



**Kimani (Suing as Guardian of Samuel Kimani Karoki) v Oyugi t/a Jopenpha School
(Tribunal Case E431 of 2022) [2023] KEBPRT 77 (KLR) (27 February 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 77 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E431 OF 2022
A MUMA, VICE CHAIR
FEBRUARY 27, 2023**

BETWEEN

**KENNETH KAUNDA KIMANI (SUING AS GUARDIAN OF SAMUEL KIMANI
KAROKI) LANDLORD**

AND

BENARD OYUGI T/A JOPENPHA SCHOOL TENANT

RULING

A. Parties and Their Representatives

1. The Applicant herein is the owner of the land LR No Nairobi/Block 113/35 and 36 (hereinafter referred to as the 'Suit Property').
2. The Applicant appears in person in this matter.
3. The Respondent is the occupant of the land LR No Nairobi/Block 113/35 and 36.
4. The Respondent is represented by the Firm of Ombachi, Moriasi & Company Advocates. Email: ombachimoriasiadvocates@gmail.com

B. Dispute Background

5. Vide a Notice of Motion Application dated May 5, 2022 the Applicant herein approached this Tribunal seeking inter alia, orders that this application be certified as urgent as service be dispensed with in the first instance; that the tenant be compelled to hand over a vacant possession of the suit property; that the OCS Embakasi Police station ensure compliance; and, that the costs be provided for.
6. Through an Order dated May 20, 2022, the Tribunal granted prayer (a), certifying the matter as urgent and directing that the Landlord to serve for interpartes hearing June 30, 2022.



C. The Applicants Case

7. The Application is supported by the affidavit of Kenneth Kaunda Kimani. He swore that the Applicant is the owner of the property known as LR No Nairobi/Block 113/35 and 36.
8. Mr Kaunda further averred that the Landlord served the Tenant with the Notice to terminate his tenancy dated May 28, 2019 as provided for by the law.
9. He deponed that the Tenant did not file a Reference thus terminating his tenancy. He further stated that this Honourable Tribunal has confirmed that the Tenant failed/did not comply with the terms of the said Notice.

D. The Respondent's Case

10. The Respondent filed a Replying Affidavit sworn by Benard Oyugi on October 28, 2022 stating that he is the Headteacher of the school known as Jopenpha Community school occupying the suit property. He averred that the application is defective, bad in law, frivolous and an abuse of the Tribunal process.
11. He further averred that the Tribunal lacks jurisdiction to make an order for vacant possession and or that the OCS Embakasi has no powers to interfere with the enforcement of the Orders.
12. He averred that he filed an application dated February 3, 2021 for filing a reference out of time to challenge the notice to terminate the under BPRT 575 of 2017. That subsequently, the said application was substantively heard and orders dismissing it issued.
13. He further averred that following his dissatisfaction with the said Ruling by this Tribunal, he lodged an appeal at the ELC, being ELCA E035/2022. That he is in the process of obtaining the proceedings for preparation of the record of appeal.
14. He further averred that the subject premises is a school for the community in which he is the only trustee, that if eviction orders are granted children from poor families will suffer irreparable damage.

E. Submissions

15. All the parties did not canvass their case by way of submission.

F. Analysis and Determination

16. I have given full consideration to the Applicant's Notice of Motion Application, and the rival affidavits. This matter came up for hearing on January 25, 2023 wherein this honorable Tribunal put the Ruling on notice and further directed that the instant suit be consolidated with BPRT No 132 of 2020.
17. In the said matter, BPRT No 132 of 2020, this Court already dispensed with the issues and condensed them in a Ruling dated March 28, 2022, in which the Tenant's Application was found to lack in merit, thus, dismissed.
18. In my respectful view, I find that, two key issues that fall for determination:
 - a) Whether this Tribunal has jurisdiction to issue orders as to vacant possession
 - b) Whether the Tenant should give a vacant possession.



a. Whether this tribunal has jurisdiction to order for vacant possession

19. At the heart of this case is the issue of jurisdiction. It is a truism that jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction?
20. 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 or a Tribunal can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a Court or Tribunal therefore proceeds to hear a dispute without jurisdiction, then the result will be nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae.
21. Section 12 of [Cap 301](#) of the Laws of Kenya provides for the authority of this Tribunal:
 - "(1) A Tribunal shall, in relation to its area of jurisdiction have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in addition to and without prejudice to the generality of the foregoing shall have power—
 - (a) to determine whether or not any tenancy is a controlled tenancy;
 - (b) to determine or vary the rent to be payable in respect of any controlled tenancy, having regard to all the circumstances thereof;
 - (c) to apportion the payment of rent payable under a controlled tenancy among tenants sharing the occupation of the premises comprised in the controlled tenancy;
 - (d) where the rent chargeable in respect of any controlled tenancy includes a payment by way of service charge, to fix the amount of such service charge;
 - (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;
 - (f) for the purpose of enabling additional buildings to be erected, to make orders permitting landlords to excise vacant land out of premises of which, but for the provisions of this Act, the landlord could have recovered possession;"
22. Jurisprudence as to the authority of the Tribunal to issue Orders as to vacant possession is replete.
23. The Tribunal at [Kisumu in Ngegeways Enterprises Limited v Kisumu Muslim Association](#) [2021] eKLR, while demonstrating its authority to issue an order of vacant possession by the Tenant, found that the tenancy had terminated by way of effluxion of time. That the Notice by the Landlord to the tenant was regular. As such, the Tribunal ordered that the Tenant issue vacant possession.
24. Similarly, the Tribunal at Mombasa while demonstrating its authority to order for vacant possession held in *Khalif Jelle Mohammed v Abdulkadir Hubess* that the term of the tenancy had expired and possession yielded to the Landlord, the proprietary interest.



25. In the instant case, the Tenant avers that, this Tribunal lacks jurisdiction to issue order as to the Vacant possession. Flowing from the above, it is indisputable that this Tribunal is well clothed to order for vacant possession.
26. On the issue of whether OCS Embakasi Police station should be restrained from interfering with the law, I wish to clarify that, administrative bodies exist to ensure strict enforcement and compliance with the law. Therefore, direction by the Tribunal that the OCS Embakasi police station does not amount to interference of enforcement of orders but regularization of administrative roles of the police, to enhance compliance.

b. Whether the tenant should give a vacant possession.

27. Section 4 (2) Cap 301 provides:

“A landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the tenant, any term or condition in, or right or service enjoyed by the tenant under, such a tenancy, shall give notice in that behalf to the tenant in the prescribed form.”

28. In the present case, there is no dispute as to the format of the impugned Notice. In fact the Tenant admitted that he was served with the Notice to terminate his tenancy dated May 28, 2019. Validity of the Notice is not challenged.
29. I have perused through all the pleadings and evidence on record, I find that, the allegation that the Tenant will suffer irreparable damage if evicted does not underscore nor take away the Landlord's overriding right to the suit property.

G. Determination

30. Having established that this Tribunal has jurisdiction to order for vacant possession by the Tenant I allow the Application in the following terms:
- i. The Tenant issue Vacant Possession to the Landlord within 60 days from the date hereof failure to which the landlord shall be at liberty to break in and take vacant possession.
 - ii. OCS Embakasi Police Station ensure compliance;
 - iii. The Landlord shall have costs.

HON A. MUMA

VICE CHAIR

BUSINESS PREMISES RENT TRIBUNAL

Ruling dated, signed and delivered virtually by Hon A. Muma this 27th Day of February 2023 in the absence of the Tenant and in the presence of Kenneth Kaunda the Landlord in person.

HON A. MUMA

VICE CHAIR

BUSINESS PREMISES RENT TRIBUNAL

