



**Daudi v Githinji (Tribunal Case E071 of 2023)
[2024] KEBPRT 310 (KLR) (Civ) (5 April 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 310 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
CIVIL**

TRIBUNAL CASE E071 OF 2023

P KITUR, MEMBER

APRIL 5, 2024

BETWEEN

SIMON NAMU DAUDI LANDLORD

AND

LAZARUS KAIYARE GITHINJI TENANT

RULING

A. Parties And Representatives

1. The Applicant Simon Namu Daudi is the Landlord and the proprietor of the suit property known as Plot No. 23 Kiritiri (hereinafter known as the 'Landlord')
2. The Landlord is represented by M/s Kahuthu & Company Advocates.
3. The Respondent Lazarus Kaiyare Githinji is the Tenant and the proprietor of the having rented from the Landlord, the suit property herein (hereinafter known as the 'Tenant')
4. The firm of Mwaniki Gachuba & Company Advocates represent the Tenant in this matter.

B. The Dispute Background

5. The Landlord Avers that the Tenant is in arrears of rent which accrued between June 2023 up to the time of filing this suit.
6. Aggrieved by the Landlord issued a Notice to terminate/alter the tenancy dated 26th September 2023 and thereafter filed Reference accompanied by a Notice of Motion Application dated 5th December 2023.



7. The Tenant thereafter filed a Notice of Preliminary Objection dated 1st February 2024 seeking that the Reference be dismissed in time for the reasons that:
 - i. A shareholder cannot be sued for the liabilities of a corporation.
 - ii. Order 32 Rule 2 and Rule 15 of the *Civil Procedure Rules*, 2010.
8. The Landlord filed a Supporting Affidavit dated 21st Feb 2024 in response to the Preliminary Objection in which he reiterated that the Mr. Lazarus was his tenant and that he had been paying rent through M-PESA.
9. Both parties filed their written submissions in respect of the Preliminary Objection which I have considered in making this determination.

List Of Issues for Determination

The issues raised for determination are as follows;

Whether the present Preliminary Objection is merited.

C. Analysis And Findings

Whether the Preliminary objection is merited

10. The principles established by the time-honored, *Mukisa Biscuit Manufacturing Co Ltd v. West End Distributors* (1969) EA 696, cited Hassan Ali Joho Case (supra) are settled that; “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 the contract giving rise to the suit to refer the dispute to arbitration. 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.”
11. The Tenant brought the preliminary objection on the ground that a shareholder cannot be sued for the liabilities of the company. The Tenant herein denied the existence of a Tenancy agreement between himself and the Landlord. He went further to state that in fact the tenancy was between the Landlord and Silver Trust Communication Limited.
12. On the Other hand, the Landlord denied knowledge of the Company and in his supporting Affidavit, reiterated that he had been receiving rent income from the MPESA number registered to the Tenant.
13. The second ground for dismissal was that the Landlord does not have capacity to sue by virtue of a mental incapacity. The Tenant produced the Landlord's KRA PIN certificate which showed that he is tax exempt.
14. The Landlord in his written submissions denied that he is mentally incapacitated stating that the tax exemption is not only for mental patients but for any other incapacity for persons with disability.
15. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.



16. It is my considered view that the Preliminary Objection raised herein, constitutes matters of fact; the existence of the tenancy between the parties herein and; the mental capacity of the Landlord, which call upon this honourable tribunal to inquire into their existence or non-existence.
17. In dismissing the Preliminary Objection raised in *Peter Mungai v Joseph Ngaba Kuria & another; Leah Njeri Ndichu (Interested Party)* [2022] eKLR The learned judge stated as follows,” As already been stated, one of the preconditions for a valid preliminary objection is based on the assumption that the facts pleaded are correct and unopposed by the rival party. While no proof of such death was tendered, the ground of objection would in itself call upon the Court to inquire into the date of the death and whether the suit was a nullity ab initio or whether the cause of action survived the deceased to warrant substitution to be validly done. All these require the Court to call in aid evidence to ascertain the same hence ousting the Preliminary Objection from being a pure point of law.”
18. It is therefore my considered view that the Preliminary Objection herein is not merited.

Orders

- a. The upshot is that the Landlord’s Preliminary Objection is dismissed in the following terms;
- b. The Landlord’s Complaint and Application dated 5th December 2023 is set down for mention for directions on 12th April 2024.
- c. Costs shall abide the outcome of the Complaint.

HON P. KITUR - MEMBER

BUSINESS PREMISES RENT TRIBUNAL

Ruling dated, signed and delivered virtually by Hon P. Kitur this 5th day of April 2024 in the absence of the parties.

HON P. KITUR - MEMBER

BUSINESS PREMISES RENT TRIBUNAL

