



**Dunrays Ondemand Limited & another v Homeplus Realtors  
Limited & 2 others; Karanja (Interested Party) (Tribunal Case  
E1212 of 2023) [2024] KEBPRT 410 (KLR) (4 April 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 410 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E1212 OF 2023  
P KITUR, MEMBER  
APRIL 4, 2024**

**BETWEEN**

**DUNRAYS ONDEMAND LIMITED ..... 1<sup>ST</sup> APPLICANT**

**DUNCAN MWEBIA ARIMI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**HOMEPLUS REALTORS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**THIHA ENTERPRISES LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**TRADE WIDE AUCTIONEERS ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**MARY WANJIKU KARANJA ..... INTERESTED PARTY**

**RULING**

**A. Parties, Their Representatives And Dispute Background**

1. The 1<sup>st</sup> and 2<sup>nd</sup> Applicants filed the Application dated 30<sup>th</sup> November 2023, seeking among others, that the Tribunal do issue a temporary injunction restraining the Respondents from levying distress for rent on the business premises situate on the suit property.
2. The Firm of M/S Mutuma Gichuru & Associates Advocates represents the Applicants in this matter.
3. The Respondents, in response filed a Notice of Preliminary Objection dated 31<sup>st</sup> January 2024 raising the following objections
  - a. That the license agreement which created the relationship between the parties did not establish a Landlord/Tenant relationship.



- b. That the Tribunal therefore lacks the jurisdiction to entertain these proceedings.
4. The firm of M/S K. Mberia & Partners LLP represents the Respondents.
5. The Interested Party has not taken part in these proceedings.
6. The Applicants aver that they entered into a License Agreement with one Charles Kahagi Thuah who is now deceased upon which they took over possession of the suit property.
7. The Applicants further state that upon the death of the Licensor, the 1<sup>st</sup> Applicant continued to remit rent payments to the 1<sup>st</sup> Respondent until they were served with a Notice to Vacate by the Interested Party. It is that notice that necessitated their institution of these proceedings.
8. Parties took directions and agreed to dispose of the Notice of Preliminary Objection by way of Written Submissions which were duly filed by both the Applicants and the Respondents.

## **B. List Of Issues For Determination**

Whether this Honorable tribunal has jurisdiction to entertain this matter.

## **C. Analysis And Findings**

Whether this Honorable Tribunal has jurisdiction?

9. Jurisdiction is everything and once challenged, a determination should be made before the Tribunal can proceed with further disposal of any matter thereto. The Tribunal has no option but to first make a determination whether it is clothed with jurisdiction in the matter. In the case of *Owners of the Motor Vessel 'Lillian' (s) versus Caltex Oil (Kenya) Ltd* [1989] KLR1, the Court stated as follows:
 

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court had no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.
10. The question therefore arising is whether there exists a tenancy relationship between the Tenant and the Landlord subject to the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*.
11. As produced by the Applicants, the document that governs the relationship between the parties herein is the one titled "License; Charles Kihagi Thuah to Dunrays Ondemand Limited."
12. In the said document the parties thereto are consistently referred to as licensor and licensee respectively.
13. Further Clause 2(e) of the Agreement provides that the demised premises shall be used solely as a restaurant, pub, butchery, car wash and related businesses as specified in the schedule and shall not be used for any other business without the consent of the licensor.
14. I am also persuaded from the tenor of the clauses of the license that I have singled out that the parties intended that their relationship be a licensee-licensor relationship. The parties clearly signed a license agreement, and the provisions that clearly bound the parties do not grant the Applicant exclusive possession and control of the premises.



15. In Nairobi HCCC No 3424 of 1982, *BP Nairobi Service Station Ltd Vs BP Kenya Ltd*, the Court stated;

“I have carefully examined the transaction the subject of this litigation and the relationship of the parties as it emerges from oral testimony given in court and the documentary evidence submitted and come to the conclusion that the Plaintiff did not enjoy exclusive possession of the premises and that such possession as it enjoyed was limited by the substantial degree of control that the grantor continued to exercise on the operations at the station and on the premises themselves. I have carefully examined the agreement dated 24th June 1968 which I have determined to be the document evidencing the relationship between the parties and governing their conduct terms which clearly suggests that it is intended to create a licence rather than a contractual tenancy.”

16. I therefore do find that the relationship between the parties herein is that of Licensor- Licensee and not one of a Tenant/Landlord.

17. In *Republic v Chairperson - Business Premises Rent Tribunal at Nairobi & another Ex-Parte Suraj Housing & Properties Limited & 2 others* [2016] eKLR, the Judge cited with approval the case of *Pritam vs. Ratilal and Another* Nairobi HCCC No. 1499 of 1970 [1972] EA 560 where it was stated as follows:

“Therefore the existence of the relationship of landlord and tenant is a pre-requisite to the application of the Act and where such relationship does not exist or it has come to or been brought to an end, the provisions of the Act will not apply. The applicability of the Act is a condition precedent to the exercise of jurisdiction by a Tribunal; otherwise the Tribunal will have no jurisdiction. There must be a controlled tenancy as defined in section 2 to which the provisions of the Act can be made to apply. Outside it, the Tribunal has no jurisdiction.”

18. I therefore proceed to order as follows;

#### **D. Orders**

- a. The upshot is that the Applicants' Application dated 30<sup>th</sup> November 2023 and the Reference herein are hereby dismissed for want of jurisdiction.
- b. Costs are awarded to the Respondents assessed at Kshs. 50,000/=.
- c. File is hereby marked as closed.

**HON P. KITUR**

**MEMBER**

**BUSINESS PREMISES RENT TRIBUNAL**

Ruling dated, signed and delivered virtually by Hon P. Kitur this 4th April 2024 in the presence of Mwenda for the Tenants and Karanja for all the Landlords/ Respondents.

**HON P. KITUR**

**MEMBER**

**BUSINESS PREMISES RENT TRIBUNAL**

