



**Kamaru t/a St Anne Lifred Academy v Estate of Late Mathew Ndungu Kimani & another  
(Tribunal Case E128 of 2023) [2023] KEBPRT 435 (KLR) (19 July 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 435 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E128 OF 2023  
A MUMA, MEMBER  
JULY 19, 2023**

**BETWEEN**

**LIBERATTA N KAMARU T/A ST ANNE LIFRED ACADEMY ..... APPLICANT**

**AND**

**THE ESTATE OF LATE MATHEW NDUNGU KIMANI ..... 1<sup>ST</sup> RESPONDENT**

**GLADSOM AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**A. Parties and Representatives**

1. The Applicant Liberatta N Kamaru trading as St Anne Lifred Academy is the tenant and had rented space for business in the suit property erected on Land Reference Number 57/643 (hereinafter the “Tenant”).
2. The firm of Kabuthia Kamau and Associates Advocates represents the Tenant in this matter.
3. The Respondent is the Estate of the Late Mathew Ndungu Kimani and the owner of the suit property and had rented out the space on the suit premises to the tenant.
4. The firm of BM Gitu & Advocates represents the Landlord in this matter.

**B. Background of the Dispute**

5. The Applicant/Tenant entered into a lease agreement with the Landlord, Martin Ndungu Kimathi on November 15, 2017. The Lease was to run for a period of eight (8) years with the monthly rent being Kenya Shillings Two Hundred Thousand (Ksh 200,000). The tenant has been running a school business on the suit premises since the year 2016.



6. The Tenant moved this vide a Reference and a Notice of Motion filed under a Certificate of Urgency both dated February 3, 2023 on a complaint that the Landlord through Gladsom Auctioneers unlawfully proclaimed her goods of trade on disputed rent arrears.
7. On April 4, 2023, this Honourable Tribunal issued orders that;
  - i. The Application be certified as urgent;
  - ii. The Respondents/ Landlords and their agent Gladsom Auctioneers be and are hereby restrained from levying distress and/or removing the proclaimed goods from Tenant's business premises pending the hearing of the Application inter-partes;
  - iii. The OCS Kasarani Police Station to assist in compliance
  - iv. The Application be served for hearing on March 6, 2023.
8. Subsequently, on April 3, 2023, the Landlords filed a Notice of Preliminary Objection contending that the Tribunal lacked jurisdiction to hear and determine this reference as the same offends Section 2 of the [\*Landlords and Tenant \(Shops, Hotels and Catering Establishments\) Act\* \(Cap 301\)](#). It is the Landlords case that the Reference filed by the Tenant is defective and ought to be struck out as it pertains to an uncontrolled tenancy.

#### **C. The Landlord's Claim**

9. The Landlord filed submissions dated April 20, 2023. The Landlord submitted that the Tribunal lacked jurisdiction to hear and determine the Tenant's/ Applicants case as the same was an uncontrolled tenancy.
10. The Landlord submits that the Tenant and deceased Landlord executed a Lease Agreement dated November 15, 2017 and the same was to run for a period of 8 Years. The Landlords also submits that the Tenant approached the Tribunal after six years of the tenancy.
11. They argued that pursuant to the provisions of Section 2 of the [\*Landlord and Tenants \(Shops, Hotels and Catering Establishments\) Act\*](#), a controlled tenancy means a tenancy which has; not been reduced into writing, or a tenancy which has been reduced into writing and which is for a period not exceeding five years relied on the case of [\*The Good Earch Group v Kenya Railways Corporation\*](#) [2022] eKLR in support of their case.
12. Ultimately, the Landlords urged the Tribunal to allow the Preliminary Objection and dismiss the Tenant's reference with costs to the Landlord.

#### **D. The Tenant's Claim**

13. The Tenant also filed written submissions opposing the notice of preliminary objection. The Tenant stated that the Notice of Preliminary Objection was filed to oppose their reference dated February 3, 2023 which sought to restrain the 1<sup>st</sup> and 2<sup>nd</sup> Respondent from levying distress on the already proclaimed goods.
14. The Tenant submitted that the tenancy was a controlled tenancy and therefore this Honourable Tribunal had jurisdiction to hear and determine the matter. The Tenant submitted that Section 2 (b ) (ii) of the [\*Landlord and Tenant \(Shops, Hotel and Catering Establishments\) Act\*](#) provided that a "controlled tenancy" means a tenancy of a shop, hotel or catering establishment that contains provision for termination otherwise than for breach of covenant, within five years from th commencement thereof..."



15. It is the Tenant's case that the Lease Agreement executed between the deceased Landlord and the Tenant contained a provision for termination under clause 8 of the Agreement. The Lease provided that;

"Notice to terminate Lease

It is hereby agreed that if either party shall desire to terminate this Tenancy Agreement, the party shall give the other a Notice in writing of Six (6) months and the Lessee shall yield up the said premises in good and Tenable repair and condition in accordance with the covenants hereinbefore contained.'

16. It is therefore the Tenant's case that a plain reading of clause 8 of the Agreement therefore means that section 2(1) (b) (ii) falls in this case as the Agreement provides for a termination clause other than for breach of covenant thus making it a controlled tenancy.
17. The Tenant relied on the cases of *Mohamed Nur Abdullahi v Al-sawaw Mohammed Abdulgader & Another* {2021}eKLR and *Al- Riaz International Limited v Ganjoni Properties Ltd* [2015]eKLR to support their case.
18. They therefore urged the Tribunal to dismiss the Landlord's Notice of Preliminary objection.

#### **F. List of Issues for Determination**

19. Having given full consideration to the Landlord's Notice of Preliminary Objection, submissions filed by Counsels, the issue for determination is;
- a) Whether this Tribunal has Jurisdiction to hear and determine the matter and consequently whether the Preliminary Objection raised is merited?

#### **G. Analysis & Determination**

20. The Preliminary Objection filed by the Landlord raises fundamental issues discussed herein below:
- a) Whether this Tribunal has Jurisdiction to hear and determine the matter and consequently whether the Preliminary Objection raised is sustainable?

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 down its tools where want of jurisdiction is deemed or assumed not to exist. 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."

21. The Landlord through a notice of Preliminary Objection dated April 3, 2023 challenged the jurisdiction of this Tribunal to hear and determine this matter on the ground that the tenancy relationship between the Landlord and the Tenant in this matter is not a controlled tenancy.
22. The question arising therefore is whether the relationship between the Tenant and the Landlord is subject to cap 301.



Under Section 2(i) of Cap 301, a controlled tenancy means 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 date thereof or
  - iii. Relates to premises of class specified under subsection (2) of this section.

23. The Landlord in their submissions argues that the Lease Agreement dated November 15, 2017 was to run for a period of Eight (8) years and as such the same does not give rise to a controlled tenancy. The tenant on the other hand argues that the Agreement contains a provision for termination otherwise than for breach and as such the same squarely falls under Section 2(1) (b) (ii) of Cap 301.

24. In *Republic v Chairperson - Business Premises Rent Tribunal at Nairobi & another Ex-Parte Suraj Housing & Properties Limited & 2 others* [2016] eKLR, the Judge cited with approval the case of *Pritam vs Ratilal and Another* Nairobi HCCC No 1499 of 1970 [1972] EA 560 where it was stated as follows:

“Therefore the existence of the relationship of landlord and tenant is a pre-requisite to the application of the Act and where such relationship does not exist or it has come to or been brought to an end, the provisions of the Act will not apply. The applicability of the Act is a condition precedent to the exercise of jurisdiction by a Tribunal; otherwise, the Tribunal will have no jurisdiction. There must be a controlled tenancy as defined in section 2 to which the provisions of the Act can be made to apply. Outside it, the Tribunal has no jurisdiction.”

25. A quick perusal of the Lease Agreement tendered before this Honourable Tribunal reveals that there indeed exists a clause on termination under clause 8 of the Agreement. Where each party shall give the other a six month notice in writing to yield up the premises.

26. In determining the meaning of controlled Tenancy, the Court of Appeal in *Khalif Jele Mohamed & another v Republic & another* [2019] eKLR stated:

“In the present case, the termination clause was a blanket provision that gave liberty to the parties to terminate at any time and for any reason within the 6-year term of the tenancy. In effect, it could be invoked by either party, and either party could terminate the tenancy within the first 5 years of the term or even 5 years after commencement of the tenancy. In effect, as worded, the termination clause did not exclude termination of the tenancy within the first 5 years of the term. It was in fact permissive of termination within 5 years from the commencement of the tenancy. To that extent we are satisfied that the termination as worded brought the tenancy within the meaning of a controlled tenancy under Section 2 (1) (b)(ii) of the Act. Consequently, the tribunal was clothed with jurisdiction over the matter.”

27. The Tenancy herein can therefore be safely held to be controlled, making this tribunal well clothed with the jurisdiction to hear and determine the dispute herein.



## **H. Orders**

- a. The upshot is that the landlord's preliminary objection dated April 3, 2023 is hereby dismissed with costs to the Tenant.
- b. The tenant's reference and application dated February 3, 2023 shall be fixed for hearing on September 7, 2023.

**HON A. MUMA**

**MEMBER**

**BUSINESS PREMISES RENT TRIBUNAL**

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY BY HON A. MUMA THIS 19<sup>TH</sup> DAY OF JULY 2023 IN THE PRESENCE KAMAU FOR THE TENANT AND MUNGE FOR THE LANDLORD.**

**HON A. MUMA**

**MEMBER**

**BUSINESS PREMISES RENT TRIBUNAL**

