



**Mwangi & Mwangi (Legal representatives in the Estate of the Late
John Mwangi) v Ndungu t/a The Accra Restaurant (Tribunal Case
E928 of 2022) [2023] KEBPRT 38 (KLR) (Civ) (3 February 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 38 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
CIVIL
TRIBUNAL CASE E928 OF 2022
GAKUHI CHEGE, VICE CHAIR
FEBRUARY 3, 2023**

BETWEEN

**SUSAN NYOKABI MWANGI & SOLOMON IRUNGU MWANGI ... APPLICANT
LEGAL REPRESENTATIVES IN THE ESTATE OF THE LATE JOHN MWANGI**

AND

**MONICA GATHONI NDUNGU T/A THE ACCRA
RESTAURANT RESPONDENT**

RULING

1. By a motion dated 13th October 2022, the landlords/Applicants moved this Tribunal seeking in pertinent part for an order directing the Respondent to pay mesne profits to them pending hearing and determination of the application and complaint.
2. They have also sought for an order of vacant possession pending hearing and determination of the application and complaint. Finally they seek that this Tribunal do direct the Respondent to pay mesne profits for the entire duration that she has been in the suit property and that the OCS, Central Police Station ensures compliance with the orders.
3. The application is supported by the affidavit of Solomon Irungu Mwangi and the grounds on the face thereof wherein it is deposed that the Applicants are the Administrators of the estate of the late John Mwangi and the persons entitled to collect rent from the suit premises as the legitimate landlords.
4. Sometimes in the year 2021, one Zaweria Wangari Mwangi started interfering and/or illegally assuming the role of the landlord without any lawful order and the dispute was heard and judgment rendered to the effect that the Applicants were the rightful persons entitled to collect rent from the suit premises



located on L.R NO.209/1413/28, Accra House as per the order attached to the supporting affidavit given in Nairobi BPRT No. E599/2021 marked "SIM".

5. The Respondent was given possession in August 2019 by Zaweria Wangari Mwangi and has not paid any rent to the Applicants as required by law. She refused to formalize her tenancy relationship with the Applicants as the rightful landlords.
6. The Respondent had filed an application vide BPRT NO. E536 of 2022 which was dismissed for being res judicata as per the order dated 2nd August 2022 attached to the supporting affidavit.
7. According to the Applicants, most of the valuable items in the suit premises occupied by the tenant are owned by them and any order for distress is impractical.
8. As there is no tenancy relationship between them and the Respondent who is still in occupation of the premises, the applicants are seeking to recover mesne profits against the Respondent for the entire duration she has been in occupation.
9. The applicants simultaneously filed a complaint under section 12(4) of Cap. 301, Laws of Kenya to the effect that the Respondent was illegally in the suit premises and she was not paying mesne profits and had refused to legalise her tenancy.
10. The application is opposed through the replying affidavit of the Tenant/Respondent sworn on 28th November 2022 wherein she deposes that the Applicants are not her landlords and that there is no landlord/tenant relationship with them.
11. According to the Respondent, her landlords are Zaweria Wangari Mwangi, Francis Mwangi Kingori and Anthony Maina Kingori as per the lease agreement marked 'MGN/1' attached to the replying affidavit. As such, the Tribunal has no jurisdiction to deal with the tenancy as her lease is for 5 years 3 months and Cap. 301, Laws of Kenya does not apply to her case.
12. The Respondent contends that she has already paid rent to her landlords and cannot pay any other party more rent.
13. According to the Respondent, the Applicants have interfered with the suit premises thereby incapacitating her business as a result of which she filed ELC Misc.E256/2022 for redress as per annexure marked 'MGN/2'. As such, she prays for stay of proceedings in accordance with Section 6 of the Civil Procedure Act Cap. 21, Laws of Kenya.
14. It is finally deposed that as long as the Applicants are admitting that they don't know or recognize her, the Tribunal has no jurisdiction to deal with the tenancy as she was a trespasser and the Tribunal cannot deal with a trespasser.
15. The Applicants filed a further affidavit sworn by one Alex Kimani on 15th December 2022 wherein it is deposed that he is the landlords' agent in respect of the suit premises. He deposes that the Applicants are not receiving any single coin from the Respondent despite the Tribunal's judgment in BPRT 599 of 2021 delivered on 15th July 2022 wherein the Applicants were declared to be entitled to collect rent.
16. According to the deponent, any purported agreement between the Respondent and any other third party is null and void. It is further deposed that the Respondent has admitted in filed documents that she pays her rent to the deponent thereby admitting jurisdiction of the Tribunal to hear and determine the matter.
17. It is deposed that the tenant has only been paying utility bills to the agent and that she has never paid alleged rent of Kshs.200,000/- to him. No payment of rent has been presented before the Tribunal.



18. In regard to the Tribunal's jurisdiction, section 12(1) (e) of Cap. 301, Laws of Kenya is cited which allows this court to make orders for recovery of possession and for payment of arrears and mesne profits against any person whether or not he is a tenant being at the material time in occupation of the premises comprised in a controlled tenancy.
19. In regard to the matter pending in the High Court, the agent deposes that there is no order for stay of proceedings issued against this Tribunal.
20. The Respondent is said to be well aware of the court's judgment in which the Tribunal directed where rent is to be paid as she filed BPRT NO.E536 of 2022 in which the Tribunal restated the ruling in BPRT No. E599 OF 2021.
21. The matter was directed to be canvassed through written submissions and both counsels complied. I shall refer to the submissions in addressing the issues for determination.
22. Based on the pleadings, the following issues arise for determination:-
 - (a) Whether this Tribunal has jurisdiction to grant the orders sought against the Respondent.
 - (b) Whether the Applicants are entitled to the reliefs sought in the complaint and application dated 13th October 2022.
 - (c) Who is liable to pay costs?.
23. The Tribunal's jurisdiction is founded on the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap. 301, Laws of Kenya. Section 12(1)(e) of the said Act provides as follows:-

“(e) to make orders upon such terms and conditions as it thinks fit, for the recovery of possession and for the payment of arrears of rent and mesne profits which orders may be applicable to any person, whether or not he is a tenant being at any material time in occupation of the premises comprised in a controlled tenancy”.
24. Section 2 of the said Act defines the term Landlord to mean:-

“The person for the time being entitled as between himself and the tenant to the rents and profits of the premises payable under the terms of the tenancy”.
25. On the other hand the term “tenant” is defined in the same section to mean:-

“.....the person for the time being entitled to the tenancy whether or not he is in occupation of the holding and includes a subtenant”.
26. The Respondent submits that she took the suit premises pursuant to the lease agreement dated 10th August 2021 marked exhibit ‘MGN1’ attached to her replying affidavit for a period of 5 years 3 months. The said lease has no termination clause for reasons other than breach of its terms and conditions. As such, it is submitted that the Tribunal has no jurisdiction to hear and determine the dispute as the tenancy is not “controlled” and the applicants are not signatories to the said lease. It is thus submitted that the dispute herein should be dealt with by the Environment and Land Court.
27. It is submitted on behalf of the Respondent that the dispute is subject matter of the Environment and Land Court in ELC Misc.E256 of 2022. It is however conceded that there are no stay of proceedings



orders but common legal decency require that the lower court stays the proceedings when the dispute is before a superior court in line with Section 6 of the [Civil Procedure Act](#).

28. According to the Respondent, the Tribunal has no jurisdiction to deal with the issue of trespass which is the domain of the Environment and Land Court or the Criminal Justice System.
29. It is also submitted that the notice of motion dated 13th October 2022 is not supported by a complaint under section 12(4) of Cap. 301 and as such is misconceived, bad in law and should be struck out as there is no complaint to investigate.
30. In regard to Tribunal case no. E599/2021 wherein orders marked exhibit 'SIM' were issued, it is submitted that the Respondent was not a party thereto and in any event her tenancy is not controlled within the meaning of Section 2 of Cap. 301.
31. Finally, it is submitted for the Respondent that there is a serious estate dispute between the faction led by the applicants and the one which gave the Respondent the suit premises and that this Tribunal has no jurisdiction to handle the dispute.
32. On the other hand, the Applicants contend that the Tribunal has jurisdiction to hear and determine the suit herein pursuant to Section 12(1) (e) of Cap. 301, Laws of Kenya. It is submitted that the Respondent produced evidence of payment of utility bills to the Applicants' agent.
33. It is further submitted that this Tribunal categorically determined the issue as to who is entitled to the rental income in BPRT case no. E599 of 2021 and the Respondent was acting in violation of the orders. The Respondent continues to operate in the suit property without paying rent which was detrimental to the Applicants.
34. The Applicants rely on the decisions in [Tekimano Company Limited v Julius Gitahi Gichuki](#) [2015] eKLR and Republic v Chairperson, Business premises Rent Tribunal at Nairobi & Another ex-parte Suraj Housing & Properties Limited & 2 Others in their submission that the Tribunal has jurisdiction.
35. In Nairobi BPRT Case No. E599 of 2021, I delivered judgment over a similar dispute involving other tenants within the suit property who were pitted in a dispute on who was entitled to rental income between the Applicants herein on one hand and Zaweria Wangari Mwangi, Francis Mwangi Kingori and Anthony Maina Kingori and made the following final orders:-
 - “(a) That the estate of the late John Mwangi Kingori (Deceased) represented by Susan Nyokabi Mwangi and Solomon Irungu Mwangi is exclusively entitled to the rental income accruing from the commercial building erected on L.R No. 209/1413/28 otherwise known as Accra Hotel, Accra Road Nairobi.
 - (b) That the Applicants'/Tenants' application dated 19th October 2021 in Nairobi BPRT case No. E599 of 2021 is allowed and the 1st, 2nd and 3rd Respondents are hereby restrained by themselves, their agents, employees, personal representatives, assigns, children or servants from evicting, harassing, collecting rent or in any other way interfering with the tenants' businesses conducted at the commercial building situate on L.R. No. 209/1413/28 otherwise known as Accra Hotel, Accra Road Nairobi.
 - (c) The 1st Respondent's application dated 22nd December 2021 is dismissed with costs.
 - (d) The application dated 11th February 2022 by Eunice Njoki Mwaura is hereby dismissed with costs to the 2nd Respondent therein (5th Respondent herein).



- (e) The application dated 2nd March 2022 by the 2nd Respondent (5th Respondent herein) in BPRT No. E152 of 2022 is allowed and the interim orders issued on 16th February are hereby vacated/set aside.
 - (f) The 1st, 2nd and 3rd Respondents shall pay costs of Kshs.75,000/- to the Applicants in respect of the case.
 - (g) Eunice Njoki Mwaura, the Applicant in Nairobi BPRT case No. E152 of 2022 shall pay the 2nd Respondent/Solomon Irungu Mwangi Kshs.25,000/- as costs in the said case”.
36. The said judgment determined the question as who are the rightful persons entitled to the rental income accruing from the building erected on L.R No. 209/1413/28, Accra Hotel, Accra Road, Nairobi which is the subject matter to this case.
37. The Respondent contends that she entered into a lease agreement with Zaweria Wangari Mwangi, Francis Mwangi Kingori and Anthony Maina Kingori on 10th August 2021 which was after the judgment in Nairobi BPRT No. E599 OF 2021. It is therefore clear that the said lease was entered into in clear contravention of the Tribunal orders aforesaid and is therefore null and void. It cannot confer any rights upon the parties therein.
38. In the case of *Heptulla v Noor Mohamed* [1984] eKLR, the court of appeal dealt with a similar situation and invoked the doctrine of ex-turpi causa non oritur actio citing the case of *Mistry Amar Singh v Kulubya* [1963] EA 408 at page 414 letter D as follows:-
- “ This old and well known legal maxim is founded in good sense and expresses clear and well recognized legal principle which is not confided to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of court and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the court ought not to assist him”.
39. The Respondent purported to enter into a lease agreement with persons who had no authority or capacity to act as landlords in respect of the suit property and now seeks to use the illegal contract to oust the Tribunal’s jurisdiction by arguing that the same created an uncontrolled tenancy within the meaning and interpretation of section 2(1) of Cap. 301, Laws of Kenya. I find and hold that no rights or obligations can legally flow from such an illegal lease neither can it afford the Respondent any protection from payment of rent to the Applicants.
40. As regards the pendency of ELC Misc. E256 of 2022, I have noted and indeed it is admitted that no order of stay of the instant proceedings have been issued by the superior court. The said case appears to have been instituted on 4th November 2022 after the instant case and being the subsequent proceedings is the one liable to be stayed if such application were to be made under section 6 of the *Civil Procedure Act* before the superior court.
41. The Respondent submitted that there is no complaint filed in this matter but upon perusal of the court file, there is one filed under Section 12(4) of Cap. 301, Laws of Kenya which is dated 13th October 2022. This makes the issue moot.



42. The submission that since the Respondent was not a party to Tribunal case no. E599 of 2021 cannot be affected by the judgment in the case is misconceived as the suit property is similar and the issue as to who is entitled to rental income therefrom was conclusively determined therein making the issue Res judicata under section 7 of the *Civil Procedure Act*. The persons with whom the Respondent entered into the purported lease agreement were trying to defeat the Tribunal's judgment in the said case which is untenable in law and an abuse of court process.
43. This Tribunal has not been called upon to determine any succession dispute as the issue was conclusively dealt with by the superior court as observed in Tribunal case No. E599 of 2021 and the rightful beneficiaries of the rental income accruing from the suit property determined.
44. Section 12(1) (e) of Cap. 301, Laws of Kenya empowers this Tribunal to order for recovery of possession and/or payment of arrears of rent or mesne profits "which orders may be applicable to any person whether or not he is a tenant being at any material time in occupation of the premises comprised in a controlled tenancy".
45. The Respondent entered into the suit premises pursuant to an illegal lease agreement and denies being a tenant of the Applicants who were declared to be legally entitled to the rental income accruing from the suit premises. She therefore became a trespasser by operation of the law and liable to be evicted therefrom under Section 12(1) (e) of Cap. 301, Laws of Kenya. As such the Applicants' application dated 13th October 2022 is well founded in law and fact and is for allowing.
46. As regards mesne profits, I have noted that the Respondent has not exhibited any evidence of payment of rent to her purported Landlords despite using the suit premises from 1st September 2021. She has not paid any mesne profits to the Applicants who are entitled to rental income accruing from the use of the suit premises in line with the judgment in Nairobi BPRT No. E599 of 2021. The admitted monthly rental income is Kshs.200,000/- in all the pleadings and documents filed herein including the Respondent's submissions. This is the amount that is payable to the Applicants until she vacates from the suit premises or is evicted therefrom. The total accrued mesne profits is Kshs.3,600,000/- for the period of 18 months from 1st September 2021 to the date of this ruling.
47. As regards costs, the same are in this Tribunal's discretion 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 Applicants.
48. In conclusion, the following orders commend to me in this case in respect of the complaint and application dated 13th October 2022:-
- (a) The Respondent shall deliver vacant possession of the suit premises situate on L.R NO. 209/1413/28, Accra House forthwith and in default shall be evicted therefrom by a licensed Auctioneer who shall be accorded security by the OCS, Central Police Station.
 - (b) The Respondent shall pay to the Applicants mesne profits in the sum of Kshs.3,600,000/- for the period 1st September 2021 to date at a rate of Kshs.200,000/- per month and at the same rate thereafter until she delivers vacant possession or is evicted therefrom.
 - (c) The Respondent shall pay costs of Kshs.50,000/- to the Applicants for the case.
 - (d) This ruling shall apply to Nairobi BPRT No. E.1006 of 2022 between Monica Gathoni v Zaweria Wangari Mwangi & Alex Kimani Mwangi whose facts are similar to this case.

It is so ordered.



RULING DATED, SIGNED & DELIVERED VIRTUALLY THIS 3RD DAY OF FEBRUARY 2023.

HON. GAKUHI CHEGE

VICE CHAIR

BUSINESS PREMISES RENT TRIBUNAL

Ruling delivered in the presence of:

Miss Oketch for the Landlord/Applicant

Miss Mburukua holding brief for Kinyua for the Tenant/Respondent

