and vexatious and amounts to an abuse of process.
 - h. It is just and equitable that the application filed by the tenant be dismissed with costs.
3. The application is supported by the affidavit of MAKAYA OWEYA, a Senior Legal Officer with the landlord to which is attached the letter of offer as annexure 'MO-II' showing that the term of the lease is 6 years beginning 7th July 2023 which ousts the jurisdiction of this Tribunal.
 4. The application is opposed through the replying affidavit of GEORGE OTIENO JAGONGO, who is a Director of the tenant, sworn on 29th February 2024 in which he deposes that the Tribunal has jurisdiction to hear and determine the case. According to the tenant, what is attached to the landlord's application is merely a letter of offer and not a tenancy agreement signed and executed by the parties which would oust the jurisdiction of this Court.
 5. The application was directed to be disposed of by way of written submissions but based on the court record, only the landlord's counsel complied.
 6. In the case of MAMTA PEEUSH MAHAJAN Vs YASHWANT KUMARI MAHAJAN (2017) eKLR, the Superior Court held as follows at paragraph 82;

“subPARA 82.

Where therefore parties reach an agreement on all the terms of contract they regard (or the law requires) as essential, a contract is deemed to have been formed. What is essential is the legal minimum to create a contract. These are the intention to create legal obligations and consideration. Other terms are secondary as far as formation of a contract is concerned. The reason is that the law does not require commercially sound terms or sensible terms. Parties may agree to any terms and the court will, once it is shown that the parties agreed and valid consideration exists, always hold the parties to their bargain. The court, will not seek to re-write the contract for the parties: see *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd & Another* [2002] EA 503.”

7. The Landlord's application raises a critical issue of jurisdiction which is a threshold matter that ought to be determined before the merits of the tenant's application is considered in line with the decision in the case of PHOENIX OF E.A ASSURANCE COMPANY LIMITED VS S.M THIGA T/A NEWSPAPER SERVICE (2019) eKLR, wherein the Court of Appeal had the following to state at paragraph 2 on the issue of jurisdiction: -

“subPARA 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.....”

8. Further in the case of THE OWNERS AND MASTER OF THE MOTOR VESSEL “JOEY” AND THE OWNERS AND MASTERS OF THE MOTOR TUGS “BARBARA” & “STEVE B” (2007) eKLR, the Court of Appeal had the following to state on the issue of jurisdiction at page 7/15:

“That is the underlying principle contained in the two previous decisions of this Court in the cases of THE OWNERS OF THE MOTOR VESSEL “LILIAN S” V. CALTEX OIL (KENYA) LTD [1989] KLR 1, and ROY SHIPPING SA & ALL OTHER PERSONS INTERESTED IN THE SHIP “MAMA [OTAN](#)” [VS. DODOMA FISHING COMPANY LTD](#), [Civil Appeal No. 238 of 1997](#) (unreported). In the LILIAN S, the Court, consisting of the late Mr. Justice Nyarangi, the late Mr. Justice Masime, and Mr. Justice Kwach, relying on previous decisions of the Courts of the United Kingdom, decisions such as The River Rima [1987] 3 ALL E.R 1, The I Congreso del Partido [1983] 1 AC 244 and such like cases, held that the question of jurisdiction, raised in the circumstances such as those existing in the present appeal, is a thresh-hold issue and must be determined by a judge at the thresh-hold stage, using such evidence as may be placed before him by the parties. Nyarangi, J.A graphically put it thus:-

“..... I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down (sic) tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

The learned Judge of Appeal then referred to certain passages in the text “Words & Phrases Legally Defined.” – Vol. 3: I – N at pg. 113 and then continued:

“It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. I can see no grounds why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado.” (emphasis added)

9. Section 2(1) of 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;"

10. In regard to the argument that the parties only executed a letter of offer and that there is no tenancy or lease agreement between them, we wish to seek the guidance of the Superior Court in the case of *BACHELOR'S BAKERY LTD Vs WESTLANDS SECURITIES LTD (1982) eKLR*, wherein the Court of Appeal had the following to say on the issue of an unregistered lease;

"The Act is legislation of a special nature enacted solely for the protection of tenants. It allows the parties a choice of occupation of premises under a controlled or uncontrolled tenancy, in the first case, within the ambit, and in the second case, outside the ambit of the Act. In the instances to which the provisions of the Act are declared to apply, it overrides any other written law which is in conflict with its provisions.

Notwithstanding the provisions of Section 107 aforesaid, which is contained in an earlier Act, therefore secondary to the provisions of the later legislation of the Act, the Act sets up a new mode, which did not exist before, of creating a valid tenancy of immovable property for any term exceeding one year by a specifically enforceable agreement in writing without registering the instrument; and if the agreement confers a right to obtain a lease thereunder for a period exceeding five years, it is a uncontrolled tenancy and outside the ambit of the Act which then loses jurisdiction over it. The Act is a cleverly conceived piece of legislation.

The uncontrolled tenancy thus created for a period exceeding five years is not altered into a controlled tenancy for it does not become a tenancy for a period less than five years, nor can it be deemed to be, as stated in Section 106 aforesaid, a lease from month to month, because an instrument under the agreement is not registered.

11. It is clear from the documents on record in this matter that what the parties entered into was a 6 years tenancy agreement which clearly removes it from the jurisdiction of this Tribunal.
12. The duty of this Tribunal is to interpret and enforce contracts entered into by the parties and not to make new agreements for them. That is what the Court of appeal held in *NATIONAL BANK LIMITED VS PIPEPLASTIC SAMKOLIT (K) LIMITED & ANOTHER (2001) eKLR*;

"..... A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge." (emphasis added)

13. Based on the foregoing analysis, it is clear that the Landlord's objection to this Tribunal's jurisdiction is well taken and its application to that effect is a candidate for allowing.
14. Costs of every action before this Tribunal are within our discretion under Section 12(1)(k) of Cap. 301, Laws of Kenya but always follow the event unless for good reasons otherwise ordered. We have no reason to deny costs to the Landlord.
15. In conclusion, the following final orders commend to us in this matter;
- a. The Landlord's application dated 15th January 2024 is hereby allowed and the tenant's suit is struck out for want of jurisdiction.



- b. All the interim orders given herein are hereby discharged/set aside.
 - c. The costs of the case assessed at Kshs 30,000/= are awarded to the Respondents.
- It is so ordered.

DATED, SIGNED & VIRTUALLY DELIVERED THIS 24TH DAY OF JUNE 2024

HON. GAKUHI CHEGE.....PANEL CHAIRPERSON

BUSINESS PREMISES RENT TRIBUNAL

HON. JOYCE A. OSODO.....PANEL MEMBER

In the presence of;

Odhiambo for the Landlord/Respondents

No appearance for the Ten

