



**Bina Wholesalers v Baringo Traders (Tribunal Case E217 of 2023)
[2024] KEBPRT 467 (KLR) (4 April 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 467 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E217 OF 2023
GAKUHI CHEGE, CHAIR & J OSODO, MEMBER
APRIL 4, 2024**

BETWEEN

BINA WHOLESALERS TENANT

AND

BARINGO TRADERS LANDLORD

RULING

1. The Landlord/Respondent filed a notice of preliminary objection dated 8th January 2024 to the Applicant's/Tenant's notice of motion application dated 7th December 2023 on the following grounds;
 - i. That the Applicant's application and entire Reference is defective, frivolous, incompetent and an abuse of the court process.
 - ii. That this Tribunal/Court has no Jurisdiction to hear and entertain the application and/or Reference herein.
 - iii. The Application/reference is res judicata.
2. The preliminary objection was directed to be canvassed by way of written submissions and both parties complied. The Landlord's/Respondent's submissions are dated 8th February 2024 while the Tenant's/Applicant's submissions are dated 13th February 2024.
3. According to the Landlord, the Applicant was a tenant in its premises known as Nakuru Municipality Block 5/114. Sometimes in the year 2019, the Respondent who was then the Landlord, issued the Applicant with a notice of intention to terminate their tenancy dated 26th June 2019. The said notice was received on 17th July 2019 and signed for on 18th July 2019.
4. It is submitted that the said notice was expressed to take effect on 1st November 2019 pursuant to Section 4(4) of Cap. 301 and that the same was in the prescribed form. The Applicant issued a letter



dated 23rd July 2019 notifying the Landlord that it would not comply with the notice and promised to file a Reference in opposition thereto. However, no Reference was filed. The Landlord's Counsel gives a historical background on what transpired thereafter but it is our view that it is not necessary to replicate the same for purposes of determining the preliminary objection.

5. The Landlord's Counsel submits that the landlord/tenant relationship lapsed as a result of which the landlord moved to the Subordinate Court vide Nakuru MCELC/E196/21 at the Chief Magistrate's Court which matter was still ongoing.
6. Citing the decision in the case of *New Solta Vs Naivasha Southlake Sacco Ltd* (2021) eKLR, the Landlord's Counsel submits that existence of the relationship of landlord and tenant is a pre-requisite to the application of Cap. 301 and where such relationship does not exist or it has come 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.
7. The Landlord's Counsel has further relied on the case of *Republic vs Business Premises Rent Tribunal & Another Ex-parte Albert Kigera Karume* [2015] eKLR which cited the case of *Re Hebtulla Properties Ltd* (1979) KLR 96, in which the court dealt with the provisions of Section 12 of *Cap 301* and stated as follows;

“The tribunal is a creature of statute and derives its powers from the statute that creates it. Its jurisdiction being limited by statute, it can only do those things, which the statute has empowered it to do since its powers are expressed and cannot be implied...The powers of the tribunal are contained in section 12(1) of the Act and anything not spelled out to be done by the Tribunal is outside its area of jurisdiction. It has no jurisdiction except for the additional matters listed under Section 12(1) (a) to (n). The Act was passed so as to protect Tenants of certain premises from eviction and exploitation by the landlord and with that in mind, the area of jurisdiction of the Tribunal is to hear and determine references made to it under section 6 of the Act. Section 9 of the Act does not give any powers to the tribunal, but merely states what the Tribunal may do within its area of jurisdictionit would be erroneous to think that section 12(4) confers on the Tribunal any extra jurisdiction to that given by or under the Act elsewhereSection 12(4) of the Act must be read together with the rest of the Act and when this is done, it becomes apparent that the complaint must be about a matter the Tribunal has jurisdiction to deal with under the Act and that is why the complaint has to relate to controlled tenancy ..The Act uses the words “any complaint” and the only qualification is that it must be “relating to a controlled tenancy”.

8. It is further submitted that the complaint that has been brought before this Tribunal does not relate to a controlled tenancy, the Landlord-Tenant relationship having terminated when the Applicant failed to file a reference before 1st November 2019 and that being the case, this Tribunal lacks jurisdiction to determine the complaint.
9. According to the Landlord, upon termination of the Landlord-Tenant relationship, the Applicant continued occupying the premises knowing that the tenancy lapsed which necessitated the Respondent to move the Subordinate Court at Nakuru Chief Magistrate's Court.
10. He submits that the mere occupation of the premises is not a renewal of the tenancy relationship. The Applicant cannot presume that because they are still in occupation of the premises and the fact that the Respondent's suit for their eviction at the Subordinate Court has not been determined, there exists



a controlled tenancy between itself and the Respondent. The Landlord's Counsel cites the court of appeal decision in Nandlal Jivraj Shah & 2 Others (all trading as Jivaco Agencies v Kingfisher Properties Limited) (2015) eKLR, wherein it was held as follows;

"Similarly, the proposition that a controlled tenancy continues to exist merely because the appellants are still in occupation of the premises is, with due respect to learned counsel, preposterous. No provision of law creates controlled tenancies by virtue of mere occupation of premises and with non-payment of rent no less! The fact that the respondent is yet to evict the appellants does not serve to resurrect a controlled tenancy which has already run its course and been terminated."

11. The Landlord's Counsel further submits that the instant suit is Res Judicata under Section 7 of the Civil Procedure Act, which provides that;

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

12. Based on the said provision, it is submitted that once an issue has been raised before a court of competent jurisdiction for determination which involves the same parties over the same issue, then it must rest once that court decides. It is the Landlord's case that the parties in the BPRT 173 of 2019 are three, that is the Applicant herein, Bina Wholesalers, West Commercial & Menengai Spices. The subject matter therein, being tenancy of property known as Nakuru Municipality Block 5/114 which is also the subject matter herein.

13. It is thus submitted that the institution of this suit by the Applicant serves to cause disorder and confusion in the adjudication process and it is an attempt to bite the cherry for the second time which this court should jealously refuse. The Applicant was listed in the order as the 1st Tenant/Applicant in BPRT 173 of 2019 and now attempts to camouflage under this cause and re-introduce adjudication of the same issues raised in the former suit.

14. The Landlord further relies on Section 6 of the Civil Procedure Act which provides that;

"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

15. It is submitted that the Respondent instituted a suit at the Subordinate Court seeking eviction of the Applicant who has adamantly refused to move out of the premises in ELC Case No. E196 of 2021 at Nakuru Subordinate Courts. The suit is alive and active before the said Court. It is therefore submitted that the institution of another suit when there is a subsisting suit over the same issue by the Applicant serves to cause multiplicity of suits between the parties over the same subject matter which is an abuse of the court process. It is urged that this court ought to stop the Applicant from enhancing multiplicity of suits, he is aware of the suit at the Subordinate Court and that is why he appointed an advocate to defend the same. According to the Landlord, the instant application was calculated to cause delay in disposing of the suit at the Subordinate Court. When the matter came up for hearing on 30th January



2024, the Applicant's submission was to have the proceedings stayed pending determination of the application herein which did not see the light of the day.

16. The Landlord's Counsel relies on the case of *Ram Hospital Limited v Ramji Meghji Gudka Limited* [2022] eKLR and the Supreme Court decision in *John Florence Maritime Services Limited & Another vs Cabinet Secretary, Transport and Infrastructure & 3 Others* [2021] eKLR, at paragraph 54 where it was held as follows;

"The doctrine of res judicata in effect, allows a litigant only one bite of the cherry. It prevents a litigant or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits which would ordinarily clog the courts apart from occasioning unnecessary costs to the parties and it ensures that litigation comes to an end and the verdict duly translates into fruits for one party and liability for another conclusively."

17. The Landlord's Counsel further cites the decision in *Republic-vs- Paul Kihara Kariuki, Attorney General & 2 Others ex-parte Law Society of Kenya* [2020] eKLR, where the High court addressed the doctrine of res-Subjudice in *Kenya National Commission on Human Rights -Vs-Attorney General Independent Electoral & Boundaries Commission & 16 Others (Interested parties)* wherein it was held by the Supreme Court of Kenya as follows;

"67. The term "Subjudice is defined in Black's Law Dictionary 9th edition as "Before the court or judge for determination"

The purpose of subjudice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts with competent jurisdiction issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res subjudice must therefore establish that there is more than one suit over the same subject matter, that one was instituted before the other, that both suits are pending before courts of competent jurisdiction and lastly, that the suits are between the same parties or their representatives."

18. It is thus submitted that this suit ought to be stayed as it was filed later in 2023 while the suit at Nakuru Chief Magistrate's Court MC ELC E196 of 2021 was coming up for hearing on the 13th February 2024. The applicant should await the outcome of the said suit.
19. On the other hand, the Tenant's Counsel submits that there is an existing tenancy relationship between the two parties herein on account of the fact that the Respondent has been receiving and acknowledging monthly rent for the premises with the last payments being for the months of January and February 2024. The act of receiving rent ever since the Applicant and the Respondent first Reference to the Tribunal were dismissed in 2019 created a tenancy relationship by conduct and therefore, the Respondent is estopped from claiming that the Applicant is not its Tenant. It has never refused to accept rent from the Applicant with an intention to communicate that their relationship had been severed. Neither has it ever refunded rent to the Applicant. The tenancy therefore created is a periodic tenancy between the Applicant and the Respondent.



20. On the issue of Res Judicata, it is submitted that the fact that the Applicant's application to file reference out of time was dismissed does not bar the Applicant from properly approaching this Tribunal as a matter of fact, the substantive issue on the reference having not been heard and determined and therefore it cannot be Res Judicata. It is the Application for extension of time that was dismissed and not the reference.
21. According to the Tenant, the suit before the Magistrate's Court is improperly before it for it relates to eviction of the Applicant from a controlled premise which only this Tribunal has jurisdiction to handle in the first instance. Under Section 12(1)(e) of [Cap 301](#), this Tribunal has powers to issue orders for recovery of possession by the Landlord.
22. The Tenant's Counsel cites the decision of this Tribunal in the Case of [Andrew Biketi Wabuyele v G.H. Tanna & Sons Holding Limited & another](#) [2022] eKLR wherein Hon A. Muma faced with a similar issue held as follows;

“I have carefully considered the evidence procured, and in deed find that the same ex-parte application was not served upon the Tenants. Right to be heard is a constitutional right which ought to have been exercised and more so where the forum being moved was not the same forum envisaged by the law. It is not right for litigants to forum shop where the law creates an avenue. I am not in any way sitting on appeal or review of the orders in 40/2021 but I find that orders made where jurisdiction is wanting are no orders at all. I cannot therefore shut the door to the Tenant who has now moved the right forum for protection. This would lead to a miscarriage of justice. “
23. According to the Tenant, it is clear that the claim by the Respondent was filed before a court devoid of jurisdiction. The suit was nullity ab initio and was not transferable to another court as jurisdiction cannot be conferred by consent and ultimately, all orders emanating from that suit are null and void.
24. The Tenant also relies on the decision in Nakuru BPRT No. E105 of 2023 between *Zablon Mugwima Kiarie & Another Vs Nelson Mandela* where this Tribunal held that it had jurisdiction to hear and determine the Reference and application by the Landlord despite the fact that the Tenant had earlier on filed a suit before Kericho Chief Magistrate's Court in the year 2021 and a temporary injunction order issued.
25. It is therefore argued that the relationship between the Applicant and the Respondent in this matter is that of Landlord and Tenant and moving to the Magistrate's Court to file an eviction suit and calling the Applicant a trespasser as the Respondent continued to enjoy monthly rent from the Applicant is an abuse of the court process.
26. As can be discerned from the foregoing analysis, the issues in dispute in this matter are highly contested between the two parties and relate to mixed law and fact. This Tribunal cannot determine the disputed issues without taking evidence as doing so may occasion a miscarriage of justice.
27. The objection by the Respondent to the instant suit is truly not on pure points of law as envisaged in the celebrated case of *Mukisa Biscuits Manufacturing Company Limited Vs West End Distributors*



Limited (1969) E.A 696. In the case of *Oraro Vs Mbaja* (2005) eKLR at page 3/8, Justice J.B Ojwang (as he then was) ably discussed what constitutes a preliminary objection and observed as follows;

“Mr. Ougo buttressed his submission by drawing from the Court of Appeal decision in *Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd* [1969] E.A. 696. Of preliminary objections, Law, JA in that case said (p.700):

“I agree that the application for the suit to be dismissed for want of prosecution should have taken the form of a motion, and not that of a ‘preliminary objection’ which it was not. 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 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.”

And to the same effect Newbold, P stated (p.701):

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.’

28. The Judge went on to observe as follows;

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.”

29. Given the length of the submissions and arguments tendered by both Counsel in this matter to buttress their respective clients’ positions, we find and hold that the issues raised in this matter ought to proceed for hearing by way of viva voce evidence in which witnesses will be cross examined on their evidence in order to test the veracity thereof.

30. We also find that under Section 12(1)(a) of *Cap. 301*, this Tribunal has power to hear and determine whether any tenancy is controlled or not. We therefore find that this Tribunal is clothed with the requisite jurisdiction to entertain the instant proceedings notwithstanding the pendency of Nakuru MCELC No. E196 of 2021 in absence of any order from the Superior Court staying the same.

31. As regards costs, the same are in this Tribunal’s discretion under Section 12(1)(k) of *Cap. 301*, Laws of Kenya but always follow the event unless for good reasons otherwise ordered. We shall order that costs of the preliminary objection shall abide the outcome of the main Reference.

32. In conclusion, the following orders commend to us in this matter;



- a. The Landlord's/Respondent's preliminary objection dated 8th January 2024 is hereby dismissed.
- b. The application and reference dated 7th December 2024 shall proceed to hearing by way of viva voce evidence and determination on their merits.
- c. Both parties shall file and exchange their witness(es) statements and documents in support of their respective cases within the next 21 days from the date hereof.
- d. The matter shall be fixed for mention to confirm compliance and fix a hearing date.

Orders accordingly.

DATED, SIGNED & VIRTUALLY DELIVERED THIS 5TH DAY OF APRIL 2024

HON. GAKUHI CHEGE - PANEL CHAIRPERSON

HON. JOYCE A. OSODO - PANEL MEMBER

In the presence of Owuor for the tenant/applicant

In the absence of the landlord

Mention on 6th May 2024.

Directions and mention notice to issue

