



**Mohamed v Eylaf real Estate Developers Limited (Tribunal Case
E138 of 2023) [2024] KEBPRT 1156 (KLR) (19 July 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 1156 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E138 OF 2023
P KITUR, MEMBER
JULY 19, 2024**

BETWEEN

MOHAMED SOUD MOHAMED LANDLORD

AND

EYLAF REAL ESTATE DEVELOPERS LIMITED TENANT

RULING

A. Parties And Representatives

1. The Applicant, Mohamed Soud Mohamed is the Landlord being owner of Plot No. 8 – Mokowe within Lamu County.
2. The Landlord is represented by the firm of Abdulmunim & Company Advocates.
3. The Respondent, Eylaf Real Estate Developers Limited rented the premises from the Landlord herein.
4. The firm of Khaminwa & Khaminwa Advocates represents the Tenant.

B. The Dispute Background

5. Vide Complaint dated 29th May 2023, the Landlord averred that the Tenant had breached fundamental terms of the Lease Agreement contrary to the provisions of Cap 301.
6. Alongside the Complaint, the Landlord filed an Application of even date where he sought, among others, an Order that the Tenant vacates the premises and pays the outstanding sum of Kshs. 600,000/= as at May 2023.
7. In response, the Tenant filed a Statement of Defence dated 17th July 2023 stating that while it took possession of the suit property under the Lease Agreement, the Landlord, sometime in April 2023 without any legal right or authority from the Tenant went to the suit premises and released the Tenant's



property to a third party, thus breaching the terms of the Lease Agreement causing it to suffer great loss and damage.

8. The Tenant additionally filed a Preliminary Objection as to the Tribunal's jurisdiction vide Notice of Preliminary Objection dated 17th July 2023.
9. Parties appeared several times before the Tribunal where Counsel for the Tenant indicated that they were exploring the possibility of an out of Court settlement when both parties last appeared before the Tribunal on 6th December 2023.
10. The Tenant has never appeared since when the matter came up for mention or hearing despite several instances of evidence of service and accommodation by the Tribunal.
11. The matter proceeded for hearing in the absence of the Tenant on 5th June 2024 on which date Counsel for the Landlord sought to have the Preliminary Objection dated 17th July 2024 dismissed for want of prosecution and non- attendance.
12. Hearing of the Complaint thereafter proceeded with the Landlord testifying that the Tenant had failed to make any rent payment since they entered the premises, having only made a payment of Kshs. 200,000/= being rent deposit in March 2023.
13. The Landlord further stated that as at the date of hearing, the Tenant had not paid rent for a period of 15 months which translated to Kshs. 3,000,000/= in unpaid rent.
14. He further prayed for costs of the suit.

C. List Of Issues For Determination

15. The issues raised for determination are as follows;
 - a. Whether the Tribunal has jurisdiction to hear this matter.
 - b. Whether the Landlord is entitled to the Orders sought

D. Analysis And Findings

Whether this Honourable Tribunal has jurisdiction over this matter

16. Before delving into the main issues in dispute, we first recognize that, jurisdiction is everything and once challenged, a determination should be made before the Tribunal can proceed with further disposal of any matter thereto. The Tribunal has no option but to first make a determination whether it is clothed with jurisdiction in the matter. In the case of Owners of the Motor Vessel 'Lillian' (s) versus Caltex Oil (Kenya) Ltd [1989] KLR1, the Court stated as follows:

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court had no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

17. The principles established by the time-honored, Mukisa Biscuit Manufacturing Co Ltd v. West End Distributors (1969) EA 696, are settled that; "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 the contract giving rise to the suit to



refer the dispute to arbitration. 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.”

18. The Tenant brought the preliminary objection on the ground as spelt out in their Statement of Defence that it did not take possession of the premises and therefore there never existed a Landlord – Tenant relationship.
19. Curiously, in their Statement of Defence the Tenant also states that there was a breach of terms of the Lease Agreement. The two arguments cannot coexist. For there to be said to have been a breach of terms of the Lease Agreement, a Landlord – Tenant relationship is acknowledged to have previously existed, at which point the Tenant cannot sustain an argument that there never existed a tenancy relationship between the parties.
20. A Lease Agreement was produced by the Landlord, having been duly executed by the parties with respect to the suit property for a period of two years commencing 1st March 2023 and with monthly rent of Kshs. 200,000/=.
21. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure 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.
22. It is my considered view that the Preliminary Objection raised herein, constitutes matters of fact; the existence of the tenancy between the parties herein which call upon this honourable tribunal to inquire into their existence or non-existence.
23. The question therefore arising is whether there exists a tenancy relationship between the Tenant and the Landlord subject to the [Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#), which is answered in the affirmative with the production of the Lease Agreement and it being uncontroverted.
24. It is therefore my considered view that the Preliminary Objection herein is not merited.

Whether the Landlord is entitled to the Orders sought

25. As already spelt out, it is the Landlord’s testimony that the Tenant had failed to make any rent payment since they entered the premises, having only made a payment of Kshs. 200,000/= being rent deposit in March 2023, and not paid rent for a period of 15 months which translated to Kshs. 3,000,000/= in unpaid rent as at the date of hearing.
26. This position was not challenged by the Tenant in their pleadings or on the date of hearing which they failed to attend.
27. It is my considered view that the debt is of a considerably large sum. As was stated in Samuel Kipkori Ngeno & another v Local Authorities Pension Trust (Registered Trustees) & another [2013] eKLR,

A tenant’s first and main obligation is to pay rent as and when it becomes due, for the landlord has the right to an income from his investment. Why would a tenant allow himself to fall into such huge arrears of rent?
28. In seeking to make the appropriate orders in view of the foregoing, I am guided by section 12 (1) (e) of Cap 301 which



- (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;

29. In light of the foregoing, I therefore proceed to order as follows;

E. Orders

- a. The upshot is that the Landlord's Application dated 29th May 2023 hereby succeeds in the following terms;
- b. The tenant shall clear the arrears of Kshs. 3,000,000/= as at 5th June 2024 in addition to any incidental costs accrued to date no later than 23rd July 2024.
- c. In default, the Landlord is at liberty to proceed to levy for distress of the rent.
- d. The Tenant shall additionally hand over vacant possession of the premises to the Landlord on or before 23rd July 2024 failure to which the Landlord shall be at liberty to break in and enter with the assistance of OCS Mokowe Police Station or any other Police station close by.
- e. This Ruling settles the Complaint herein.
- f. Costs are awarded to the Landlord assessed at Kshs. 40,000/=.
- g. File marked closed.

HON P. KITUR

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

Ruling dated, signed and delivered virtually by Hon P. Kitur on 19th July 2024 in the absence of the parties.

HON P. KITUR

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

