



**Kimani v Waithanji (Tribunal Case E1171 of 2023)
[2024] KEBPRT 302 (KLR) (13 March 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 302 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E1171 OF 2023
N WAHOME, MEMBER
MARCH 13, 2024**

BETWEEN

ZIPPORAH NJOKI KIMANI APPLICANT

AND

ELIAS BARAGU WAITHANJI RESPONDENT

RULING

1. The Tenant/Applicant initiated these proceedings by way of the reference dated 27th November 2023. The grievance in the reference was that:-

“The landlord has threatened to evict by issuing illegal notice to vacate contrary to Cap. 301 Laws of Kenya”.
2. The reference was accompanied by a notice of motion of even date. It principally sought to have the Tenant/Applicant allowed quiet enjoyment of the demised premises as found on the premises known as Nairobi plot No. 209/2279 along Charles Rubia Road.
3. The applicant also filed the further Affidavit sworn on the 11/12/2023. In all the Tenant’s case was that:
 - i. The Landlord had issued her with a notice to vacate which was not compliant with the law.
 - ii. She had carried out repairs and renovations at the premises valued at approximately Kshs.350,000/-.
 - iii. Had paid goodwill and rent deposit at Kshs.2,500,000/- and Kshs.90,000/- respectively.
 - iv. The landlord had depicted her in the eyes of the public in negative light when she was a legally complaint Tenant,



- v. The lease agreement between her and the landlord dated 1/8/2022 had a termination clause and therefore created a controlled tenancy.
 - vi. There was an ownership dispute related to the demised premises which was only resolved vide H.C.E.L.C case No. 501 of 2017 in favour of the landlord effective the 15/12/2021.
 - vii. The landlord had vide Tribunal case no. E087 of 2022 (Nairobi been restrained from in anyway interfering with the Applicants quiet enjoyment of the tenancy.
 - viii. The Applicant therefore sought that the landlord's preliminary objection be dismissed with costs.
4. The landlord on his part filed the Notice of preliminary objection dated 6/12/2013 and a replying affidavit sworn by himself on even date. The preliminary objection was on the following grounds:-
- i. That the Tribunal lacks jurisdiction to try this matter as there is a lease agreement for five years and three months between the applicant and the Respondent,
 - ii. That the tenancy is not a controlled tenancy within the meaning of Section 2(1) of Cap. 301 Laws of Kenya.
5. In his Replying affidavit aforesaid, the landlord asserted that:-
- a. His lease with the applicant was for a term of 5 years and 3 months commencing on the 1st August 2018 and to expire and/or lapse on the 30th November 2023.
 - b. The lease dated 1st June 2018 was a stranger to him and was entered into by the applicant and an imposter.
 - c. The tribunal had no jurisdiction to try this matter and should therefore down its tools and take no further step in these proceedings.
6. I have perused the materials placed before me and am of the view that the issues for determination in this matter are the following
- A Whether this Tribunal has the jurisdiction to hear this matter.
- B. Who should bear the costs of this matter.

Issue No. 1 – Whether this court has the jurisdiction to hear this matter.

7. There is no dispute and it is settled that having jurisdiction is the engine that drives any proceedings. In the celebrated case of *Owners of motor vessel "Lilians "s" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 the court of Appeal held that:-

“I think it reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it a court has no power to move one more step. As soon as a question of jurisdiction is raised the court should hear and dispose of that issue without further ado”.



8. I have no doubt that the best way to canvass the question of jurisdiction is by way of preliminary objection as initiated by the Landlord in this proceedings. In the Locus Classicus case of *Mukhisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 the court held that:-
- “A preliminary objection is in the nature of what used to be a demerour. It raises a pure point of law which is usually 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”.
9. From the foregoing, I find that the preliminary objection has been raised in a timely manner and that it satisfies the requirements and the principles set down in the case of *Mukisa Biscuits* supra. I will therefore proceed to determine whether the same is merited.
- Section 2(1) of the *Landlord and Tenant (Shops, Hotels and Catering Establishment act)* Cap 301 herein after “the act” defines a controlled tenancy as,
- “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”.
10. The lease Agreement herein and dated 1/8/2032 purports to have taken effect on the 1/8/2018. That was an impossibility in that the landlord was decreed the premises by the court in its judgment dated 15/12/2021 and the Decree thereof made on he 20th December 2021. The Landlord in his letter dated 18/1/2022 written by his advocates m/s Mbichi Mboroki and Kinyua Advocates addressed to the Tenant stated thus,
- “That pursuant to the decree of the court in HELC No. 501 of 2017 dated 15/12/2021 a copy herein attached, he is the bonafide owner of plot no. 209/2279 and therefore your rightful landlord with effect from the said date of 15th December 2021. You are HEREBY therefore advised to pay all your future rents rated at Kshs.45,000/- directly to the Landlord”.
11. The inference to this is that if the tenancy relationship between the parties commenced on the 15/12/2021 and was to lapse by the 30/11/2023, then the same was not for a term of 5 years and 3 months but one year 11 months and 15 days, thus a controlled tenancy. If on the other hand the landlord did not want the Tenancy not to be controlled, then the same should have run between the 15/12/2021 for five years and three months to the 15th day of March 2027 otherwise the landlord cannot be seen to want to eat his cake and still have it.
12. I also note that there has been in existence of BPRT case No. E087 of 2022 (Nairobi) where the applicant herein was the 1st Applicant and the respondent herein was the 2nd respondent in the matter. Though the Applicant says that the suit was decided in totality on the 26/1/2022, the attached orders speak to the matter having been fixed for hearing on the 22/2/2022. It is not clear as to what became of the said suit as the lease agreement dated 1/8/2022 is also silent on the same.
13. In the final analysis I am of the view that the notice of preliminary objection from the observations above has no merit and the same is dismissed.



Issued No. B- Who should bear the costs of this suit.

14. The proviso to Section 27 of the [Civil Procedure Act](#) has absolute clarity on this issue. Costs follow the event. I do not have any cause to depart from its wisdom. I will therefore grant costs of the dismissed notice of preliminary objection to the Applicant/Tenant.
15. In conclusion, the orders that commend to me are the following,
 - i. That the Notice of preliminary objection dated 6/12/2023 is dismissed.
 - ii. That the Applicant/Tenant is awarded costs at Kshs.10,000/- to be offset from the rent payable to the Respondent.
 - iii. That file BPRT No. E087/2022 (Nairobi) shall be placed together with this file before me for further directions.

RULING DATED, SIGNED & DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF MARCH, 2024.

HON. NDEGWA WAHOME MBS

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

Ruling delivered in the presence of M/S Kirera holding brief for Mr. Kinyua for the Landlord and in the absence of the Tenant, Tenant later appears.

Court: The matter will be mentioned on 16/4/2023 together with E087/2024 for further directions. The interim orders on record are extended to that date.

