



Hassan v Nur (Tribunal Case E074 of 2024) [2024] KEBPRT 929 (KLR) (12 July 2024) (Ruling)

Neutral citation: [2024] KEBPRT 929 (KLR)

REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E074 OF 2024
J OSODO, CHAIR & GAKUHI CHEGE, MEMBER
JULY 12, 2024

BETWEEN

HASSAN ADAN HASSAN APPLICANT

AND

ISMAIL SHEIKH NUR RESPONDENT

RULING

A. Dispute Background

1. Before us is a Notice of Preliminary Objection dated 24th April, 2024 filed by the landlord herein, which is based on the following grounds; -
 - i. That the Tribunal has no jurisdiction to hear and determine this matter as there is no existing tenancy between the purported tenant/applicant and the landlord/respondent.
 - ii. That the suit is fatally and incurably defective and the same ought to be struck out in the first instance.
 - iii. That the suit is incompetent and bad in law.
2. The tenant was granted leave to file a response to the notice of preliminary objection. The tenant filed an affidavit in response dated 13th May 2024 in which he deposes as follows; -
 - i. That he is the tenant occupying the suit premises owned by the landlord herein for 15 years now and diligently paying rent. Copies of Mpesa statements are annexed as “HAH-2”.
 - ii. That the tenant entered into an oral agreement with the landlord whereby the landlord agreed to lease the suit premises for a monthly rent of KES. 50,000. Copies of pictures of the shop being run by the tenant are annexed as “HAH-1”.
 - iii. That the landlord has never employed the tenant to collect rent from other tenants in the premises as alleged. That the landlord has appointed one Mr. Suleiman Ismail Nur as his sole



agent whose duty is to collect rent and manage the premises. A copy of a letter notifying tenants of the appointment of the agent is dated 21st March 2024 and annexed as “HAH-3”.

- iv. That the tenant has experienced threats of eviction which has affected his business leading to the filing of a Complaint against the landlord vide a reference dated 11th March 2024.
 - v. That contrary to the landlord’s allegations, the tenant has never brought goons to the suit premises but rather on 26th March 2024 his wife was attacked by the landlord and his agents threatening to evict the tenant.
 - vi. That on 9th May 2024, the tenant was served with a proclamation of attachment of movable property by Status Auctioneers in distress for rent which further proves that the applicant is a tenant at the suit premises.
3. At a court hearing on 24th April 2024, the Tribunal directed that the Notice of Preliminary Objection be disposed of by way of written submissions. Both parties complied with the tenant filing his written submissions dated 17th May 2024 and the landlord filing his dated 20th May 2024.

B. Issues for determination

4. The issue arising for determination is; -
- a. Whether this tribunal has jurisdiction to determine this case.
5. The landlord in his written submissions’ states that the alleged tenant herein did not file any evidence showing a lease or tenancy agreement between the parties.
6. The landlord adds that all the tenant has filed is Mpesa messages for 3 instances and that the landlord had made it clear that the alleged tenant was an agent for collecting money from the tenants of the landlord herein.
7. The landlord further submits that there being no evidence of a landlord-tenant relationship between the parties, then the case cannot stand.
8. The tenant on the other hand in his written submissions confirm that the parties herein entered into an oral tenancy agreement whereby the landlord agreed to lease the suit premises at a monthly rent of KES. 50,000.
9. The tenant refers the Tribunal to Section 2 (1) of [Cap 301](#) which defines a controlled tenancy thus:
- “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 commencement thereof; or
 - (iii) relates to premises of a class specified under subsection (2) of this section:



10. The tenant further states that the landlord has never employed him as an agent to collect rent from other tenants at the premises and has not adduced any evidence to show that he has ever contracted the tenant herein as his agent.

C. Analysis

11. The test of what constitutes a Preliminary objection was settled in the locus classicus case of *Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors* (1969) EA 696 wherein it was stated as follows:

“----a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case, Sir Charles Newbold, P. stated:

“A preliminary objection is in the nature of what used to be a demurrer. 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 is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

12. In the instant case, we have perused the documents filed in this matter and we find that the issues raised by the landlord herein are disputed facts and not pure points of law.
13. The landlord/respondent who claims that the tenant herein is his agent and not his tenant has not shown any proof that he has ever contracted the tenant/applicant as his agent. It is trite law that “he who alleges must prove”
14. We have perused the Proclamation of Attachment of movable property by Status Auctioneers in distress for rent dated 9th May 2024 annexed to the tenant’s affidavit as “HAH-4” which reveals the parties names as landlord and tenant.
15. The tenant has also attached Mpesa messages of payment of KES. 50,000 together with Mpesa statements showing payment to the landlord herein.
16. We have also perused the letter dated 21st March 2024 annexed by the tenant to his affidavit notifying the tenants that one Mr. Suleiman Ismail Nur had been appointed as the sole agent for the landlord’s properties with effect from 1st April 2024. This is followed by another letter dated 15th May 2024 withdrawing the instructions issued earlier. There is no evidence to show the applicant’s appointment as an agent of the landlord as alleged by the latter herein.
17. We agree with the tenant/applicant that the parties herein need not to have entered into a written tenancy agreement as their relationship is well founded in Section 2 (1) of [Cap 301](#) Laws of Kenya (*supra*).
18. In view of the foregoing analysis, we find that the notice of preliminary objection has been wrongly raised and the same is a candidate for dismissal.



D. Orders;

19. In view of the foregoing, the following orders commend to us; -

- a. The Notice of preliminary Objection dated 24th April, 2024 is hereby dismissed with costs.
- b. All applications in this file shall be dealt with together and parties shall file and serve their responses to the applications and thereafter file and serve their written submissions on the same within 30 days hereof with the tenant starting and taking 15 days.
- c. Costs of KES. 25,000 to the tenant/applicant.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 12th DAY of JULY 2024.

HON. JOYCE AKINYI OSODO (PANEL CHAIRPERSON)

HON GAKUHI CHEGE- (MEMBER)

BUSINESS PREMISES RENT TRIBUNAL

In the absence of parties

