



**Mutuku t/a Diani Data Tours & Travel Agent v Ashburton Grove Limited (Tribunal Case E143 of 2023) [2023] KEBPRT 1121 (KLR) (5 December 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 1121 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E143 OF 2023  
CN MUGAMBI, CHAIR  
DECEMBER 5, 2023**

**BETWEEN**

**BRUCE MUTIE MUTUKU T/A DIANI DATA TOURS & TRAVEL  
AGENT ..... TENANT**

**AND**

**ASHBURTON GROVE LIMITED ..... LANDLORD**

**RULING**

**Introduction**

1. The notice of preliminary objection by the landlord is brought on the grounds:-
  - a. That the respondent is not the applicant's landlord and therefore has not capacity to be sued.
  - b. That the applicant's reference has been overtaken by events as ownership of Bahari Plaza Shop No. 14 in Diani Beach road currently belongs to Restos Estates Kenya Limited.
  - c. That the applicant was evicted for failing to comply with court orders dated May 5, 2023.
  - d. That the reference is offensive, frivolous, vexatious and or is an abuse of the court process.
2. Both parties have filed their written submissions and I will consider them in this ruling.
3. The issue I have to consider at the very outset is whether the preliminary objection raised by the landlord meets the threshold of a preliminary objection in law.
4. The law on preliminary objections was well settled in the case of; *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 to mean:

“so far as I am aware, 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 agreed 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.”

5. In the same case, Sir Charles Newbald further 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 had to be ascertained or if what is sought is the exercise of judicial discretion.”

6. In the case of *Oraro v Mbaja* [2005] IKLR 141, the court held that:-

“ 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.”

7. From the record, the landlord’s notice to terminate is the one dated May 25, 2023 and the landlord named therein is Michael John Bill of Ashburton Grove Limited. The tenant/applicant in response to the notice by the landlord filed his reference to the Tribunal dated May 29, 2023. whether or not the respondent is the landlord of the applicant is a matter of fact which requires evidence to be determined. I do not think this ground of objection therefore raises a pure point of law especially considering the plain language of the notice to terminate tenancy which is under challenge in this matter.

8. The landlord has also objected to the reference on the grounds that the suit premises no longer belongs to the respondent but rather to Restos Estates Kenya Limited. Whether or not the suit premises has changed ownership is also a question of fact which cannot be determined on the basis of a preliminary objection.

9. The landlord’s contention that the tenant has been evicted pursuant to court orders is also in my view a question of fact to be determined after consideration of evidence.

10. The submissions of both parties seem to miss the point as both parties seem to be inviting the court to consider and evaluate evidence in determining the preliminary objection raised by the landlord.

11. It is therefore my finding that the preliminary objection by the landlord does not meet the threshold of a preliminary objection strictly so called and the same is dismissed with costs to the tenant/applicant.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 5<sup>TH</sup> DAY OF DECEMBER 2023**

**HON. CYPRIAN N. MUGAMBI**

**CHAIRPERSON**

12.2023

**Delivered in the presence of Ms. Wambua for the respondent**

In the absence of Mr. Omwenga for the Applicant

