



**Mumo v Njuguna & 2 others (Tribunal Case E494 of 2024)
[2024] KEBPRT 1351 (KLR) (17 September 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 1351 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E494 OF 2024
A MUMA, MEMBER
SEPTEMBER 17, 2024**

BETWEEN

GIBSON MUMO APPLICANT

AND

PAUL MWAURA NJUGUNA 1ST RESPONDENT

PRESTIGE MANAGEMENT 2ND RESPONDENT

JOEL GUTHU 3RD RESPONDENT

RULING

A. Parties And Representatives

1. The Applicant, Gibbson Mumo, has rented space for commercial purposes (“the Tenant”) at the premises known as Afya Business Plaza, Room No. 602A which is erected on plot no. L.R 209/136/246 located within Nairobi (the “suit property”).
2. The firm of Odero & Partners Advocates represents the Tenant in this matter.
3. The 1st Respondent, Paul Mwaura Njuguna, is the Landlord and owner of the suit property who rented out the suit property to the Tenant (the “Landlord”).
4. The 2nd Respondent, Prestige Management, is the Manager of the suit property hence the agent of the Landlord.
5. The 3rd Respondent, Joel Guthu, is the Auctioneer of the suit property hence the agent of the Landlord.
6. The firm of Wanyoike & Macharia Advocates represents the Respondents in this matter.



B. The Dispute Background

7. On 23rd April 2024, the Tenant moved this Honourable Tribunal vide a Reference and an Application under a Certificate of Urgency on even date. On 29th April 2024, the Tribunal ordered the Respondent to re-open the suit property failure upon which the Tenant shall be at liberty to break in under the supervision of the OCS Central Police Station. Further, Tenant was ordered to pay rent for April and May before the inter-partes hearing.
8. Subsequently, the Landlord filed a Preliminary Objection dated 6th May 2024 challenging the jurisdiction of this Honourable Tribunal on the ground that the tenancy is not a controlled tenancy.
9. In response to the Tenant's Application dated 23rd April 2024, the Landlord filed a Replying Affidavit dated 10th May 2024.
10. During the hearing on 25th July 2024, the Tribunal directed parties to file their submissions on the Landlord's Notice of Preliminary Objection. Accordingly, parties filed their submissions and a date for ruling given on 22nd August 2024.
11. Therefore, it the Landlord's Notice of Preliminary Objection dated 6th May 2024 that is the subject of this ruling.

C. Landlord's Claim

12. The Landlord alleges that the tenancy between the Landlord and the Tenant herein is not a controlled tenancy within the meaning of section 2 (1) of the Landlord and Tenant Act, Cap 301 Laws of Kenya. As such, the Tenant's Reference and Application ought to be struck out for want of jurisdiction as provided under paragraph 4 of his Replying Affidavit.
13. The Landlord also depones under paragraph 8 of his Replying Affidavit that the Tenant's Application is premature, misconceived and bad in law since there is an existing Lease Agreement which provides for a term of 5 years and 3 months as evidenced in the attachment. Therefore, he prays that the instant Application by the Tenant be dismissed.

D. Tenant's Claim

14. In response, the Tenant submits that the Landlord's Notice of Preliminary Objection has not satisfied the threshold set in law as it does not disclose pure points of law. As such, it is incurably defective and should be dismissed with costs.
15. In light of the above, the Tenant prays that the Respondent be ordered to re-open the suit property failure to which, he be allowed to break in under the supervision of the OCS Central Police Station. He also seeks restraining orders against the Respondents herein.

E. Issues For Determination

16. Based on the above, I find that the sole issue that falls for determination is:

Whether this Honourable Tribunal has the jurisdiction to hear and determine the Tenant's Application dated 23rd April 2024.



F. Analysis And Findings

17. Section 12 of the Landlord and Tenant (Sops, Hotels and Catering Establishments) Act, Cap 301 Laws of Kenya (“the Act”) confers powers to this Honourable Tribunal to determine the question on jurisdiction. It states as follows:
- (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;
18. Further, Section 2 of the Act, defines a controlled tenancy as;
- Tenancy of a shop, hotel or catering establishment-
- b) Which has not been reduced into writing; OR
- c) Which has been reduced into writing and which-
- i. Is for a period not exceeding five years; OR
- ii. Contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or
- iii. Relates to premises of a class specified under subsection 2 of this section.
- Provided that no tenancy to which the Government, the Community or a local authority is a party, whether as landlord or as tenant, shall be a controlled tenancy;
19. In the instant case, the Landlord has through a Notice of Preliminary Objection dated 6th May 2024 challenged the jurisdiction of this Tribunal on the ground that the tenancy between the Landlord and the Tenant is not a controlled tenancy within the meaning under Section 2 of the Act. It therefore behooves this Tribunal to make its determination on the aforesaid issue before it proceeds further.
20. The Landlord has adduced as evidence a Tenancy Agreement dated 10th July 2021 (hereinafter referred to as “the Agreement”) which clearly indicates that the Tenant herein has rented out the suit property for a term of 5 years and 3 months which is beyond the statutory period from Young Bibirioni Investors Limited as the Landlord under the directorship of John K. Kiarie. It does not mention the Respondents as a party or parties to the Agreement. I am therefore guided by this Agreement to determine on the nature of the impugned tenancy relationship.
21. Subsequently, upon perusal, I have established that Clause 5 of the said Agreement provides that the Agreement may be terminated if the Tenant has failed to pay rent within 14 days or has become bankrupt or an order has been made against any of his goods.
22. In light of the foregoing, I am of the considered view that non-adherence by the Tenant to fulfil his end of the bargain under a contract does not fall within the realm for determination by this Tribunal. Therefore, I find that the Landlord’s Preliminary Objection has merit.



23. Relatively, in the case of David Karobia Kiiru Vs Charles Nderitu Gitoi & another [2018] Eklr at paragraph 12 of the ruling, Justice Odungo observed as follows:

“For a preliminary objection to succeed, the following tests ought to be satisfied. Firstly, it should raise a point of law, secondly, it is argued on the assumption that all the facts pleaded by the other side are correct and finally it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful dispose of the suit.”

24. By dint of the above, I stand guided by the observations of the Learned Judge as set out above and therefore do find that the issues raised by the Landlord’s Preliminary Objection are valid. Therefore, this Tribunal lacks jurisdiction to hear and determine the dispute.

25. The rationale is that a landlord, as is in this case, has a right to distress for rent in case of any rent arrears as agreed between the parties’ failure upon which the landlord is entitled to exercise his right of re-entry into the suit property and obtain vacant possession this ought to be differentiated by a clause that allows the landlord to terminate within a particular time whether the tenant is in default or not. Thus this clause is not in any way a termination clause since it is purely activated by breaches on the tenants’ part and cannot be singly handedly relied on by the landlord to instigate an eviction contrary to Cap 301.

G. Orders

26. In the upshot, the Landlord’s Notice of Preliminary Objection dated 6th May 2024 is hereby allowed. Each party shall bear its own costs.

HON. A MUMA

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

RULING DATED, DELIVERED AND SIGNED AT NAIROBI ON THIS 17TH DAY OF SEPTEMBER 2024

in presence of Andrew W for the Landlady and Miiri holding brief for Odera for the Tenant.

HON. A MUMA

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

