



64 Door East Africa Limited v Sameer Africa Limited (Tribunal Case E370 of 2024) [2024] KEBPRT 635 (KLR) (24 April 2024) (Ruling)

Neutral citation: [2024] KEBPRT 635 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E370 OF 2024
A MUMA, AG. CHAIR & J ROP, MEMBER
APRIL 24, 2024**

BETWEEN

64 DOOR EAST AFRICA LIMITED TENANT

AND

SAMEER AFRICA LIMITED LANDLORD

RULING

A. Parties And Their Representatives

1. The Applicant 64 Door East Africa Limited is the tenant and rented space on the suit premises located on Land Reference No. 12081/9(the suit property) belonging to the Respondent herein. (hereinafter the “tenant”).
2. The firm of A.N Mwanzia & Co. Advocates appears for the Tenant in this matter.
3. The Respondent Sameer Africa Limited is the Landlord and the proprietor of the suit property. (hereinafter the “landlord”)
4. The Firm of KTK Advocates represent the respondent in this matter.

B. The Dispute Background

5. The current suit was instituted by the tenant vide a Reference and a Notice of Motion Application under Certificate of Urgency dated 19th March 2024 under Section 12(4) of the [Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#) Cap 301. The tenant was seeking break-in orders to enable them continue operating its business as well as orders restraining the landlord from evicting and levying distress against them. Additionally, the tenant wanted an order restraining the respondent from leasing out the premises to any other tenant pending the hearing and determination of the matter.



6. The Respondents have filed a Preliminary Objection dated 22nd March 2024 in opposition to the Tenant's Application where they put to question the Jurisdiction of this Tribunal to deal with the matter.
7. The Tenant has in response to the Preliminary Objection filed a Replying Affidavit dated 28th March where they affirm that the Tribunal indeed has Jurisdiction to deal with the matter.

C. Jurisdiction

8. The jurisdiction of this Tribunal is in dispute.

D. The Tenant/applicant's Claim

9. The Tenant filed a Reference and a Notice of Motion application under Certificate of Urgency and supporting affidavit dated 19th March 2023 seeking break-in orders to enable them continue operating its business as well as orders restraining the landlord from evicting and levying distress against them.
10. The tenant sought the above orders based on a Notice issued by the Landlord to Terminate Tenancy and claiming for rent arrears of Kshs. 3,128,421.26.
11. The tenant has also filed a replying affidavit in response to the Landlord's Preliminary Objection where they address the issues raised alleging that the Tribunal does not have Jurisdiction.

E. The Landlord/respondent's Claim

12. The respondent has filed a Preliminary Objection where they claim that the Tribunal does not have Jurisdiction to determine the issues raised in the Tenant's Application.

F. Issues For Determination

- a. Whether the Tribunal has the requisite Jurisdiction to hear and determine the issues raised in the Tenant's Reference and Application?

G. Analysis And Determination

13. The tenant approached this Tribunal seeking break-in orders and protection against eviction and distress by the landlord.
14. The basis for seeking the said orders was that the landlord had issued the tenant with a letter in which they sought to terminate tenancy on the grounds that the tenant was in arrears of Kshs. 3,128,421.26 and that they had failed to pay despite there being several demands by the landlord.
15. The landlord responded through filing a Preliminary Objection which raises several issues that question the Jurisdiction of this Tribunal. The same was argued before the Tribunal orally and the Tribunal is grateful for the insightful lead by both counsels.
16. In the locus classicus of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd.* (1989), in this subject, this Court pronounced itself as follows:

"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 downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Where a court takes it upon itself to exercise



jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

17. Further, in the case of *Joseph Muthee Kamau & Another v. David Mwangi Gichure & Another* (2013) eKLR, the Court considered the issue of jurisdiction and stated as follows:

“When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being *Kagenyi v. Musirambo* (1968) EA 43. We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing.”

18. Based on the above it is evident that this Tribunal must establish whether or not it is clothed with Jurisdiction before proceeding to determine the substantive issues as raised by the Tenant in the Reference.

19. The landlord claims that the tenant’s application is without substratum as the tenant has not produced the lease agreement between the parties to show existence of a tenancy relationship and as such the Tenant is failing to disclose material documents.

20. The Landlord also alleges that the Jurisdiction of this Tribunal is only invoked after a Reference is filed in the statutory format, without which the Tribunal has no Jurisdiction.

21. The gravamen of this case is the vexed question of “preliminary objections.” Newbold, J.A. (as he then was) gave the legal fraternity the most commonly cited definition of a preliminary objection when he famously surmised as follows in *Mukisa Biscuit Co Ltd v West End Distributors Ltd* [1969] E.A. 696:

“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”.

22. He went on to further state that;

“The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues.”

23. This Tribunal has analyzed the substance and the grounds of the Landlord’s Preliminary Objection and will be guided by the above-cited authority in determining whether the same should be upheld or dismissed.

24. First, I take note of the fact that the landlord claims that the Tenant has failed to produce the material lease agreement before this Tribunal and as a result the Jurisdiction of the Tribunal is put to question.

25. It is the observation of this Tribunal that the above assertion by the landlord contravenes what qualifies a Preliminary Objection. In order to prove the existence of the Tenancy Relationship, the Tenant would be required to produce the lease agreement. The existence of the Tenancy Relationship then becomes a fact that has to be ascertained through production of additional documents.

26. Additionally, I also observe that the tenant has in their Replying Affidavit stated that no written tenancy agreement exists between the parties which is why the tenant has not produced one in support of their application.



27. The Tribunal also notes that it is the Landlord who is leaning towards showing the Tribunal that there exists a written agreement and not the tenant. This is evidenced in the letter dated 14th August 2023 annexed by the Tenant in their Supporting Affidavit where the Landlord has made reference to a Clause 17 of the Heads of Terms as their basis for wanting to terminate the tenancy.
28. The landlord has also adduced as a ground for filing the preliminary objection the fact that for the Tribunal's Jurisdiction to be invoked, a Reference needs to be filed. I take note that the Tenant has satisfied this requirement since they indeed filed a Reference which lacks a date but indicates that it was filed on 19th March 2024.
29. In light of the above, I proceed to order as follows;

H. Orders

- a. The upshot is that the Landlord's Preliminary Objection dated 22nd March 2024 is hereby dismissed.
- b. The Application and Reference will be heard together.
- c. Tenant is granted the liberty to regularise its Reference by enlarging time to file a dated Reference for a further 14 days plus additional documents in support of the reference especially statement of accounts
- d. The landlord is also given 14 days to respond. File and Serve
- e. The Tenant's Reference and Application dated 19th March 2024 shall be fixed for hearing on 29th May 2024.
- f. Tenant to Pay rent for March and April and May before the Hearing Date. Interim Orders Extended.
- g. Costs shall be in the Cause.

HON A. MUMA

AG. CHAIR/MEMBER

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HON JACKSON ROP

Member

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Ruling dated, signed and delivered virtually by Hon A. Muma this 24th day of April 2024 in the presence of Mwanzia for the Tenant and Anyango holding Brief for Kipkorir for the Landlord.

HON A. MUMA

Ag. Chair/Member

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