



**Stephen Gitonga Mbaabu t/a S. G Mbaabu & Co v National Fund for Disabled of Kenya
(Tribunal Case E1103 of 2023) [2024] KEBPRT 294 (KLR) (22 March 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 294 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E1103 OF 2023
GAKUHI CHEGE, CHAIR & J OSODO, MEMBER
MARCH 22, 2024**

BETWEEN
STEPHEN GITONGA MBAABU T/A S. G MBAABU & CO APPLICANT
AND
NATIONAL FUND FOR DISABLED OF KENYA RESPONDENT

RULING

1. By a Reference/Complaint dated 7th November 2023, the Applicant moved this Tribunal claiming that the Respondent had issued him with notice to vacate the suit premises by 10th November 2023 and was threatening to evict him.
2. The Applicant simultaneously filed a motion of even date seeking that the matter be certified urgent and an order be issued restricting the Respondent and his agents, his servants and or employees from evicting, terminating, harassing, intimidating and or interfering with his peaceful occupation of the tenancy premises pending hearing and determination of the suit inter-partes. He also sought that the OCS Central Police Station be directed to ensure enforcement of the orders and that the costs of the application be provided for.
3. The application is supported by the affidavit of Stephen Gitonga Mbaabu sworn on 7th November 2023 and the following grounds:
 - a. That the Applicant is a tenant of the Respondent/Landlord.
 - b. That the Applicant has been renting the Landlord's property since January 2023
 - c. That on 3rd November 2023, the Applicant was issued with a notice to vacate the premises by 10th November 2023
 - d. That the demised premises may be locked up and hence interfering with the firm's conduct of business.



- e. That unless the application is heard on priority basis, the Applicant will suffer irreparable loss and damage.
4. In his supporting affidavit, the Applicant deposes that the Respondent issued a letter of offer for six years which lapsed on 31st January 2023 but the Respondent continued to accept payment of rent as per copies of Cheques marked “K (1)” to the date of filing suit which rendered the Applicant’s firm a monthly tenant hence controlled under Cap 301 of the Laws of Kenya.
 5. He is therefore seeking that this honorable Tribunal declares him a protected tenant under Cap 301 Laws of Kenya.
 6. It is the Applicant’s case that the demised premises stood to be locked up which would result into interference with the conduct of his business and that it is fair and just that the application be heard and the prayers sought granted.
 7. The application is opposed through the replying affidavit sworn on 23rd February 2024 by Elizabeth Wanjohi, who is the Property Manager of the Respondent/Landlord.
 8. She deposes that the Applicant is not a controlled tenant and that on 2nd October 2017, the Applicant moved this Tribunal in Tribunal Case No. 728 of 2017 to be declared a controlled tenant and prohibit the Respondent from levying distress for rent arrears. A ruling was delivered on 20th September 2019 dismissing the application. The said ruling is attached to the affidavit and marked “EW1”. As such, the question of the Applicant’s tenancy is Res Judicata.
 9. According to the Respondent, the annexures to the Applicant’s application show that rent payments were made on behalf of Midland Gems Limited which is exactly the same issue that was considered by this Tribunal in case No.728 of 2017.
 10. According to the Respondent, a cursory glance at the Applicant’s supporting affidavit shows that the rent payment cheques, though drawn by the Applicant herein were in respect of Midland Gems Limited which is clear from the forwarding letters annexed to the supporting affidavit.
 11. Therefore, the Applicant’s continued mischief of hiding behind the veil of Midland Gems Limited must not be tolerated as he is attempting to force a controlled tenancy where it does not exist.
 12. Therefore, the application is attacked on the basis of being frivolous, vexatious, bad faith and an abuse of court process and the Respondent prays for its dismissal with costs.
 13. The matter was directed to be canvassed by way of written submissions and both parties complied. We shall consider the said submissions together with the issues for determination set out below.
 14. The following issues arise for determination in this case:
 - a. Whether this matter is Res Judicata.
 - b. Whether the Applicant is entitled to the reliefs sought in the reference/complaint and application dated 7th November 2023.
 - c. Who is liable to pay costs?
 15. The Respondent submits that the issue of the Applicant’s tenancy had already been conclusively determined by this Tribunal in Case No. 728 of 2017 vide a ruling delivered on 20th September 2019 which dismissed the Applicant’s application to be declared a controlled tenant. As such, the Respondent submits that the tenancy is not controlled as confirmed by the said ruling and that



- the matter is Res Judicata and cannot be re-litigated. The rent payments made as evidenced by the forwarding letters annexed to the application were made on behalf of Midland Gems Limited.
16. The Respondent cites the provisions of section 6 of the Civil Procedure Act, the decisions in Ram Hospital limited Vs Ramji Meghji Gudka Limited (2022) eKLR & John Florence Maritime Services Limited & Another Vs Cabinet Secretary, Transport and Infrastructure & 3 Others (2021) eKLR in support of its submission that this matter is Res Judicata.
17. On the other hand, the Applicant submits that the current tenancy is controlled since the Applicant continues to occupy the suit premises without any lease and has continued paying rent on monthly basis which the Respondent has accepted. He further argues that non-acceptance of the terms and conditions of the letter of offer issued by the Respondent dated 23rd February 2023, acceptance of rent for over one year created a protected tenancy as envisaged in Section 2 of Cap. 301, Laws of Kenya. The Applicant attaches copies of cheques in the name of S.G Mbaabu & Company as evidence of rent payment.
18. We have considered the submissions and all the documents tendered on the issue of Res Judicata and have noted that indeed, this Tribunal determined a similar dispute vide BPRT No. 728 of 2017 between S.G Mbaabu & Co. Advocates vs National Fund For Disabled of Kenya & Another wherein it was held as follows;
- “ 1. That the Landlord has a written tenancy agreement with Midland Gems Ltd in respect of the suit premises. The tenancy agreement is landlord’s exhibit JM1.
2. Payment of rent does not entitle one to be a Tenant in respect of the suit premises”
19. It is therefore clear that the same issues which are under litigation in this case were determined in the previous case wherein this Tribunal rendered itself in no uncertain terms that the tenancy was not controlled. The current Applicant had sued as the tenant in the said case just like in the present case but it was found that the correct tenant was Midland Gems Ltd. The Applicant herein has not demonstrated that he was subsequently recognized as a tenant of the Respondent in respect of the suit premises and a look at the forwarding letters attached to the Applicant’s supporting affidavit shows that the rent payments were made on behalf of Midland Gems Ltd. It is therefore our finding that this matter is res judicata and an abuse of court process.
20. Indeed, the Applicant herein has no Landlord/Tenant relationship with the Respondent upon which he could maintain a suit against the Landlord and he is therefore non-suited in line with the decision of the court of appeal in Agricultural Finance Corporation Vs Lengetia Limited & Another (1985) eKLR where it was held as follows;
- “ As is stated in Halsbury’s Laws of England, 3rd Edition, Volume 8 at paragraph 110:
- “As a general rule, a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”



21. Based on the foregoing findings, it follows that the Applicant is not entitled to the reliefs sought in the reference and application dated 7th November 2023 and both are candidates for dismissal.
22. Costs of every action before this Tribunal are at its discretion under section 12(1)(k) of [Cap. 301](#), Laws of Kenya but always follow the event unless for good reasons otherwise ordered. We have no reason to deny costs to the Respondent.
23. In conclusion, the following final orders commend to us under Section 12(4) of [Cap. 301](#), Laws of Kenya;
 - a. The Applicant's Reference and Application dated 7th November 2023 are hereby dismissed with costs.
 - b. The interim orders given on 9th November 2023 are hereby discharged.
 - c. The Respondent's costs are assessed at KES 30,000/= against the Applicant.It is so ordered.

DATED, SIGNED & VIRTUALLY DELIVERED THIS 22ND DAY OF MARCH 2024.

HON. GAKUHI CHEGE - PANEL CHAIRPERSON

HON. JOYCE A. OSODO - PANEL MEMBER

In the presence of:-

Wayne Pelegi for the Landlord

Gitari holding brief for Mbaabu for Tenant

