



**Obuya v Nyiera (Tribunal Case E057 of 2023)  
[2023] KEBPRT 1217 (KLR) (18 December 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 1217 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E057 OF 2023  
M MAKORI, MEMBER  
DECEMBER 18, 2023**

**BETWEEN**

**TOM OMONDI OBUYA ..... LANDLORD**

**AND**

**KELVINS OKETCH NYIERA ..... TENANT**

**RULING**

1. The present claim was filed vide an application dated 21<sup>st</sup> September 2023 supported by the supporting affidavit of Idris Tom Omondi Obuya and which application was opposed vide a Replying Affidavit dated deposed to by Kelvin Odhiambo Oketch.
2. The Landlord sought for among other orders an eviction order to issue for the landlord against the tenant from Kisumu Jua Kali artisan plot number 475 and the recovery of rent arrears.
3. The Respondent on his replying affidavit and statement of defense deposed that the application is an attempt by the tenants to defraud him as there is no tenant-Landlord relationship.
4. From the totality of the pleadings filed by parties and submissions made, several issues pose themselves for determination:
  - a) Whether the landlord is entitled to the preliminary objection dated
  - b) Whether there is a Landlord/Tenant relationship in existence between the parties herein.
  - b) Whether the Landlord is entitled to the orders sought in the application dated 21<sup>st</sup> September 2023.
  - (c) Who is liable to pay costs of the suits?



## Whether the landlord is entitled to the preliminary objection dated

5. The tenant preliminary objection is based on the provisions of section 4 that the landlord is in clear affront of the said provisions and that the suit is premature or misplaced.
6. In the often-quoted case of; *Mukhisa Biscuit Vs West End Distributors*, the court stated that:

“...Preliminary objection is in the nature of what used to be a demurer. It raises pure points 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 facts have to be ascertained or if what is sought is the exercise of judicial discretion.”
7. Being a controlled tenancy, the appellants were obligated to comply with the prerequisites set out in sections 4(1), (2), (4) & (5) of the Act if they desired to terminate the tenancy. These provide:

“ 4. Termination of and alteration of terms and conditions in, controlled tenancy.

  - (1) Notwithstanding, the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be terminated, and no term or conditions or right or service enjoyed by the tenant of any such tenancy shall be altered, other than in accordance with the following provisions of this Act.

.....
  - (2) 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 on the prescribed form.

.....”
  - (4). No tenancy notice shall take effect until such date, not being less than two months after the receipt thereof by the receiving party as shall be specified therein.....
  - (5) A tenancy notice shall not be effective for any of the purposes of this Act unless it specifies the grounds upon which the requesting party seeks the termination, alteration or reassessment concerned and requires the receiving party to notify the requesting party in writing, within one month after the date of receipt of the notice; whether or not he agrees to comply with the notice.”
7. In assessment of the application filed it is clear that the orders sought are not only for eviction and termination of a controlled tenancy but also orders seeking for rent recovery. Several orders have been sought to which the preliminary objection does not raise points of law that the tribunal can direct its mind to.
8. The upshot of all the above assessment and reasoning is that the preliminary objection has no merit.



**Whether there is a Landlord/Tenant relationship in existence between the parties herein.**

10. 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.
11. Upon reading the Applicant's Application and the Respondent's replying affidavit, it is clear from the above statement the main issue in dispute that arises is if indeed a Landlord-Tenant relationship exists.
12. To support the claim, the landlord has sought to produce a receipt of payment to the Kisumu jua kali association showing that he is indeed a member and the legal owner of the said premise.
13. The tenants have proceeded to make a claim that the tenant has no stake in the premise and as such does not have authority to make demands on rent and any arrears in support of the claim, they sought to produce the association minutes on an alleged meeting that occurred in the Presence of both parties and the association officials.
14. I have analyzed the parties' submissions and all documents filed in this Tribunal. It is apparent that there is no evidence showing the existence of a tenancy agreement.
15. In assessment of the documents the tribunal notes that the landlord has not shown or attached any document to show that indeed rental payments have been made to him to seal the tenancy relationship.
16. The tenant has made claim that indeed the dispute has persisted for some time and there were indeed measures to resolve the issue and to which the association noted that the applicant was indeed a member but after defaulting in payment his membership was relinquished.
17. The existence of such a meeting and resolution has not been denied by the applicant and by the words in the minutes on the conclusion the officials claim that the applicant had lost his membership and only resurfaced to make a membership payment to the association.
18. Indeed, both parties acknowledge that the premises are run in trust by the association and a claim of tenancy ownership can only arise if the said authority is sought from the association.
19. By losing his membership at the association the applicant can not therefore prove ownership of the premise and is therefore precluded from claiming that he is the landlord of the premise.
20. In support of the above claim reliance is sought in the case of 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.”

21. In this case having established that there is tenant-landlord relationship it would be important to note that the tribunal has no jurisdiction.
22. The jurisdiction of Business Premises Rent Tribunal was aptly discussed in the case of; *Republic vs Business Premises Rent Tribunal & Another Ex- Parte Albert Kigera Karume* [2015] eKLR which cited with approval the case of; *Re Hebtulla Properties Ltd.* [1979] KLR 96; [1976-80] 1 KLR 1195 where 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 landlords 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 jurisdiction..... It would be erroneous to think that section 12(4) confers on the Tribunal any extra jurisdiction to that given by and under the Act elsewhere...Section 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 a controlled tenancy.... The Act uses the words “any complaint” and the only qualification is that it must be “relating to a controlled tenancy”.

23. This Tribunal derives its jurisdiction from the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, with respect to certain premises for the protection of tenants of such premises from eviction or from exploitation and for matters connected therewith and incidental thereto.
24. Noting that parties have not adduced evidence to show the existence of a tenancy agreement which is a contested issue, I have no option but to down my tools as it was stated in the case of; *Owners of the Motor Vessel ‘Lillian’ (s) versus Caltex Oil (Kenya) Ltd* [1989] KLR1, 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.

25. Based on the foregoing, it is established that the Landlord is not entitled to the prayers requested and as such the tribunal makes the following orders
  - a. The Applicant’s reference and notice of motion Application dated 21<sup>st</sup> September 2023 are hereby dismissed.
  - b. Each party shall bear its own cost.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 18<sup>TH</sup> DAY OF DECEMBER, 2023**



**HON. MIKE MAKORI**

**MEMBER**

**18. 12.2023**

