



**Chacha t/a Soul Springs Wellness & Spa v North Eastern Investment Limited & another
(Tribunal Case E1289 of 2023) [2024] KEBPRT 699 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 699 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E1289 OF 2023
GAKUHI CHEGE, CHAIR & J OSODO, MEMBER
MAY 24, 2024**

BETWEEN

**MARIANNE WANJIRU CHACHA T/A SOUL SPRINGS WELLNESS &
SPA TENANT**

AND

NORTH EASTERN INVESTMENT LIMITED LANDLORD

AND

NW REALITE VALUERS & PROPERTY CONSULTANTS LTD .. RESPONDENT

RULING

1. The Tenant moved this Tribunal by way of a reference under Section 12(4) of Cap. 301, Laws of Kenya complaining that the Landlord had denied her access to the common areas of the building such as the storage room and washrooms. The Landlord is also accused of failing to make available to the Tenant a constant and stable power supply which is essential to the operation of her business. The Landlord is finally accused of failing to clear damages incurred during construction period of the Tenant's business which damages were to be compensated fully to the Tenant.
2. The Tenant simultaneously filed a motion dated 15th December 2023 seeking for orders;
 - i. That the Application be certified as urgent and heard ex-parte in the first instance for purpose of Prayer 2 thereof.
 - ii. That the Honorable Tribunal be pleased to compel the Landlord/1st Respondent and the 2nd Respondent to grant the Tenant access to the common areas of the building.
 - iii. That the Honorable Tribunal issues orders mandating the landlord/1st Respondent and 2nd Respondent to compensate the Tenant for damages incurred during the construction period of the Tenant's business which damages were to be compensated fully to the Tenant.



- iv. That the Honorable Tribunal issues orders compelling the Landlord/1st Respondent and 2nd Respondent to make available to the Tenant a constant and stable power supply which is essential to the operation of the Tenant's business.
 - v. That this Honorable Tribunal issues orders refraining the Landlord/1st Respondent and the 2nd Respondent, its agents, employees or contractors from interfering with the Tenant/Applicant's occupation of the demised premises.
 - vi. That the OCS Police Station and any other relevant officer of the police station to ensure compliance with the orders.
 - vii. That the costs of the Application be provided for by the landlord/1st Respondent and the 2nd Respondent:
 - viii. That the Honorable Tribunal issues any other orders that will favour the course of justice.
3. The application is based on the following grounds that:
- a. This Honorable Tribunal is clothed with wide and unfettered discretion to issue the orders sought.
 - b. The Landlord/1st Respondent and the Tenant/Applicant executed a Letter of offer between them in which the Landlord/1st Respondent offered the Tenant/Applicant seven hundred and seventy-nine square feet for L.R number 209/11146 on 21st April 2022 with a commencement date of 1st June 2022.
 - c. Under the terms of the letter of offer dated 21st April 2022, the Landlord/1st Respondent offered the Tenant/Applicant the premises being approximately 779 sq. ft. inclusive of the common areas in the building.
 - d. Since the execution of the Letter of offer, the Tenant/Applicant has been denied access to the said common areas and the landlord/1st Respondent has failed to make available to the Tenant/Applicant a constant and stable power supply which is essential to the operation of the Tenant/Applicant's business.
 - e. Despite several demands from the Tenant/Applicant for remedying of these issues, the Landlord has failed to address the same, breaching the terms of the relationship and occasioning loss upon the Tenant.
 - f. The Tenant/Applicant has always dutifully paid their rents to the Landlord/Respondent since the commencement of their tenancy agreement.
 - g. The Tenant/Applicant's tenancy is a controlled tenancy and falls within the definition of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, CAP. 301 of the Laws of Kenya.
 - h. The Tenant/Applicant should be accorded uninterrupted use of the premises to enable them run their business.
 - i. It is meet and just, for the purpose of justice and equity and the overarching purpose of constitutional integrity, to make the orders sought.
4. The application is further supported by the affidavit of MARRIANE WANJIRU CHACHA wherein it is deposed that she owns a business known as Soul Springs Wellness & Spa located at HH Plaza, Nairobi, measuring seven hundred and seventy-nine square feet in L.R number 209/11146.



5. The Landlord/1st Respondent and the Tenant executed a Letter of offer in which the Landlord/1st Respondent offered the suit premises measuring seven hundred and seventy-nine square feet at LR number 209/11146 on 21st April 2022 with a commencement date of 1st June 2022.
6. Under the terms of the letter of offer, the Landlord/1st Respondent offered the Tenant the premises being approximately 779 sq. ft. inclusive of the common areas in the building.
7. According to the Tenant, the Landlord/1st Respondent has denied her access to the common areas and failed to make available to her a constant and stable power supply which is essential to the operation of her business. Despite making several demands for remedying of the issues, the Landlord has failed to address the same, breaching the terms of the relationship and occasioning loss to the Tenant.
8. The Tenant deposes that she has been dutifully paying rent to the Landlord/1st Respondent since the commencement of the tenancy on 1st June 2022.
9. It is the tenant's case that her tenancy is controlled tenancy and falls within the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* CAP 301 of the Laws of Kenya and that it is in the interest of Justice that the orders sought be issued.
10. The application was considered ex-parte on 22nd December 2023 and certified urgent. The Respondents were compelled to grant the Tenant access to the common areas of the building pending hearing of the application inter-partes on 5th January 2024. The Respondents were also compelled to make available to the Tenant a constant and stable power supply which is essential to the operation of her business pending hearing of the application inter-partes and the OCS of the nearest Police Station or any other relevant officer of the Police Station was directed to ensure compliance with the orders.
11. The Respondents on the other hand filed a motion dated 16th January 2024 under certificate of urgency seeking for stay of execution of the Tribunal's orders given on 9th January 2024 pending the hearing and determination of the application. They also sought for review, variation and/or setting aside of the said orders.
12. In addition, the respondents are also seeking that this Tribunal issues orders restraining the Tenant/Respondent from harassing, intimidating and/or howsoever interfering with the other tenants' quiet possession and enjoyment of the common areas pending the hearing and determination of the application. Under prayer 4 thereof, the Respondents have sought for an order directing the Tenant to vacate the Service Canopy and all parts of common areas that she has cordoned off for her personal use.
13. Prayer 5 seeks for an order compelling the Tenant to grant the Landlord/Applicant and their agents access to the demised premises for reading of the water meter for billing purposes. Finally, they are seeking that the costs of Kshs. 25,000/= awarded to the Tenant/Respondent of 9th January, 2024 be revoked.
14. The application is based on the grounds set out on the face thereof and is further supported by the affidavit sworn by James Muriithi on 16th January 2024. According to the Respondents, the Tribunal's orders dated 9th January 2024 were given through material non-disclosure and misrepresentation of the Respondent and without the Landlord being afforded an opportunity to be heard.
15. The tenant is accused of coming to this Tribunal with unclean hands and hoodwinked this court into granting the said orders yet she is the one who has been guilty of interfering with the Landlord's peaceful management of the business premises and other tenants' quiet possession of their demised premises and enjoyment of the common areas.



16. The Tenant hoodwinked the Tribunal into believing that she had been denied access to the common areas, yet she was attempting to illegally gain access to premises and areas that are demised for management and not part of the premises demised for her use.
17. The Tenant is further accused of using police officers, DCI officers and officers from the EACC on several occasions to harass the Landlord and management into yielding possession of premises not demised for her use and not part of the premises let out to her, and when this failed, the Tenant resulted into using City Council Officers to harass the management and eventually filing of the application dated 15th December, 2023 in which misrepresented facts to this Court.
18. Despite filing a misleading and false application, the Tenant served the application and hearing notice thereof upon the Landlord's Customer service instead of the management/Landlord on 4th January, 2024, which hearing was scheduled the following day on 5th January, 2024 therefore denying the Applicants an opportunity to be heard.
19. No stay of execution of the said orders had been granted and the orders are unfair to the Landlord and undeserving to the Tenant. In the circumstances, it is in the interests of justice that the application be allowed and the orders granted as prayed.
20. In his supporting affidavit, James Muriithi repeats the contents of the grounds set out above and deposes that he is the Property Manager of the Landlord and that the Tenant's said application contains grave falsehoods and misrepresentations, and that this Tribunal's orders of 9th January 2024 were given through material non-disclosure and misrepresentations by the Tenant without the Landlord being afforded an opportunity of being heard.
21. The Orders given by this Court are attacked as very unjust to the Landlord because the tenant came to this Tribunal with unclean hands and hoodwinked the Tribunal into granting the said orders, yet she is the one who has been guilty of interfering with the landlord's peaceful management of the business premises and other tenants' quiet possession of their demised premises and enjoyment of the common areas.
22. According to the Landlord, the Tenant hoodwinked the Tribunal into believing that she had been denied access to the common areas, yet she was attempting to illegally gain access to premises and areas that are demised for management, and not part of the premises demised for the Tenant's use.
23. The Tenant signed a lease agreement commencing in June 2022 and after signing the agreement, she was to make full payment of the necessary deposits and initial rents as per the Lease, but instead, she did a partial payment, claiming to have paid the rest of the amount before to an earlier Manager. She was requested for proof of payments which she did not provide, thus she, among other tenants, was denied access to proceed with fit-out until she provided proof of payments.
24. After her contractor was denied access to proceed with works in the absence of proof of payment at end of June 2022, the Tenant sent police officers to the Landlord's Town office at Lonrho House, whereby a meeting was held in her presence and it was agreed that the contractor be allowed to proceed with works and the Tenant to provide her Mpesa Statement as evidence of payment, to be availed within the same week. (She provided this two weeks later).
25. The Tenant had claimed that there were damages caused by the Respondents when her contractors were denied access hence the police officers requested her to provide evidence of what was damaged the following day which she has to date not done.



26. During her fit out, the Tenant encroached onto a service canopy on the floor where her demised premises are and broke the external window to have its access without the Landlords' consent and she has been using that space to date.
27. In December 2022, a meeting was held with the Tenant at the Landlord's office to discuss her rent balance (Represented parties at the meeting were landlord's accountant, the Landlords' team and the Tenant and her team). The Tenant claimed that she was granted waiver for the month of August 2022 by the landlord and she was requested to provide proof of the alleged waiver which she did not have. As a result, the said allegations were found to be false but the rent remains unpaid.
28. At the inception of the Lease, the Tenant and other tenants on the same floor were allowed to store debris during construction in one of the Respondents' temporary stores located next to the washrooms to ensure that the corridors remained neat and clean. All the keys for all the store rooms on every floor are kept by the security guard but the Tenant was able to get one key for the store she was storing her materials and debris. At the completion of fit out, the two tenants were requested to remove whatever debris and materials that remained in the store so that the space could be used by the landlord for the designated purposes and while all other tenants removed whatever they had stored therein, the Tenant herein declined.
29. When the Tenant was denied access to the store, she sent police officers the following day to arrest the management and the management also received calls and texts past 6 pm from a male, claiming to be from the Business Premises Tribunal threatening them. Annexed thereto and marked "JM3" is a screengrab of text messages sent to the affiant by the person purporting to be from the BPRT.
30. On the following day, the Respondents received a call from an officer claiming to be from EACC who was coercing them to hand over the store to the Tenant yet the store does not belong to her and is not part of her Lease. The Tenant only wants to take it by force. The said calls, texts and CCTV footage has been recorded to prove the allegations and the Respondents claim that they can provide the same to this Court when called upon to do so.
31. Consequently, the Tenant vide her application dated 15th December, 2023, came to this Court, to attempt to illegally enforce access into the store that does not belong to her and is not part of her demised premises. The Tenant has not been denied access to the leased premises measuring 779 Square Feet and she has enjoyed full access to her premises. To the contrary, the Tenant has violated the terms of her lease by interfering with the Landlord's management of the building and by interfering with other tenants' peaceful occupation of their premises.
32. The Tenant has caused the Landlord to be unduly harassed and intimidated by Nairobi City County Officials who swarm the Landlord's premises every now and then to allegedly "check compliance" of the building to the various City codes despite there being no apparent reason for the frequent visits.
33. In particular, besides breaking the external window and encroaching onto the service canopy, the Tenant has cordoned off the common areas to expand her space without authority from the Landlord to the detriment of the other tenants.
34. Further, her demised premises which she operates as a spa is connected with water and a submeter was installed inside her premises. She has since denied the management access to take the water reading, to enable billing for water consumed.
35. Earlier this year, the Tenant verbally requested to use part of the corridor the Respondents have the fire hose reel cabinet so that she can partition it to use as a store but the request was vehemently declined.



36. According to the Respondents, the Tenant's tenancy has been riddled with disturbances and harassments from all corners and it is only fair and just that this Tenant is directed to honor the terms of the Lease Agreement to the letter.
37. With regard to power supply, the Tenant has not been denied a constant and stable power supply as alleged. All units in the subject building with a single phase electric connection were fitted with standardized prepaid meters, while those tenants who envisioned a heavy consumption of electricity such as hotels requested for a 3-phase connection, which was fitted and individual post-paid meter fitted in the specific units. This information was given to all persons who requested to take up space in the subject building. 19. The Tenant herein accepted a Lease of the premises with a single-phase electric connection, and did not request a 3-phase connection. Consequently, she installed AC, washing machines and other electric equipment that consumes a lot of electricity and hence the heavy load causes the circuit breaker in her premises to trip.
38. The Tenant once again unlawfully directed her technician to conduct works on the building's main switch board that houses the KPLC meters, the transformer and thus inaccessible to all tenants, or any person without the presence and authority of a KPLC authorized technician. The Tenant's technician was thus denied access. The Tenant was advised to notify the Respondents when her technician would be available so that they could equally procure a KPLC authorized personnel so as to oversee the Tenant's works at the switch board as is required by KPLC but the Tenant has never notified them of the same.
39. It is thus very unjust for the Tenant to approach this court and present misrepresentations and falsehoods in an attempt to further her violations of the Lease Agreement.
40. The Landlord has been penalized to pay costs of Kshs. 25,000/= which is based on mere falsehoods from the Tenant and it is in the interest of justice that the said orders be set aside and the application allowed as prayed.
41. The application was considered ex-parte and certified as urgent. A stay of execution of the orders issued on 9th January 2024 was granted pending hearing of the application inter-partes. The Tenant/Respondent was also restrained from harassing, intimidating and or howsoever interfering with the other tenants' quiet possession and enjoyment of the common areas pending hearing of the application inter-partes. This Tribunal also ordered the Tenant/Respondent to grant the Landlord/Applicant and their agents access to the demised premises for purposes of reading the water meter for his billing pending hearing of the application inter-partes on 30th January 2024.
42. Through yet another application dated 29th January 2024 brought under certificate of urgency, the Tenant sought that this Tribunal be pleased to set aside the orders issued on 17th January 2024 pending hearing and determination of the application.
43. The application is supported by the Tenant's affidavit and the grounds that:-
- This Tribunal is clothed with wide and unfettered discretion to issue the orders sought herein.
 - This Tribunal issued orders dated 17th January 2024 staying the orders issued on 9th January 2024.
 - The orders were issued in spite of the fact that at all material times, the Tenant/Applicant has never interfered with the use of the business premises for other business owners in the same building.



- d. The Landlord/1st Respondent insists on access to read the water meter for billing whereas the same have been withheld from the Tenant/Applicant who cannot access or locate where the water meter has been placed in the building as the same is not in a common access area.
 - e. If the orders issued by the Tribunal on the 17th January 2024 are not set aside, the Tenant/Applicant stands to suffer great loss as her property rights as a Tenant shall be denied irregularly.
 - f. If the orders to set aside the orders issued to the Landlord/1st Respondent herein are not issued, the Tenant shall be grossly affected as she will not be able to access the common areas of the building thereby occasioning her irreparable harm.
 - g. It is meet and just for the purposes of justice and equity and the overarching purpose of constitutional integrity to make the orders sought.
44. The application is opposed through the replying affidavit of JAMES MURIITHI wherein it is deposed that the Tenant does not indicate what kind of irregularity she purports to affect the impugned court order. According to the Respondents, the orders granted by the court were justifiably granted, as the Tenant had hoodwinked the Tribunal into believing that she had been denied access to the common areas, yet she was attempting to illegally gain access to premises and areas that are demised for management and not part of the premises demised for the Tenant's use.
45. After the court granted the orders of 17th January, 2024, the Tenant granted the Landlord access to her premises for purposes of reading the water meter and a bill was issued to her. That only goes to show that the orders granted were justified. The Tenant thereafter wrote to the Landlord seeking that the meter be moved from her premises. As demonstrated by annexure marked "Exhibit 2" being a copy of the water bill issued to the Tenant & the Letter.
46. The Tenant has not shown any irreparable damage or any damage whatsoever that she might suffer in the event that the orders of 17th January 2024 are not set aside. On the contrary, the Landlord risks endangering other tenants and losing business too.
47. If the said orders are set aside, the Landlord also risks harassment by the DCI, City Council Officials and other Police Officers and Law enforcement officers that the Tenant uses to harass the Landlord's caretaker, Managers and other agents. The Tenant would also persist in her Lease violations, cordoning off and occupying common areas solely, yet they are meant for the use and utilization by other tenants.
48. The Tenant has not been denied exclusive access to her leased premises measuring 779 Square Feet and shared access to the common areas, just like all other tenants.
49. On the contrary, the Tenant has violated the terms of her lease, by interfering with the Landlord's management of the building, interfering with other tenants' peaceful occupation of their premises, and by cordoning off the service canopy meant to be used during emergencies like fire.
50. The Tenant has caused the Landlord to be unduly harassed and intimidated by Nairobi City County Officials who swarm the Landlord's premises every now and then to allegedly "check compliance" of the building to the various city codes despite there being no apparent reason for the frequent visits.
51. The Tenant's tenancy has been riddled with disturbances and harassments from all corners and it is only fair and just that she is directed to honor the terms of the Lease agreement to the letter.
52. The applications were directed to be canvassed by way of written submissions and both parties complied. We are required to determine the following issues based on the filed pleadings;
- a. Whether this Tribunal has the requisite jurisdiction to entertain this case.



- b. Whether the Tenant is entitled to the reliefs sought in the reference and the applications dated 15th December 2023 and 29th January 2024.
 - c. Whether the Respondents are entitled to the reliefs sought in the application dated 16th January 2024.
 - d. Who is liable to pay costs?
53. It is not in dispute that the parties herein entered into a tenancy agreement over the suit premises whose terms are contained in the letter of offer dated 21st April 2022 for a term of six (6) years with effect 1st June 2022.
54. The jurisdiction of this Tribunal is derived from Section 2 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Cap. 301, Laws of Kenya which defines a controlled tenancy to mean “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;
55. Although the issue of this Tribunal’s jurisdiction has not been raised by either party, we are entitled to consider it as a threshold issue since any decision made by a court without jurisdiction is a nullity.
56. We are fortified in this regard by the court of appeal decision in the case of Phoenix of East Africa assurance Company Limited Vs S.M Thiga T/a Newspaper Service (2019) eKLR at paragraph 2 where it was held as follows;
- “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.”
57. Similarly, in the locus classicus case of Owners of motor vessel “Lillian S” Vs Caltex Oil (K) Limited (1989) eKLR the same court had the following to state on the issues of a court’s jurisdiction;
- “I think that 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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

58. The same court in the case of Kenya Ports Authority Vs Modern Holdings (E.A) Limited (2017) eKLR, had the following to state on the same issue;

“Generally speaking and on the authority of the Supreme Court decision in Samuel Kamau Macharia & Another V Kenya Commercial Bank Limited & 2 Others, a court can only exercise that jurisdiction that has been donated to it by either *the Constitution* or legislation or both. Therefore, it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. Jurisdiction is in the end everything since it goes to the very heart of a dispute. Without it, the court cannot entertain any proceedings and must down its tools. See The Owners of the Motor Vessel Lilian ‘S’ v. Caltex Kenya Limited (1989) KLR 1.

This Court in Adero & Another Vs Ulinzi Sacco Society Limited [2002] 1 KLR 577, quite sufficiently summarized the law on jurisdiction as follows;

- “1
2. The jurisdiction either exists or does not ab initio and the non- constitution of the forum created by statute to adjudicate on specified disputes could not of itself have the effect of conferring jurisdiction on another forum which otherwise lacked jurisdiction.
3. Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.
4. Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.
5. Where a cause is filed in court without jurisdiction, there is no power on that court to transfer it to a court of competent jurisdiction.
6.
7.” (Our emphasis).

We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised.....at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the court itself.”

59. It is therefore clear that whereas this Tribunal has substantially engaged in dealing with the instant dispute, the same has all along been happening devoid of jurisdiction and all the orders made herein are a nullity and ought to be set aside. We therefore proceed to do so.
60. As regards costs, the same are at our discretion under Section 12(1)(k) of Cap. 301 but always follow the event unless for good reasons otherwise ordered. It is clear that both parties failed to satisfy themselves on the question of jurisdiction of the Tribunal and both have benefitted from orders emanating therefrom without raising any issue in that regard. The issue has been raised Suo motto by this Tribunal and none of the parties ought to benefit from any costs resulting from the striking of the suit. We shall therefore order that each party bears own costs.



61. In conclusion, we make the following final orders in this matter;

- a. The Tenant's reference together with the applications dated 15th December 2023 & 29th January 2024 are hereby struck out.
- b. The Respondents' application dated 16th January 2024 is also struck out.
- c. All the orders given in the matter are hereby discharged or set aside.
- d. Each party shall bear own costs of the suit.

It is so ordered.

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

HON GAKUHI CHEGE

PANEL CHAIRPERSON

BUSINESS PREMISES RENT TRIBUNAL

HON. JOYCE A. OSODO

PANEL MEMBER

BUSINESS PREMISES RENT TRIBUNAL

