



**Gikiri v Nanak Hospital Management Services & another (Tribunal Case E218 of 2023) [2023] KEBPRT 469 (KLR) (7 September 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 469 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E218 OF 2023  
P MAY, VICE CHAIR  
SEPTEMBER 7, 2023**

**BETWEEN**

**ESTHER WANJIKU GIKIRI ..... TENANT**

**AND**

**NANAK HOSPITAL MANAGEMENT SERVICES ..... LANDLORD**

**AND**

**DK MWANGI T/A KENYA SHIELD AUCTIONEERS ..... RESPONDENT**

**RULING**

1. The tenant approached the Tribunal by filing the reference dated February 24, 2023. Contemporaneous with the reference the tenant filed a notice of motion brought by way of certificate dated on an even date. The application sought for prayers of temporary injunction to be issued against the landlord to protect the tenant from the distress proceedings that had been commenced against her. The application was premised on the grounds set out on the face of the application and which I have summarized below:
2. The tenant averred that she entered into an unwritten tenancy agreement with the landlord for the lease of the demised premises at an agreed monthly rent of Kshs. 42, 500. The tenant stated that sometimes in May 2021, the landlord without any plausible reason closed the premises for nine (9) working days occasioning her great loss. Despite the said actions, the tenant remained on the demised premises and has been paying rent as when it fell due.
3. The tenant stated that the landlord proceeded to issue a proclamation notice against her over alleged rent arrears owed. She maintained that she was perplexed by the turn of events as she had always paid her rent as when it fell due.



4. The landlord opposed the application by filing a replying affidavit and notice of preliminary objection both dated March 10, 2023. The landlord accused the tenant of concealment of material facts as it alluded to the existence of a pending case being Milimani MCCC No. E8779 of 2021.
5. The landlord further stated that the levying of distress that it had initiated was well within the purview of the law as it had increased the rent as from May, 2021 and which the tenant had complied with the said rent increment.
6. The tenant filed a further affidavit to respond to the averments made in the Replying affidavit. She admitted to the existence of the civil suit No. CMCC E8779 of 2021 but was quick to state that the orders sought in the said suit was for damages after the premises were wrongfully closed. She therefore insisted that the substratum of the two proceedings were totally different hence the allegations of sub judice were unsubstantiated.
7. The parties elected to canvass the notice of preliminary objection and the merits of the application generally by way of written submissions.

### Analysis

8. As a matter of practice, the Tribunal has to make a determination on the first instance as the same goes to the jurisdiction of the Tribunal to deal with the present dispute. According to the Black Law Dictionary a Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

9. The above legal preposition has been made graphically clear in the now famous case of; Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd. [1969] E.A. 696. Where Lord Charles Newbold P. held that a proper preliminary objection constitutes a pure point of law. The Learned Judge then held that:-

“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 demurer 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 in 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 issue. The improper practice should stop”

10. I have further relied on the decision of; Attorney General & another v Andrew Mwaura Githinji & another [2016] eKLR:- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-

- (i) i) A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
- (ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and



- (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.
10. Section 6 of the [Civil Procedure Act](#) provides as follows; “No court shall proceed with the trial of any suit or proceedings 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 other court having jurisdiction in Kenya to grant the relief claimed”
  11. The Supreme Court in Advisory Opinion Reference No. 1 of 2017, [Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others \(Interested Parties\)](#) [2020] eKLR handled the issue of sub-judice. The Court observed as follows;
    - (67) The term ‘sub-judice’ is defined in *Black’s Law Dictionary* 9<sup>th</sup> Edition as: “Before the court or Judge for determination.” The purpose of sub-judice 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 between 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 sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit 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.
  12. In their submissions the landlord point out that it will serve the interest of justice therefore that by the doctrine of pendency and the provisions of section 6 of the [Civil Procedure Act](#) sub-judice this proceeding be stayed pending the determination of the suit filed at the Magistrates Court
  13. The parties admitted to the existence of the suit at the magistrate court but none has adduced any evidence of the pleadings filed so as to guide the Tribunal on the orders sought. The preliminary objection therefore fails as the Tribunal has to engage in fact finding.
  14. I am fortified by the decision in [Thika Min Hydro Co. Ltd v Josphat Karu Ndwiga](#) (2013) eKLR where the court held that:
 

“It is not the form in which the suit is framed that determines whether it is sub judice. Rather it is the substance of the suit and looking at the pleading in both cases.”
  15. I will now turn to the prayers sought by the tenant. The requirements for the grant of temporary orders of injunctions are now well settled as were discussed in the celebrated case of; *Giella v Cassman Brown*.
  16. An application for injunction must meet at least the first two principles espoused in the case of; *Giella v Cassman Brown and Co. Ltd* to wit:-
    - (i) An applicant must show a prima facie case with a probability of success.
    - (ii) An injunction will not normally be granted unless the applicant may otherwise suffer irreparable injury.
    - (iii) When the court is in doubt, it will decide the application on the balance of convenience.



17. The tenant has stated that they have been in the demised premises and that they have always paid rent as when it fell due. The landlord has disputed the rent payable and indicated that the same was increased. In making a decision at the interlocutory stage, the Tribunal must be cautious to ensure that where facts are contested, it does not make a conclusive decision before affording parties an opportunity to be heard adequately.
18. In view of the foregoing, it is my considered view that the issues raised can be ventilated during the hearing of the reference.
19. The upshot of the above is that the Tribunal issues the following orders:
  - a. The landlord's notice of preliminary objection dated March 10, 2023 is dismissed as it lacks merit.
  - b. The notice of motion dated February 24, 2023 is allowed in terms of prayer 3.
  - c. On costs, the outcome of the reference shall abide the costs the application.

**RULING DATED, SIGNED & DELIVERED VIRTUALLY THIS 7<sup>TH</sup> DAY OF SEPTEMBER 2023**

**HON. P. MAY**

**VICE CHAIR**

**9.2023**

**IN THE PRESENCE OF;**

**IMO JOSHUA H/B FOR OBUYA FOR THE TENANT**

**KANDERE FOR THE LANDLORD**

