



**Kimani & 2 others v Mungai (Tribunal Case E336 & E365 of 2023  
(Consolidated)) [2024] KEBPRT 1485 (KLR) (23 October 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 1485 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E336 & E365 OF 2023 (CONSOLIDATED)  
GAKUHI CHEGE, CHAIR & J OSODO, MEMBER  
OCTOBER 23, 2024**

**BETWEEN**

**CATHERINE NYAMBURA KIMANI ..... 1<sup>ST</sup> TENANT**

**SILAS KIMATHI KIMANI ..... 2<sup>ND</sup> TENANT**

**SUSAN KULET ..... 3<sup>RD</sup> TENANT**

**AND**

**HANNAH NJERI MUNGAI ..... LANDLORD**

**RULING**

**A. Dispute background**

1. The tenants filed a notice of motion dated 5<sup>th</sup> September 2024 under a certificate of urgency in which they sought in pertinent part for orders that the Rent Inspector to enter and inspect the suit premises erected on Ruiru East Block 1/1863 and prepare a report before delivery of the Tribunal's decision on the Tenants' Reference.
2. The application is supported by an affidavit of even date sworn by the 1<sup>st</sup> Tenant wherein she deposes that the landlady issued the tenants with a notice to vacate the premises by 31<sup>st</sup> March 2023. Pursuant to the said notice, the Tenants filed the instant reference.
3. The parties were directed to file their witnesses' statements as well as their submissions. The landlady filed a further affidavit annexed building plans showing the major renovations she intends to undertake as annexure CNK-2.
4. According to the Tenants, the building plans do not match the situation currently at the suit premises and appear to be for a different premises other than the suit premises as can be discerned from their annexure CNK-3.

5. The tenants depose that the notice to terminate tenancy was issued selectively since the suit premises has other tenants who have not been issued with notices to terminate their tenancies. Additionally, the landlord lives in the suit premises and that the ground floor has three other tenants while the first floor has 6 tenants. It is for that reason that this Tribunal is being invited to visit the suit premises to establish the status before delivering its decision on the 'Tenants' Reference at their own costs.
6. In response to the application, the Landlady filed a Preliminary objection to the effect that the application is bad in law, inadmissible, incurably defective and incompetent for want of jurisdiction. The Landlady further contends that the application is incurably defective for inviting this Tribunal to inspect residential premises over which it had no jurisdiction and which has no relevance in the subject reference. It is also the Landlady's contention that the tenants have not challenged the rent payable for the premises and as such, there is no lawful ground for any inspection as envisioned under the Act and Regulations. Finally, the tenants contend that the application is in bad faith, has been filed inordinately late in the proceedings and is clearly just an attempt to delay these proceedings and waste the Tribunal's valuable judicial time.
7. The application and preliminary objection were directed to be argued orally and both parties were heard on 13<sup>th</sup> September 2024. The main thrust of the tenants' argument is that the preliminary objection has not met the test in *Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd*.
8. In response, the Landlady reiterated that the powers under Section 12(1)(n) of Cap 301 are only exercised where rent or value of premises is in issue. The tenants do not dispute the rent amount payable. The rent is Kshs 16,000/= per unit. As such the application for inspection must fail.
9. It is the Landlady's case that the application is meant to frustrate and delay the matter. The matter originated in 2022 and subsequently, the notices were issued on the 6<sup>th</sup> December 2022. The references were filed on 30<sup>th</sup> March 2023. The application for inspection is late. Directions were in May 2024 to file further affidavit and submissions. As such, the application is meant to frustrate the rights of the landlord and delay justice without any lawful cause.
10. According to the landlord, the premises are commercial in nature. It is therefore wrong for the Tribunal to go and inspect other premises which are residential in nature. The Tribunal has no jurisdiction to do that. The inspection sought will not serve justice to the tenants and the landlord in this case.

## **B. Issues for determination**

11. The following are the issues for determination; -
  - a. Whether the preliminary objection is merited.
  - b. Whether the reliefs sought in the tenants' application ought to be allowed or denied.
  - c. Who shall bear the costs of the application?Issue a) Whether the preliminary objection is merited.  
Issue (b) Whether the tenant/applicant is entitled to the orders sought in the application dated 19<sup>th</sup> December 2023.

12. The test of what constitutes a Preliminary objection was settled in the locus classicus case of Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696 wherein it was stated as follows:
- “ ----a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.
13. In the same case, Sir Charles Newbold, P. stated:
- “ A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.
14. Similarly, in the case of Oraro vs Mbaja (2005) eKLR, Justice J.B Ojwang (as he then was) observed as follows on the same issue;
- “I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.”
15. The Landlady filed a Preliminary objection to the effect that the application is bad in law, inadmissible, incurably defective and incompetent for want of jurisdiction. The Landlady further contends that the application is incurably defective for inviting this Tribunal to inspect residential premises over which it had no jurisdiction and which has no relevance in the subject Reference. It is also the Landlady’s contention that the tenants have not challenged the rent payable for the premises and as such, there is no lawful ground for any inspection as envisioned under the Act and Regulations. Finally, the tenants contend that the application is in bad faith, has been filed inordinately late in the proceedings and is clearly just an attempt to delay these proceedings and waste the Tribunal’s valuable judicial time.
16. The Landlady did not file any replying affidavit to the tenants’ application and it is not clear how the issue of residential premises alleged to be existing in the suit premises affects the power of this Tribunal to order for inspection.
17. Section 12(1)(n) of Cap 301 provides one of the powers of this Tribunal as follows; -
- “(n) to enter and inspect premises comprised in a controlled tenancy in respect of which a reference has been made to the Tribunal.”
18. The power of inspection is not limited to rent issues and there is no restriction to that effect in the said provision. The said power cannot by any stretch of imagination be limited by the Forms in the schedule to the Act. No regulation has been cited by the Landlady under the relevant statute which derogates the power of rent inspection at any stage of the proceedings before this Tribunal.

19. The tenants depose that the notice to terminate tenancy was issued selectively since the suit premises has other tenants who have not been issued with notices to terminate their tenancies. Additionally, the landlord lives in the suit premises and that the ground floor has three other tenants while the first floor has 6 tenants. It is for that reason that this Tribunal is being invited to visit the suit premises to establish the status thereof before delivering its decision on the Tenants' Reference at their own costs.
20. These are issues that would interest this Tribunal and cannot be wished away. If it is true that there are other tenants both commercial and residential who occupy the suit premises and who have not been issued with similar notices to terminate tenancies, it will go into the root of the notices issued to the tenants herein.
21. It is therefore our view that the preliminary objection has no merit and is a candidate for dismissal. It is our further finding that the application by the tenants has merit and ought to be allowed.

**Issue (c) Who shall bear the costs of the application?**

22. As regards costs, the same are in the Tribunal's discretion under Section 12(1)(k) of Cap. 301, but always follow the event unless for good reasons otherwise ordered. We shall order the costs of the application to abide the outcome of the Reference.

**C. Orders**

23. In view of the foregoing, the following orders commend to us; -
  - a. The Landlady's preliminary objection dated 8<sup>th</sup> September 2024 is hereby dismissed.
  - b. The Tenants' application dated 5<sup>th</sup> September 2024 is allowed in terms of prayer 2 thereof.
  - c. The Rent inspector shall inter-alia confirm whether the suit premises is occupied by other tenants and if so whether they were served with notices to terminate their tenancies and shall also report on the condition of the suit premises and shall take and file photographs thereof.
  - d. The costs of the application shall abide the outcome of the Reference.

It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 23<sup>RD</sup> DAY OF OCTOBER 2024.**

**HON. GAKUHI CHEGE - (PANEL CHAIRPERSON)**

**BUSINESS PREMISES RENT TRIBUNAL**

**HON. JOYCE AKINYI OSODO - (MEMBER)**

**In the presence of:**

Mwikali h/b for Murimi Murango for the tenants

Mbugua for the Landlady