



Elegance Technology Ltd v Kiwakimu Ltd & another (Tribunal Case E462 of 2023) [2023] KEBPRT 657 (KLR) (6 October 2023) (Ruling)

Neutral citation: [2023] KEBPRT 657 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E462 OF 2023
GAKUHI CHEGE, CHAIR & J OSODO, MEMBER
OCTOBER 6, 2023**

BETWEEN

ELEGANCE TECHNOLOGY LTD TENANT

AND

KIWAKIMU LTD LANDLORD

AND

HERITAGE PROPERTY CONSULTANTS AGENT

RULING

1. We intend to begin this ruling with a quotation from the case of *Owners of Motor Vessel "Lillian s" – vs- Caltex Oil (Kenya) Ltd* (1989) eKLR at page 8 as follows:-

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction”.

2. In the case of *Phoenix of E.A Assurance company Limited – vs-S.M. Thiga t/a Newspaper Service* (2019) eKLR at paragraph 2 the Court of Appeal held as follows:-

“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 can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without



jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amiable to being set aside *ex-debito justitiae*”.

3. This Tribunal’s jurisdiction is derived from the provisions of [Cap. 301](#), Laws of Kenya in respect of controlled tenancies as defined in Section 2(1) thereof to mean:-

“.....a tenancy of a shop, hotel or catering establishment

- a. Which has not been reduced into writing or
- b. 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”.

4. A shop is defined under the same Section as follows:-

“Shop means premises occupied wholly or mainly for the purposes of a retail or wholesale trade or business or for the purposes of rendering services for money or money’s worth”.

5. The Respondents filed a notice of preliminary objection dated 6th July 2023 contending that the suit premises is a manufacturing/processing facility complete with heavy machinery and is therefore neither a shop, hotel or catering establishment as defined in Section 2 of the [Landlord and Tenant \(Shop, Hotels & Catering Establishments\) Act](#).
6. The Respondents further contend that the premises has been let for a duration of more than ten (10) years and has not been terminated during the said period making it uncontrolled within the meaning of Section 2 of [Cap. 301](#), Laws of Kenya.
7. It is finally contended that the tenant has brought the suit prematurely as it has never notified the Respondent that it would not comply with the tenancy notice dated 2nd May 2023.
8. In response to the preliminary objection, counsel for the tenant has sworn a replying affidavit dated 24th August 2023 stating at paragraph 3 as follows:-

“3. That the respondent let the applicant the premises to be used as a shop for printing, branding and photocopy as evidenced by the single business permit dated 3rd July 2023 issued by Nairobi City County annexed in the replying affidavit. Hence this is a shop establishment as per the provisions of the Act”.

9. The single business permit marked “B00-3” shows that the tenant is authorized to engage in the activity/business or occupation of:-

“Industrial plants, factories, workshops, contractors”.



10. The activity code is:-

“825- medium workshop/service/repair contractor with 6-20 employees and comprises of premises of 25SqM- 500sq-printing”

11. From the foregoing contents of the single business permit, it is inconceivable how the premises can fit the description of a shop as contended by the tenant. We are guided by the decision in the case of [*Total Kenya Limited – vs- Drumcon Kenya Limited*](#) (2022) eKLR where it was held as follows at paragraph 14:-

“I am in full agreement with the above. Premises used for manufacturing goods do not fall within the ambit of premises falling under Cap. 301. As I had earlier mentioned, the premise herein was let out for purposes of drum manufacturing. This is an industrial purposes property. It is neither a shop, hotel nor a catering establishment”.

12. The court followed the decision in *Panesar – vs- Balbir* (1972) EA 208 at paragraph 14 and stated as follows:-

“The situation before me is not very far off from what arose in *Panesar – vs- Balbir* (1972) EA 208. The dispute in that case related to premises used for the purpose of manufacturing furniture. It was held that the premises could not fall under the definition of shop in Cap. 301. The Court of Appeal had this to say:-

“There is something termed a lease for manufacturing purposes (Section 106 of the *Transfer of property Act of India*) and the lease here was such a lease. The long title to the Act refers only to shops, hotels and catering establishments not to factories or premises for manufacturing goods”.

13. The single business permit issued to the tenant herein is for industrial plants, factories, workshops and contractors which removes it from the definition of controlled tenancies. Any dispute relating thereto ought to be filed in the appropriate forum as this Tribunal is bereft of jurisdiction.

14. Having found that we have no jurisdiction to entertain the instant dispute, the only other issue left to us is to determine who is liable to pay costs of the suit.

15. Section 12 (1) (k) of [*Cap. 301*](#), Laws of Kenya grants this Tribunal jurisdiction to determine who is liable to pay costs. The power is discretionary and like every discretion must be exercised judicially. Costs always follow the event unless for good reasons otherwise ordered. We have no reason to deny costs to the Respondents who were dragged into the wrong forum by the tenant they are entitled to payment of costs.

16. In conclusion, the final orders which commend to us in this matter are as follows:-

- a. The tenant’s reference dated 5th May 2023 and the application of even date are struck out with costs to the Respondents.
- b. The interim orders given on 26th May 2023 are discharged/vacated.
- c. The Respondents’ costs are assessed at Kshs.20,000/- against the tenant.

It is so ordered.

RULING DATED, SIGNED & DELIVERED VIRTUALLY THIS 6TH DAY OF OCTOBER 2023.



HON. GAKUHI CHEGE

CHAIRPERSON

BUSINESS PREMISES RENT TRIBUNAL

HON. JOYCE OSODO

(MEMBER)

In the presence of:

Odero for the Tenant

Kamenju for the Respondent

