



**Lesedi Developers Limited v Square Meter Limited & another (Tribunal
Case E351 of 2023) [2023] KEBPRT 641 (KLR) (27 October 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 641 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E351 OF 2023
A MUMA, AG. CHAIR
OCTOBER 27, 2023**

BETWEEN

LESEDI DEVELOPERS LIMITED APPLICANT

AND

SQUARE METER LIMITED 1ST RESPONDENT

J.K. WANDERI AUCTIONEERS 2ND RESPONDENT

RULING

Parties and their Representatives

1. The Applicant herein is the current occupant of the Suit Premises owned by the Landlord being Assumption Centre 6th Floor erected on land known as LR No. Nakuru Municipality Block 5/1626 within the Republic of Kenya.
2. The Applicant is represented by the Firm of Mwenda Njagi & Company Advocates.
3. The 1st Respondent although sued as the Landlord, is the Property Management Company currently managing the premises on behalf of the Landlord being Catholic Diocese of Nakuru (Registered Trustees).
4. The 2nd Respondent is an Auctioneering Firm instructed by the 1st Respondent to levy distress upon the Applicant.
5. The Respondents are represented by the Firm of Mutimu Kangatta & Company Advocates.

Dispute Background

6. Vide a Reference dated 4th April 2023 and Notice of Motion Application of even date, the Applicant herein approached this Tribunal seeking inter alia, orders that the 1st Respondent/Landlord be



ordered to allow unlimited ingress and egress of the Tenant, access, peaceful, quiet and uninterrupted occupation of the premises known as Assumption Centre 6th Floor erected on land known as LR No. Nakuru Municipality Block 5/1626.

7. Subsequently, on 18th April 2023, the 1st Respondent filed a Replying Affidavit sworn by Mary Mulwa as well as a Preliminary Objection contending the jurisdiction of this Tribunal to hear and determine the present matter. It is the said Preliminary Objection that is the subject of this Ruling.

The Respondents' Case

8. The Respondents filed written submissions dated 31st May 2023. They submitted that the existence of a Controlled Tenancy relationship is a prerequisite for the exercise of jurisdiction by this Tribunal; without an existing Controlled Tenancy relationship between the parties, the Tribunal cannot have the requisite jurisdiction to hear and/or determine the disputes between the parties litigating before it.
9. The Respondents further submitted that from the Affidavit evidence that has been placed before the Tribunal by the Respondents, it is crystal clear that the Respondents named herein have no tenancy relationship of any kind whatsoever between themselves and the Applicant herein. The Respondents furthered this argument by relying on their Affidavit dated 18th April 2023 in which it was demonstrated that the Applicant is and has been a Tenant of the Catholic Diocese of Nakuru (Registered Trustees) in respect of the suit premises pursuant to a Letter of Offer dated 8th August 2020.
10. The Respondents also submitted that the said Letter of Offer gave the Applicant herein a Tenancy for a period of six (6) years with effect from 1st October 2020. Further, that the said Letter of Offer does not provide for termination of the Tenancy for reasons other than breach of the terms of the Tenancy.
11. It was the Respondents submission that even if the Applicant and its true Landlord, The Catholic Diocese of Nakuru (Registered Trustees) had a tenancy relationship, the relationship between them is obviously not a controlled tenancy relationship even if it were, this Tribunal would still not have the requisite jurisdiction to hear and determine any tenancy dispute that may exist between them, in view of the Letter of Offer dated 4th August 2020.
12. Ultimately, the Respondents urged this Tribunal to strike out/dismiss the Applicant's Reference and Notice of Motion both dated 4th April 2023 for want of jurisdiction on the part of the Tribunal.

The Applicant's Case

13. The Applicant also filed written submissions dated 13th June 2023. It submitted that the rent that it paid for the duration of their tenancy was KShs.100,000.00 only as evidenced in the annexures to the Applicant's Supporting Affidavit dated 4th April 2023. The terms between the Applicant and the 1st Respondent were unwritten and comprised of payment receipts and M-Pesa messages.
14. The Applicant also submitted that the Letter of Offer dated 4th August 2020 indicated expressly at clause 28 that there was to be a Standard Lease within 21 days and that it was not to be in its stead but rather a proposal of terms. Additionally, the Applicant never executed any lease agreement with the 1st Respondent and therefore the 1st Respondent's Letter of Offer does not constitute a lease agreement.
15. The Applicant further submitted that the relationship is a Controlled Tenancy under section 2 of Cap 301 and that the Tribunal should be guided that the Letter of Offer cannot be a lease agreement that defeats the Controlled Tenancy between the Applicant and the 1st Respondent.
16. It was also the Applicant's submission that the drastic and hostile actions of instructing the 2nd Respondent to levy distress over disputed rent arrears are evidence that the 1st Respondent has



authority to act autonomously in as far as collecting and distressing rent for the suit premises are concerned.

17. The Applicant urged that the 1st Respondent's insistence that they are not the Landlord is paradoxical in nature since it has never proven that it has instruction to act on behalf of the Catholic Diocese of Nakuru (Registered Trustees) and that it lacks locus to raise any issues about other potential landlords.
18. The Applicant also submitted that it is abundantly clear that the 1st Respondent was receiving payments of rent as per the evidence adduced in the Applicant's Supporting Affidavit dated 4th April 2023. As such, the 1st Respondent has been collecting and enjoying rent and profits as per the terms agreed between them and the Applicant which fits the description envisaged in the definition of a "landlord" in Cap 301.
19. Ultimately, the Applicant urged that in consideration of its foregoing submissions, this Court finds that it has proven the existence of a Controlled Tenancy with the 1st Respondent as the Landlord.

Issues For Determination

20. I have given full consideration to the Tenant's Reference and Notice of Motion Application, Preliminary Objection, the rival affidavits and submissions of Counsel.
21. In my respectful view, I find that the sole issue that falls for determination is:

Whether the Respondents' Preliminary Objection dated 18th April 2023 is sustainable.

Analysis and Determination

22. Newbold, J.A. (as he then was) gave the legal fraternity the most commonly cited definition of a preliminary objection when he stated 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".

23. 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."

24. Such was the eminence of a preliminary objection at the time, a position which still prevails to date owing to its determinative nature in the event that it is successfully canvassed. It is in the matter before me and it is against the foregoing backdrop that the Landlord invites this Tribunal to so consider.
25. 'Jurisdiction' denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a Court or a Tribunal can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a Court or Tribunal therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae.
26. Section 2 of the [Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#) provides as follows:



For the purposes of this Act, unless the context otherwise requires—

“catering establishment” means any premises on which is carried out the business of supplying food or drink for consumption on such premises, by persons other than those who reside and are boarded on such premises;

“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 commencement thereof; or
 - (iii) relates to premises of a class specified under subsection(2) of this section

Provided that no tenancy to which the Government, the Community or a local authority is a party, whether as landlord or as tenant, shall be a controlled tenancy;

27. In view of the above provisions, it is clear that this Tribunal only has jurisdiction to hear and determine disputes in cases where Agreements are reduced to writing, Agreements which do not exceed a period of 5 years.
28. Moreover, jurisdiction is key in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint one in the court clothed with jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself.
29. 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.”
30. With regard to the basis of termination, the clause 18 of the Letter of Offer which allows for termination of tenancy in the event of breach and provides as follows:

“Breach of Covenants:

If the rent agreed or any part thereof shall at any time remain unpaid for fourteen (14) days after the due date (whether lawfully demanded or not) clause 7 notwithstanding or if at any time thereafter the Tenant is in breach of any of the covenants or conditions referred to in this Heads of Terms, it shall be lawful for the Landlord to re-enter the premises or any part thereof and thereupon the lease shall be terminated absolutely without prejudice to any



rights and remedies which may have accrued to the Landlord against the Tenant in respect of any breach of the Tenant's covenant."

31. A cursory look at clause 28 intimates that the contract between the parties was pegged on the Standard Lease to be executed within 21 days of the final proposed engrossed lease. It also provided for a period of 6 years for the lease. However, a Letter of Offer duly executed suffices as a contract proper able to govern parties.
32. In *Villa Care Ltd v Registered Trustees of the National fund for the Disabled of Kenya* [2014] eKLR it was held that:

“It is not in dispute that the amalgamated lease was not executed by the Plaintiff. Therefore, it is apparent that the guiding document when it comes to terminating the tenancy was the Letter of Offer dated 6th February 2009 as is clearly provided for at Clause 11 already restated at page 6 of this ruling.”
33. This read together with the termination clause which was only for breach of covenant and the 6 years term lease denies this court the jurisdiction as this is not a controlled tenancy.
34. In addition I have also noted that the Applicant has brought this suit against the Agent of the Landlord. However, as per the Letter of Offer dated 4th August 2020 indicates the Landlord as Catholic Diocese of Nakuru (Registered Trustees) who should have been sued as the proper party.

Determination

35. From the foregoing analysis, the orders that commends itself to this Tribunal are as follows:
 - a. The Respondents' Preliminary Objection dated 18th April 2023 is hereby upheld.
 - b. Tenant's Reference and Application both dated 4th April 2023 collapses.
 - c. Costs awarded to the Respondents at KShs.20,000.00.

HON A. MUMA

AG CHAIR/MEMBER

BUSINESS PREMISES RENT TRIBUNAL

RULING DATED, DELIVERED AND SIGNED AT NAIROBI ON THIS 27TH DAY OF OCTOBER, 2023 IN THE PRESENCE OF KANGATTA FOR THE RESPONDENTS/LANDLORD. NO APPEARANCE FOR THE TENANT/APPLICANT.

HON A. MUMA

AG CHAIR/MEMBER

BUSINESS PREMISES RENT TRIBUNAL

