



**Njuguna v Faza Properties Limited & another (Tribunal Case
E268 of 2023) [2023] KEBPRT 425 (KLR) (Civ) (1 August 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 425 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
CIVIL
TRIBUNAL CASE E268 OF 2023
A MUMA, MEMBER
AUGUST 1, 2023**

BETWEEN

EPHANTUS WANJOHI NJUGUNA TENANT

AND

FAZA PROPERTIES LIMITED 1ST RESPONDENT

PETER MUCHENDU GITONGA 2ND RESPONDENT

RULING

A. Parties and Representatives

1. The Applicant Ephantus Wanjohi Njuguna is the tenant and had rented space for business in the suit property stalls number M31, Digital Shopping Centre Moi Avenue. (Hereinafter the “Tenant”).
2. The firm of Obonyo Ngani Advocates represents the Tenant in this matter.
3. The 1st Respondent Faza Properties Limited is the Landlord and the owner of the suit property and had rented out the space on the suit premises to the tenant.
4. The 2nd Respondent was the Tenant’s business partner.
5. The firm of S.N Thuku & Associates Advocates represents the Landlord in this matter.

B. Background of The Dispute

6. The Applicant/Tenant is the registered owner of a business known as Nephic Global Agencies and the business partner of the 2nd Respondent in Compshub Centre Solutions.



7. The Applicant/ Tenant entered into lease agreement dated 1st June ,2021 with the Landlord. The Tenant avers that he has been occupying the business suite premises since 1st June, 2021 and has been paying his monthly rent of Ksh. 30,000 without fail.
8. The Tenant alleges that the Landlord issued him with a notice to vacate the suit premises as he wished to let the premises to another tenant and at a higher monthly rent.
9. Consequently, the Tenant filed a Reference dated 9th March, 2023 seeking the intervention of this Honorable Tribunal.
10. It is the 2nd Respondents case that the tenant's intention is to evict him from the partnership business through illegal means.
11. The 2nd Respondent then raised a preliminary objection in his replying affidavit stating that this Honourable Tribunal lacked jurisdiction to hear and determine this matter as the same concerns a shareholding between the applicant and himself in Compshub Centre Solutions.

C. The Tenant's Claim

10. The Tenant avers that the Landlord was convinced by the 2nd Respondent to evict him from the business premises as the 2nd Respondent wishes to start the same business as the Tenant.
11. The Tenant submits that the 2nd Respondent has, out of malice attempted to convince the Landlord to evict him in order to pass ownership of the premises to him at a higher monthly rate. The tenant claims that the 2nd Respondent offered to pay twice the amount of the monthly rent had he should the Landlord evict the tenant.
12. The Tenant further avers that the 2nd Respondent has consistently been interfering with the Tenant's business operations at stall number M31 Digital Shopping Centre, Moi Avenue Nairobi.

The 2nd Respondent's Claim

10. It is the 2nd Respondent's case that the Tenant is the registered owner of Nephic Global Agencies and that he and the tenant are business partners in Compshub Centre Solutions.
11. He states that they fell out in 2023 when the tenant illegally removed him as a registered partner of Comps hub Centre Solutions.
12. The 2nd Respondent raised an issue in the Replying Affidavit stating the Tribunal does not have jurisdiction to hear and determine this matter.
13. The 2nd Respondent further states that upon developing issues with the Tenant, he is no longer occupying stall market number M31 Digital shopping mall and he has since moved to another stall. The 2nd Respondent submits that the main dispute is between two business partners where business transaction collapsed.
14. Having given full consideration to the Preliminary Objection raised, the issue for determination is;
 - a) Whether this Tribunal has Jurisdiction to hear and determine the matter?

F. Analysis & Determination

10. The 2nd Respondent raised a Preliminary Objection in his replying affidavit 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?

11. 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] KLR 1, 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.

12. The 2nd Respondent through a replying affidavit dated April 12, 2023 challenged the jurisdiction of this Tribunal to hear and determine this matter on the ground that the real issue in dispute is between two business partners regarding the shareholding of a business.
13. In his submissions, the Tenant contends that the real issue is whether the tenancy agreement remains in force. I note that there is a lease agreement in place is between the Tenant and the 1st Respondent, Faza Properties Limited. Notably, the said Landlord has not entered any appearance and neither has he responded to any of the issues filed against him.
14. The question therefore arising is whether there exist a tenancy relationship between the Tenant and the Landlord 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.
15. The Sub Lease availed before this Tribunal shows that the Tenancy is to run for a period of 5 years and 3 months. The same also contains a termination clause.
14. 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.”



15. A perusal of the reference filed by the Tenant indicates that the Landlord wanted to unlawfully evict him from the suit premises as the 2nd Respondent had offered to pay higher monthly rate to the Landlord. The Landlord has neither confirmed nor denied this position.
16. Indeed, it is clear that the relationship between the Tenant /Applicant and the 2nd Respondent is at its rocky stage and there are many issues arising from the same.
17. I will consider the issue on the tenancy relationship which is safely held to be controlled, making this tribunal well clothed with the jurisdiction to hear and determine the dispute herein.
18. The Landlord did not issue a valid notice as per section 4 (2) and (4) of the *Landlord And Tenant (Shops, Hotels And Catering Establishments) Act* which states that ;

“ A landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the tenant, any term or condition in, or right or service enjoyed by the tenant under, such a tenancy, shall give notice in that behalf to the tenant in the prescribed form.

... No tenancy notice shall take effect until such date, not being less than two months after the receipt thereof by the receiving party,
19. The termination of such tenancy between the Tenant and the Landlord is therefore illegal.

Orders

- a. The upshot is that the 2nd Respondent’s Preliminary Objection dated April 12, 2023 is hereby dismissed as it was raised by a party not part of the tenancy relationship.
- b. In addition to (a) above, the Tenant’s Reference and Application dated 9th March 2023 are also compromised by virtue of the fact that the pleadings as filed involve parties who are not in a tenancy relationship. Parties should therefore move to the right forum to determine rights of the 2nd Respondent.
- c. The Tenant, shall remain in the premises and continue paying rent as and when it falls due.
- d. The 2nd Respondent is hereby restrained from accessing the suit premises and interfering with the possession of the tenant.
- e. Each party shall bear their own costs.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY BY HON A. MUMA THIS 1ST DAY OF AUGUST,2023 IN THE ABSENCE OF THE TENANT AND MAINA FOR THE 2ND RESPONDENT.

HON A. MUMA

MEMBER

BUSINESS PREMISES RENT TRIBUNAL.

