



**Mwangi v Haroon (Tribunal Case E449 of 2024)
[2024] KEBPRT 822 (KLR) (7 June 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 822 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E449 OF 2024
CN MUGAMBI, CHAIR
JUNE 7, 2024**

BETWEEN

ELISHIVA WANGECHI MWANGI APPLICANT

AND

FOZIA MOHAMED HAROON RESPONDENT

RULING

1. The Respondent's notice of Preliminary objection dated 17.04.2024 is brought on the grounds;-
 - a. That this court lacks the jurisdiction to hear and determine the Application by the Tenant dated 9.04.2024 and for that reason, this suit has been brought before the wrong court.
 - b. That the suit premises, House 41 in Kabarnet Lane on LR No. 209/2681/9 are single private residences for the accommodation of one family and not business premises within the provision of Cap 301 of the Laws of Kenya.
2. The Respondent has also filed grounds of opposition dated 18.04.2024 where amongst other grounds, she has stated that;-
 - i. The Applicant is no longer a Tenant in the suit premises and the court therefore lacks jurisdiction.
 - ii. The Applicant who was represented by Counsel at/during the signing of the agreement has full knowledge of the terms of the agreement.
 - iii. The Applicant without the knowledge of the Respondent and in breach of the lease agreement was operating an illegal brothel on the suit premises while causing serious disturbance to the community.



- iv. The Tenant did not deny the said breaches which were communicated in a letter dated 08.04.2024 and the Landlord therefore invoked her rights under the lease agreement and Cap 301 of the Laws of Kenya to terminate the tenancy.
 - v. The lease agreement at clause (6) provides for arbitration and therefore the Tenant's suit is bad in law.
3. The Tenant in response to the Preliminary objection, has filed a Replying affidavit wherein she has deponed that she has been issued with a unified business permit for the suit premises showing that the premises is a commercial premises and further depones that the lease agreement between the parties is silent on whether the suit premises is a commercial or residential premises.
 4. I do not think a Replying affidavit is the proper way to respond to a notice of Preliminary objection. This is so because Preliminary objections are brought on purely matters of law while affidavits are statements of facts on oath. A Preliminary objection ought therefore to be argued on issues of law and where the establishment of facts has to be undertaken, then the objection falls outside the narrow limits and confines of Preliminary objections.
 5. The contest in this matter revolves around whether or not the suit premises are commercial or residential. Both partes have taken different views of this issue with the Tenant taking the view that the suit premises is commercial while the Respondent contends that the suit premises is residential. Although not part of the Preliminary objection, the Respondent has in her grounds of opposition also stated that the Tenant is no longer in the suit premises and the court therefore lacks jurisdiction. The Respondent in her grounds also states that the lease agreement provided for arbitration in the event of a dispute and the Tribunal is therefore the wrong forum.
 6. Whether or not the suit premises is a business premises or a residential premises is a matter of fact which is to be established by evidence. The court will have to do more than just read the notice of Preliminary objection to establish this position. Further, whether or not the Tenant is in the suit premises, is also a question of fact to be established by evidence.
 7. Is the notice of Preliminary objection filed by the Respondent in this case a Preliminary objection as strictly defined in Law and precedent?

In the case of; *Oraro vs Mbaja* [2005] eKLR, 141, the court held:-

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence.”

Similarly, in the case of; *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd* [1969] EA 696, the court 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...”

8. It is clear in the instant circumstances that there are facts that need to be ascertained by the introduction and considerations of evidence. It is my finding therefore that the notice of Preliminary objection filed by the Respondent herein has no merits and the same is dismissed with costs to the Tenant.

Dated, signed and delivered virtually this 7th day of June, 2024



HON. CYPRIAN MUGAMBI

CHAIRPERSON

BUSINESS PREMISES RENT TRIBUNAL

Delivered in the presence of;

Mr. Opiyo for the Landlord

Mr. Thuku for the Tenant

Court: Mention on 25.06.2024

