



**Eben Hardware Hephjay Ltd v Mugo & another (Tribunal Case
E063 of 2023) [2023] KEBPRT 461 (KLR) (24 August 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 461 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E063 OF 2023
P MAY, VICE CHAIR
AUGUST 24, 2023**

BETWEEN

EBEN HARDWARE HEPHJAY LTD TENANT

AND

PENINAH WAMBUI MUGO 1ST RESPONDENT

MARY MUTHONI NJARAMBA 2ND RESPONDENT

RULING

1. The tenant approached the tribunal by filing the reference dated April 12, 2023 challenging the notice of termination issued by the 1st respondent. Contemporaneous with the reference, the tenant filed an application under certificate seeking a plethora of orders including orders of temporary injunction.
2. The 1st respondent upon being duly served entered appearance and filed an application under certificate dated April 25, 2023 seeking for the striking of the reference and the attendant application for want of jurisdiction.
3. It is the 1st respondent's contention that the respondents were embroiled in a legal tussle involving the demised property that has spanned for almost 2 decades. The 1st respondent stated that she got favourable judgement both at the High Court and the Court of Appeal and that the present proceedings are an abuse of the process of the tribunal and attempts to deprive the 1st respondent the sweet fruits of her judgements from the superior courts.
4. The parties elected to canvass the application by way of written submissions. There has been compliance by both parties. I have considered the said submissions and the affidavits on record and would proceed as follows:



5. The sole issue for determination is whether the tribunal has jurisdiction under section 12 of the [Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#) chapter 301 Laws of Kenya to hear and determine the present dispute.
6. The tribunal's jurisdiction is circumscribed under section 2(1) of the [Landlord and Tenant \(Shops, Hotels and Catering Establishment\) Act](#) that the tribunal can only adjudicate on disputes emanating from controlled tenancies. A controlled tenancy is defined as a tenancy of a shop, hotel or catering establishment which has been reduced into writing and which is for a period not exceeding five years. In the present dispute, the 1st respondent contends that there exist no landlord and tenant relationship between her and the tenant.
7. The 1st respondent has annexed decisions from the High Court and the Court of Appeal where the superior courts made judgements granting her vacant possession of the demised premises as it found it was the rightful owner of the property.
8. The tenant in response to the application stated that they were not aware of the proceedings in the superior courts and only learnt about them when the 1st respondent wrote seeking for their eviction. The tenant claimed that they enjoyed an overriding interest over the property which passed even with the change of ownership and created controlled tenancy.
9. The Supreme Court in its advisory opinion, [In the Matter of advisory opinion of the Supreme Court](#), Constitutional Application No. 2 of 2011, restated the principle in the "Motor Vessel "Lillian S case", in the following terms –

“The “Lillian S” case [1989] KLR, establishes that jurisdiction flows from law and the recipient court is to apply the same with any limitation embodied therein. Such a court may not arrogate to itself jurisdiction through craft of interpretation or by way of endeavor to discern or interpret the intention of Parliament where the wording of legislation is clear and there is no ambiguity”.
10. The preamble to the [Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#), reads as follows: -

“An Act of Parliament to make provision with respect to certain premises for the protection of tenants of such premises from eviction or from exploitation and for matters connected there with and incidental thereto.”
11. The tribunal's construction of the title of this Act together with the content of the preamble (supra) is that, this Act deals specifically with the landlord and tenant relationships in relation to structures standing on the land. The mandate to resolve disputes arising from dealings in relation to such structures is exclusively vested in the Business Premises and Rent Tribunal in terms of section 12 of the Act.
12. Section 12(4) of cap 301, Laws of Kenya confers this tribunal jurisdiction to investigate any complaint relating to a controlled tenancy made to it by the landlord/tenant and make such order thereon as it deems fit. As such, the first qualification as earlier observed is that there must be in existence a landlord and tenant relationship. In absence of such a relationship the tribunal has no jurisdiction in line with the locus classicus case of; [The Owners and Master of the Motor Vessel 'Joey' and the Owners and Masters of the Motor Tugs 'Barbara' & 'Steve b'](#) (2007) eKLR.



13. In the case of; *Republic v Chairperson, Business Premises Rent Tribunal at Nairobi & another ex-parte Suraj Housing & Properties Limited & 2 others* (2016) eKLR the court cited with approval the decision in *Pritam v Ratilal and another* (1972) EA 560 as follows:-

“As stated in the *landlord and Tenant (Shops, Hotels and Catering Establishments) Act* itself, it is an Act of Parliament to make provision with respect premises for the protection of tenants of such premises from eviction or from exploitation and for matters connected there with and incidental thereto. The scheme of this special legislation is to provide extra and special protection for tenants. A special class of tenants is created. 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”.

14. I have taken time to consider the decisions annexed from the superior courts. The orders issued both by the trial and appellate court were explicit. The 2nd respondent was supposed to vacate the demised premises. The orders issued were equivocal and in my view extended to her agents. The landlord and tenant relationship is contractual in nature and can only be created where there is meeting of minds either in deed or through negotiations. The same cannot be imposed as it will be contrary to the right to own property. It is therefore my finding that there does not exist a landlord and tenant relationship between Eben Hardware Hephjay Ltd and the 1st respondent.
15. In the case of; *Nandlal Jiuraj Shah & 2 others v Kingfisher Properties Limited* [2015] eKLR it was held that in the absence of a landlord/tenant relationship, the tribunal has no jurisdiction to entertain any dispute arising between the parties. In the circumstances thereof, I will down my tools.

Orders ;

- i. The notice of motion dated April 25, 2023 is allowed in terms of prayer 1.
- ii. The tenant shall vacate the demised premises within 7 days from the date hereof. In default the 1st respondent shall be at liberty to effect eviction with the assistance of the nearest police station.
- iii. The tenant shall pay the 1st respondent the cost of the application and complaint assessed at Kshs 50,000/-

RULING DATED, SIGNED & DELIVERED VIRTUALLY THIS 24TH DAY OF AUGUST 2023.

HON. P. MAY

VICE CHAIR

