



**Erotekt (Kenya) Limited v Oketch (Tribunal Case E064 of 2023)  
[2024] KEBPRT 687 (KLR) (2 May 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 687 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E064 OF 2023  
N WAHOME, MEMBER  
MAY 2, 2024**

**BETWEEN**

**EROTEKT (KENYA) LIMITED ..... APPLICANT**

**AND**

**MARY ADHIAMBO OKETCH ..... RESPONDENT**

**RULING**

1. This Ruling is on the Tenant/Applicant's Application dated the 30.10.2023 and the Landlord/Respondent's notice of preliminary objection dated 14.11.2023. These proceedings were triggered by the Landlord's notice of termination of tenancy dated 4.10.2023. The same was to take effect on the 1.1.2024.
2. The notice to terminate aforesaid was founded on Section 4(2) of the Landlord and Tenant (shops, hotels & Catering Establishments Act) Cap 301 hereinafter referred to as "the Act". The grounds for the sought termination were;-
  - a. That the Tenant has committed substantial breaches of the lease agreement dated 1.3.2019 by carrying out demolitions, renovations and constructions on the property without the parties having performed a joint inspection prior to the said works being effected and as such the Landlady's consent was not obtained or given as stipulated under clause six (6) of the lease agreement.
  - b. The Tenant has breached the terms of the lease agreement dated 1<sup>st</sup> March, 2019.
  - c. The Landlady intends to do major repairs and renovations on the premises.
3. The notice of termination was duly served by M/S Rachier Amollo LLP on behalf of the Respondent to M/S Wachakana & Co. Advocates for the Applicant vide the letter dated 5.10.2023. In response to the notice, the Applicant filed the Reference herein dated 25.10.2023 and which is said to be founded



on Section 12(4) of the Landlord and Tenant (Shops, Hotels and Catering Establishments Act) Cap 301.

4. The Complaint by the Tenant was that;-
  - i. That the Landlord through its agents and contrary to the terms and conditions of the lease agreement has unilaterally, unlawfully and illegally issued a notice to vacate dated 4.10.2023.
  - ii. That the Tenant will suffer irreparable damages and financial loss if the orders are not granted; and
  - iii. That it is in the interest of justice that the orders are granted.
5. The orders that the Tenant sought in the Reference are;-
  - i. That the Application be certified as urgent.
  - ii. That pending hearing and determination of this Reference, the Respondent/Landlady Mary Adhiambo Okech, her workers, relatives, agents, advisors be restrained from taking possession, evicting, threatening to evict or interfering with the Applicant's quiet and peaceful possession of the rented premises herein on LR No. 7473 situate at Ahero in Kisumu.
6. The Reference was accompanied by a notice of motion Application dated 30<sup>th</sup> October, 2023 filed under certificate of urgency and which also principally sought for the Tenant's security as a Tenant on the suit premises.
7. On being served with the Reference and the notice of motion aforesaid, the Respondent filed a memorandum of Appearance dated 2.11.2023 and a 48 paragraph Replying affidavit sworn on the 14.11.2023 by the Respondent. Annexed to the affidavit were supporting documents to the Replying affidavit running from pages 9 to page 167 of the Respondent's bundle.
8. The Respondent together with the Replying affidavit filed a notice of preliminary objection dated 14.11.2023. For purposes of clarity, I will rehearse the same verbatim. It read thus;

“Take notice that Mary Adhiambo Okech, the Landlady/Respondent herein shall at the hearing of the Application dated 30.10.2023 raise a preliminary objection to be determined in limine on these grounds:

- i. That this Honourable Tribunal lacks the pre-requisite jurisdiction to hear and determine the present suit as there is a prevailing judgment delivered by Hon. Patricia May on the 8.9.2021 being Tribunal Case No. 43 of 2020: EROTEKT (Kenya) Ltd vs Mary Adhiambo Oketch. Hence the Tenant's Reference and suit is incompetent as it offends the mandatory provisions of Section 7.
- ii. That this Honorable Tribunal lacks the pre-requisite jurisdiction to hear and determine the present suit as there is a prevailing judgment delivered by Hon. Lady Justice E. Asati on the 28.9.2023 in Kisumu ELCA in Case No. 71 of 2021; Erotekt (kenya) Ltd Vs Mary Adhiambo Oketch. Hence the Tenant's Reference and suit is incompetent and it offends the mandatory provisions of Section 7 of the Civil Procedure Act Cap 21.
- iii. That the instant Reference and the entire suit is an abuse of the court process and should be dismissed with costs to the Respondent/Landlady.



9. Directions were taken on the 15.11.2023 and by consent of both parties, with the concurrence of the court, it was agreed to have the Application dated 25.10.2023 and the notice of preliminary objection dated 14.11.2023 canvassed by written submissions.
10. By the 14.12.2023 when the matter was mentioned for further directions, the Tenant had filed the following documents:-
  - a. Submissions dated 22.11.2023 in support of the notice of motion;
  - b. Submissions dated 22.11.2023 in opposition to the notice of preliminary objection.
  - c. List of authorities dated 22.11.2023; and
  - d. Supplementary submissions dated 4.12.2023 in support of the Application.
11. On her part, the Landlady had filed the following documents:-
  - a. Submissions dated 11.12.2023 in opposition to the Application dated 30.10.2023.
  - b. Submissions dated 4.12.2023 in support of the notice of preliminary objection.
12. From the foregoing, one can summarize the case for the Tenant to be that:-
  - i. The notice of termination was based on non-existent breaches.
  - ii. The termination notice was defiant of the Judgment in this Tribunal's case No. 43 of 2020 at Kisumu and in any event, the lease herein is to expire in May, 2024.
  - iii. All the improvements on the demised premises including filling up the water logged and muddy empty space had been agreed upon by the parties.
  - iv. Strictly and pursuant to the lease agreement, the Tenant had carried out reasonable improvements on the demised premises and renovations at very huge costs to make it habitable.
  - v. The improvements carried out included erecting temporary structures to keep away trespassers from the demised premises.
  - vi. In causing the improvements and renovations, he had under gone costs estimated at Kshs. 8,009,000/= which he was claiming.
  - vii. All the improvements and renovations were done with the knowledge and consent of the landlady.
13. The case for the Landlady is that:-
  - a. The Applicant did not come to court with clean hands and was guilty of material non-disclosure.
  - b. The Reference and the Application were bad in law for being res-judicata in view of the decisions in Tribunal Case No. 43 of 2020 at Kisumu and Kisumu ELCA Case No. 71 of 2021.
  - c. The Reference and notice of motion decided in Tribunal case No. 43 of 2020 and the current Reference and motion have raised similar issues which have been determined up to the level of Appeal.
  - d. There is evidence and the court have determined that the Tenant was in breach of clause 6 of their agreement dated 1.3.2019.



- e. The Tenant had effected structural changes on the demised premises which was her preserve under the Act.
  - f. The improvements and renovations had interfered with and undermined the structural plan of the demised premises.
  - g. The improvements and renovations had not been approved by the County Government of Kisumu and she was at risk of being issued with sanctions.
  - h. The Tribunal should enforce the parties agreement entered on the 1.3.2019 as the same was voluntary.
14. The Landlady therefore sought for the dismissal of the Reference and the Application and that her notice of termination dated 4.10.2023 be upheld and the Tenant be ordered to handover vacant possession of the demised premises otherwise known as L.R. No. 7153(Formerly 7473) situate in Ahero Township within Kisumu County.
15. I have perused the very erudite submissions by both Counsels, Mr. Wachakana for the Tenant and Mr. Ongoro for the Landlady including the caselaws cited and I thank them for the deep research employed in this matter.
16. From the totality of all the materials presented to court, I am of the view that the issues that are for determination in this matter are the following:-
- a: Whether the notice of preliminary objection dated 14.11.2023 is merited.
  - b: Whether the notice of termination of tenancy dated 4.10.2023 by the Landlady is lawful.
  - c: Whether the Applicant's Application has merit.

**Issue No. a:Whether the notice of preliminary objection dated 14.11.2023 is merited**

17. The Landlady in support of this notice was of the opinion that the matter was Res-judicata having been determined with finality, on such determination the Tribunal was rendered functus official and without jurisdiction to hear the matter. To the Landlady, this Tribunal should down its tools and take no more step in this matter.
18. On its part, the Tenant submitted that the Landlady was in defiance with the Ruling of Hon. Patricia May and did not comply with the Act in issuing the fresh notice of termination. That the notice of termination could not issue as the lease was for five (5) years which were yet to expire. The expiry date being May, 2024.
19. The Tenant submitted that no substantial breaches of the lease agreement dated 1.3.2019 had been proved and that in any event, the Landlady had breached Section 4(4) of the Act in issuing the Termination notice. The Tenant further submitted that the decision in Kisumu ELCA No. E071 of 2021 related to the termination notice dated 15.10.2020 which was a stranger to the proceedings herein.
20. I would wish to deal with the three components constituting the notice of preliminary objection starting with the question of legality of the notice of preliminary objection, the questions of jurisdiction, Res judicata and finally the principal of functus official.



### **(i) Preliminary objection**

21. In the locus classicus case of *Mukisa Biscuits Manufacturing Ltd vs Westend Distribution* [1969] EA 696 laid down the principles to qualify a preliminary objection. The court held that;-
- “A preliminary objection consists of a point of law which has been pleaded or which is by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.”
22. The court proceeded to hold that; “a preliminary objection is in the nature of what used to be a demurrer. It raises 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.”
23. In the case of; *Peter Mungai vs Joseph Ngaba Kuria & Another, Leah Njeri Ndichu* (Interested party) [2022] eKLR the court held that;-
- “The parameters of consideration of a preliminary objection are now well settled. A preliminary objection must only raise issues of law. The principles that the court is enjoined to apply in determining the merits or otherwise of the preliminary objection was set out by the court of Appeal in *Mukisa Biscuits Manufacturing Co. Ltd* [supra].”
24. The evidence presented by all the parties herein is not in conflict that the issues herein were also issues in Tribunal Case No. 43 of 2020 at Kisumu and ELCA Case No. 71 of 2021 also at Kisumu.
25. The interpretation of clause 6 of the agreement dated 1.3.2019 by the Tribunal and the Environment and Land Court have also not been conflicted at least from the parties dispositions in this matter. The issues raised by the Landlady in the preliminary objection are jurisdiction, Res judicata and the principle of functus official which are pure points of law. Am therefore of the view that the preliminary objection dated 14.11.2023 meets all the requirement as set down by the law and attendant case law.

### **(ii) Jurisdiction**

26. In the celebrated case of *The Owners of Motor Vessel ‘Lillian S’ vs Caltex Oil (Kenya) Ltd* [1989] KLR 1, Justice Nyarangi J.A. as he then was held that;-
- “I think it is reasonable 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 make one more step..... 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.”
27. The Supreme court of Kenya in the case of; *Samuel Kamau Macharia vs KCB & 2 Others*, Civil Appeal No. 2 of 2011, held that;-
- “Courts jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it.”
28. Having said that, I will revisit this issue after deliberating on the question of Res judicata and the principal of functus officio.



### **(iii) Res judicata**

29. Section 7 of the [Civil Procedure Act](#) Cap 2 of res judicata provides that;-

“no court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided.”

30. In the case of; Samuel Njau Wainaina vs Commissioner of Lands & 6 Others [2012] eKLR, the court held that;-

“In this respect, I would do no better than quote the case of; Edwin Thuo vs Attorney General & Anot – Nairobi Petition No. 212 of 2012 (unreported), where the court stated.”  
The courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the 2<sup>nd</sup> suit is trying to bring before the court in another way and in form a new cause of action which has been resolved by a court of competent jurisdiction.”

31. In the case of; Njangu vs Wambugu & Another Nairobi HCCC No. 2340 of 1991 (unreported) Kuloba J as he then was, held that;-

“If parties were allowed to go on litigation forever over the same matter/issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic facelift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.”

32. Both the Tribunal in case No. 43 of 2020 (Kisumu) and Environment & Land Court in case ELCA No. 71 of 2021 effectively addressed themselves to clause 6 of the agreement between the parties dated 1.3.2019. The clause reads thus;-

“The lessee shall effect any necessary and reasonable improvements and renovations not structural in nature to make the premises more suitable for the intended bar and restaurant business. However, expenses incurred on the current want of reparation shall be borne by the lessee and recovered from the rent. The parties shall perform a joint inspection prior to the repairs being effected.”

33. The Environment and Land Court and this Tribunal found with finality that the Tenant was in breach of clause 6 and that determination stands unchallenged. That is an issue that is Res-judicata and cannot be revisited.

### **(iv) Principle of Functus officio**

34. The functus officio doctrine or principle is one of the mechanisms by means of which the law gives expression to the principle of finality. The import of the doctrine is that a person who is vested with adjudicative or decision making authority may as a general Rule, exercise that authority only once in relation to the same matter.



In the case of; Telkom Kenya Limited vs John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Ltd [2014] eKLR), the court of Appeal held that;-

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon.”

35. It therefore follows that clause 6 of the Agreement dated 1.3.2019 is not available for this Tribunal’s attention and I therefore decline the invitation to revisit the same in view of the learned decision of my sister Hon. Patricia May which was also upheld by Justice E. Asati in Kisumu ELCA No. 71 of 2021.
36. I therefore determine that it is indeed legitimate that this Tribunal does not have the jurisdiction to re-look at clause 6 of the Agreement dated 1.3.2019, that this Tribunal is rendered functus officio in that respect.

**Issue No. B: Whether the Notice of Tenancy by the Landlord dated 4.10.2023 is lawful**

37. To start with, I would wish to clarify that this court is properly seized of this issue as there has not been any known determination on the question of the notice of termination of Tenancy herein and dated 4.10.2023. The notice that the Hon. Patricia May rendered a Ruling on and determined the same to be unlawful was the notice of termination dated 15.10.2020. This Tribunal is therefore called upon to decide on the legality of the notice of termination dated 4.10.2023 or otherwise.

38. Section 4(2) of the Act provides 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.”

Regulation 4(1) of the Regulation to the Act provides that;

“A notice under Section 4(2) of the Act by a Tenant shall be in Form A in the Schedule to these Regulations.”

39. The Act at Section 4(4) thereof further provides that;-

“(i) where a notice is given of the termination of a controlled tenancy, the date of termination shall not be earlier than the earliest date on which, but for the provisions of this Act, the tenancy would have or could have been, terminated.”

(ii) where the terms and conditions of a controlled tenancy provide for a period of notice exceeding two months, that period shall be substituted for the said period of two months after the receipt of the tenancy notice.”

40. The long and short of this is that, the termination notice dated 4.10.2023 has satisfied all the requirements of the Act and Regulations thereof including;-

- (i) Requiring 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- Section 4(5) of the Act; and
- (ii) Specified the grounds upon which the requesting party seeks the termination – Section 4(5) of the Act.





41. Therefore, what remains for determination on the notice of termination is the legitimacy and the soundness of the grounds stated in the said notice. Mr. Wachakana faulted the notice on the grounds that it was not compliant with Section 4(4) of the Act. He submitted that the lease agreement was to terminate in May, 2024 and that it should be allowed to run its course. Am however of a different view in recognition of the provisions of Section 7(c) of the Act which provides that, it is a ground of termination of tenancy if:-

“The tenant has committed other substantial breaches of his obligations under the tenancy, or for any other reason connected with the Tenant’s use or management of the premises comprised in the tenancy.”

42. Here, this Tribunal in case No. 43 of 2020 (Kisumu) and the ELC Court in ELCA Case No. 71 of 2021 have determined with finality that the Tenant has breached clause 6 of the Agreement dated 1.3.2019. That is a legitimate ground for the early termination of the lease herein.
43. The 1<sup>st</sup> and 2<sup>nd</sup> grounds of termination in the said notice amount to the same thing. That the Tenant had committed substantial breaches to the lease agreement dated 1.3.2019. The 3<sup>rd</sup> ground was to the effect that the landlady intended to do major repairs and renovations on the premises.

Section 7(1)(f) of the Act provides that:-

“on termination of the tenancy, the Landlord intends to demolish or reconstruct the premises comprised in the tenancy or a substantial part thereof or to carry out substantial works of construction on such premises or part thereof and that he could not reasonably do so without obtaining possession of such premises.”

44. The test to be applied for this ground to find legitimacy was laid down in the case of Fisher vs Taylors Furnishing Stores Ltd [1956] 2 ALL ER 78 which held that:-

“There must, therefore be an intention and it must be an intention which in point of time is related to the termination of the current tenancy. It seems to me that the intention must be to do one of the following things:-

- (i) to demolish the premises comprised in the holding;
- (ii) to reconstruct the premises comprised in the holding; or
- (iii) to demolish a substantial part of the premises comprised in the holding;
- (iv) to reconstruct a substantial part of the premises comprised in the holding; or
- (v) to carry out substantial work of construction on the holding; or
- (vi) to carry out substantial work of construction on a part of the holding.

If the landlord proves an intention to do one of those things, and to do it on the termination of the current tenancy, he must then prove that he could not reasonably do it without obtaining possession of the holding.”

45. Based on the above, am not convinced that the Landlady has any intention to “demolish and reconstruct” as appears in the notice of termination. The least I would have expected from the Landlady is a plan for the new building to be constructed, proof of sources of finances and approvals from the





relevant government agencies including but not limited to the Kisumu County Government, National Construction Authority and National Environment Management Authority.

46. Therefore, this ground is not available to the Landlady. However, Section 7 of the Act only requires a landlord wishing to terminate a tenancy to offer any or one of the grounds as provided for under Section 7 of the Act. I had earlier determined that in view of the Ruling in Tribunal case No. 43 OF 2020 (Kisumu) and Kisumu ELCA Case No. 71 of 2021 the question of substantial breach by the Tenant had been established. I therefore make a finding that the notice of termination dated 4.10.2023 is lawful.

#### **Whether the Applicant's Application is merited.**

47. Section 6(1) of the Act provides that;-

“A receiving party who wishes to oppose tenancy notice and who has notified the requesting party under Section 4(5) of this Act that the does not agree to comply with the tenancy notice, may, before the date upon which such notice is to take effect, refer the matter to a Tribunal, whereupon such notice shall be of no effect until, and subject to the determination of the Reference by the Tribunal.”

48. In my view and flowing from above, the Tenant did not require to file the Application dated 30.10.2023 as the same merely duplicated the same purpose as that served by the Reference pursuant to Section 6(1) of the Act.

49. The Tenant in its affidavit dated 30.10.2023 has claimed compensation of Kshs. 8,009,000/=. That claim is not in either the Reference or in the notice of motion. Therefore the same is not based on any pleading as an affidavit is not a pleading.

In the case of; Jacinta Wanjala vs IEBC & 3 Others, it was held that;-

“An affidavit is evidence and not a pleading. Based on the foregoing, I can safely say that an affidavit is not a pleading.”

50. Furthermore, the claim for the Kshs. 8,009,000/= is a claim for special damages. The same must be specifically pleaded and proved as required by law. In the case of; Joseph Kipkorir Rono vs Kenya Breweries Limited & Another- Kericho HCCCA No. 45 of 2013, it was held that;-

“if damages are special damages, they must be specifically pleaded and proved as required by law. For a loss to be calculable at the date of trial, it must be a sum that has actually been spent or loss that has already been incurred.”

51. Even if the Kshs. 8,009,000/= had been properly pleaded, I doubt that the Tenant would be able to recover the same. This is because the same was occasioned in pursuit of breaches to the Agreement dated 1.3.2019 as already determined by this court and the High court.

#### **Issue No. D: Who should bear the costs of this suit**

52. I respectfully conclude that; it was an unfortunate misadventure for the Tenant to pursue his claim herein in view of the findings in Tribunal Case No. 43 of 2020 (Kisumu) and ELCA Case No. 71 of 2021 also at Kisumu. A ground for the termination of his tenancy had been availed to the Landlady by the said determinations. I therefore do not find any compelling reasons to make me depart from



the conventional wisdom of Section 27 of the Civil Procedure Act. I will therefore award costs to the Landlady.

53. In the final analysis, I make the following orders;-

- a. That the termination notice dated 4.10.2023 is lawful and took effect on the 1.1.2024.
- b. That the Tenant will have thirty (30) days to deliver vacant possession to the landlord and in default the Landlord to resume possession by eviction of the Tenant at his cost.
- c. The Tenant shall pay the rent or mesne profits for the month of January, 2023 as it is expected to utilize the month of February, 2024 for evacuation activities from the demised premises.
- d. The Tenant will pay the costs of the suit and the Application to the Landlord assessed at Kshs. 30,000/=.
- e. That by determination of the Application and the preliminary objection, there is nothing left of the Reference dated 25.10.2023 and the same is deemed as settled in the same terms.

Those are the orders of the court.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 2<sup>ND</sup> DAY OF FEBRUARY, 2024.**

**HON. NDEGWA WAHOME, MBS**

**MEMBER**

**BUSINESS PREMISES RENT TRIBUNAL**

Delivered in the presence of Mr. Wachakana for the Tenant/Applicant and Mr. Ongoro for the Landlady/Respondent

