



**Mwendah v Wasike (Tribunal Case E095 of 2023)  
[2023] KEBPRT 674 (KLR) (24 October 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 674 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E095 OF 2023  
N WAHOME, MEMBER  
OCTOBER 24, 2023**

**BETWEEN**

**GETRUDE MUKOYA MWENDAH ..... LANDLORD**

**AND**

**JOSAMU WANJALA WASIKE ..... TENANT**

**RULING**

1. The landlord Getrude Mukoya Mwenda issued a notice to terminate the tenant's (Josamu Wanjala Wasike) tenancy with her for reasons that:

“The tenant has committed substantial breaches of its tenancy by refusing and/or ignoring to pay the agreed monthly rent of Kshs. 30,000/= from 1<sup>st</sup> August, 2022 and the rent is in arrears amounting to Kshs. 260,000/= as at the 1<sup>st</sup> May, 2023 and which continues to accrue monthly.”
2. The said notice was rendered under Section 4 (2) of the [Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#) (Cap. 301) of the Laws of Kenya (hereinafter referred to as “the Act”) and Rule 4 (1) of the Regulations thereof.
3. The tenant in his part moved the court by a reference dated 5/10/2023. The said reference was bereft of any materials or the subject matter except for the name and address of the landlord.
4. The landlord/applicant by an application dated 8/8/2023 and brought under certificate of urgency sought for the following reliefs:
  - a. Spent



- b. That this Honorable Court be pleased to grant leave to the landlord/applicant to levy for distress for rent, amounting to Kshs. 360,000/= against the tenant/respondent in respect of the parcels of land known as Titles Number:
    - i. Kakamega/Lumakanda/2151, and
    - ii. Kakamega/Lumakanda/2160
 pending the hearing and determination of the tenant/respondent reference dated 5<sup>th</sup> June, 2023, by alienating, selling, and disposing the tenant/respondent's goods and property.
  - c. That the OCS Lumakanda Police Station provides security during the distress for rent.
  - d. That costs of this application be provided for.
5. That over and above the notice of termination dated 11/5/2023, the landlord/applicant had further issued the notice of termination dated 2/6/2023. The same grounds were given in this particular notice just like that dated 11/5/2023 only that the latter one was to take effect on the 1<sup>st</sup> September, 2023.

#### **The Landlord's Case:**

6. In response to the landlord's application, the tenant filed a replying affidavit which he swore on the 5/9/2023.
- i. That she had issued notices to terminate the respondent's tenancy with her on Title Nos. Kakamega/Lumakanda/2151 and 2160. She submitted the two notices dated 11/5/2023 and 2/6/2023 respectively together with copies of the Title deeds thereof.
  - ii. That Title No. 2151 was occupied by her deceased mother who also took care of Title No. 2160 in her life.
  - iii. That in May 2022, she learnt that her uncle one Joseph Ashioya Otiende had leased out Title No. 2151 which is developed and was also agreed to lease from her Title No. 2160 which he was using as a garbage and dumping site.
  - iv. That the tenant paid rent for May, June, and July but that he refused to pay any further rent nor to vacate the demised premises on expiring of the lease which was effective the 1/10/2023.
  - v. That at the time of approaching the court, she was owed a total of Kshs. 360,000/= by the tenant and the reason for the request for leave to levy distress against the tenant.
  - vi. The lease agreement which is signed on the 25/5/2022 but was to take effect in the 1/5/2023 and serve for 6 months until the 1/10/2022 was exhibited by the landlord.
  - vii. That the tenant had become rude and arrogant and had refused any communication from her.
  - viii. She therefore prayed that leave be granted to allow or levy distress on the property of the tenant lying on both Title No. 2151 and 2160 to enable her recover the rent in arrears at Kshs. 360,000/=.

#### **The Case For The Tenant**

7. The landlord further filed a reply to the tenants reference dated 05/6/2023 which is a replica of her supporting affidavit to her application dated the 8/8/2023.



- i. That he entered into a lease agreement with one Joseph Ashioya Otiende who was acting for the landlord and an uncle to the landlord. The lease was for plot No. 2160 in Kipkaren within Kakamega County.
  - ii. That he had never entered into any lease agreement relating to either Title No. Kakamega/Lumakanda/2151 or 2160 and that he was a stranger to any such agreement.
  - iii. That the lease which he entered into and which he put in as annexure “JWW1” was under the Land Registration Act No. 3 of 2012 and therefore outside the jurisdiction of this court.
  - iv. That he had overpaid the rent for the demised premises at Kshs. 615,300 instead of Kshs. 510,000/= and that therefore he was entitled to a further 3 months of occupation of the leased premises until November 2023.
  - v. The evidence of such payments were exhibited as Tenants exhibits “JWW3”, “JWW4”, and “JWW5”
8. The tenant therefore sought for the dismissal of the landlord’s notice of motion. Application dated 8/8/2023 as the same had no merit and that this court had no jurisdiction to entertain the same.
  9. Directions were taken on the 7/9/2023 where by consent of both parties, it was agreed to dispose off the application dated 8/8/2023. In pursuit thereto the applicant/landlord filed the submissions dated 14/9/2023 and the respondents filed the submission date 13/10/2023.
  10. In her submissions, the landlord retracted all the averments in her affidavits as filed. She however further stated that according to the tenants own tabulation and rents paid, the same amounted to only Kshs. 331,000/= and not Kshs. 615,300 as claimed. The landlord therefore sought to be granted leave to levy distress against the tenant’s goods lying on both Tittle No. 2151 and 2160.
  11. The landlord based her application on the provisions of the Distress for Rent Act and in particular Section 3 (1) thereof pending the hearing and determination of the reference by the tenant.
  12. The tenant in his submissions disputed the jurisdictions of this court to entertain the matter beforehand. It was his contention that the jurisdiction for this matter was to be found in the Land Registration Act No. 3 of 2012.
  13. Further in support of his case, the tenant relied on the following case laws:
    - a. *MC Foy – Vs – United Africa Co. Ltd* (1961) 3 All ER, 1169 as cited by the Court of Appeal in *Phoenix E.A Assurance Co. Ltd – Vs – S.M Thiga T/A Newspaper Service*(2019)eKLR.
    - b. *National Bank of Kenya Ltd. – Vs – Pipe Plastic Samkolit (K) Ltd* (2002) 2 E.A 503 (2011) and.
    - c. *Pius Kimaiyo Langat – Vs – Co-operative Bank of Kenya Ltd* (2017)eLKR.

#### **Issues For Determination:**

14. The issues for determination in this matter are as follows:
  - i. Whether this court has jurisdiction.
  - ii. Whether the landlord is entitled to levy distress against the tenant.



## Whether This Court Has Jurisdiction

15. As well stated in the case of *Owner of Motor Vessel "Lillian S" – Vs – Caltex Oil (Kenya) Ltd.* The court of appeal had this to say on the issue of jurisdiction:

“By jurisdiction, is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted...”
16. The Court of Appeal went further to state that:

“When a court takes it upon itself to exercise a jurisdiction which it does not possess, its decisions amounts to nothing. Jurisdiction must be acquired before judgment is given.”
17. The court in the case of *Owners of Motor Vehicles "Lillians"* proceeded to further state that:

“It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of the court may not be heard to raise the issue after the matter is heard and determined.”
18. In Civil Application No. 2 of 2011 *Samuel Kamau Macharia – Vs – KCB and 2 Others* the court had this to say on the question of jurisdiction:

“A court’s 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 by Law.”
19. I also appreciate the determination in the case of *MacFoy – Vs – United Africa Co. Ltd* (1961) 3ALL E.R, 1169 as cited with approval by the Court of Appeal in the case of *Phonix of E.A Assurance Company Limited – Vs – S.M Thiga T/A Newspaper Service* [2019]eKLR where it was stated that:

“If an Act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order to sit it aside. It is automatically null and void without more ado, though it is sometimes more convenient to have the court declare it to be so. And every proceeding which is founded on it is also not bad and incurably bad.”
20. Having cited case laws on the question of jurisdiction, it is plain and clear that jurisdiction is the trigger to any court proceedings. In this matter, the tenant raised the issue of jurisdiction at paragraphs 8 and 9 of his replying affidavit sworn on the 5/9/2023. The same has been raised in the tenant’s submissions and its incumbent upon me to me deal with the same before any further steps are taken in this proceedings.
21. It is however strange that it is the tenant who initiated this proceeding by filing his reference dated 5/6/2023 only to eloquently turn around and raise the issue of jurisdiction. Fortunately for him, it is an issue that must be addressed once raised.



22. The jurisdiction of this court is found under Section 2 of the Act. The same provides as follows:

2(1) For the purposes of this Act, unless the context otherwise requires “Catering Establishment” means any premises or which is carried out the business of supplying food or drink for consumption on such premises, by persons other than those who reside and are boarded on such premises; “Controlled tenancy” means a tenancy of a shop, hotel or catering establishment:

- a. Which has not been reduced into writing; or
- b. Which has not been reduced into writing and which:
  - i. Is for a period not exceeding five years.
  - ii. Contains provision for termination, otherwise than for breach of covenant, within five years from the commencement hereof or:
  - iii. Relates to premises or a class specified under Subsection (2) of this Section....

23. Section 12 (4) of the Act provides that:

“In addition to any other powers specifically conferred on it by or under this Act, a Tribunal may investigate any complaint relating to a controlled tenancy made to it by the landlord or the tenant, and may make such order thereon as it deems fit.”

24. In the present case, the relationship between the parties herein was established pursuant to a lease instrument which has been acknowledged by both parties and indeed it has been exhibited in their respective pleadings.

25. The said lease is said to relate to plot No. 2160 Kipkaren Kakamega County. However, the claim by the landlord is on purported rent arrears accrued from Tittle Nos. 2151 and 2160. These from a plain observations are different observation from the subject matter of the lease instrument signed on 25/5/2022.

26. As that may, the lease is said to have been made under the [Land Act](#) No. 6 of 2012 and the [Land Registration Act](#) No. 3 of 2012. That is the relationship that the parties voluntarily entered into. The only duty of the court in this regard therefore is to interpret the legal station where their respective rights can be safeguarded, secured and enforced.

27. In the case of National Bank of Kenya Ltd – Vs – Pipe Plastic Samkolit (K) Ltd (2022) 2 E.A 503 (2011) eKLR, the Court of Appeal had this to say on interpretation of contracts of Agreements between the parties:

“A Court of Law cannot rewrite a contract between its parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”



28. In *Pius Kimaiyo Langat – Vs – Cooperative Bank of Kenya Ltd* (20170 eKLR, the Court of Appeal had this to say on parties voluntary engagements through Contract Order Agreement:

“We are alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties, they are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”

29. This is therefore to mean that in deciding on the issue of jurisdiction as raised, the court can only confine itself to the lease instrument between the parties as signed by both and rendered in evidence in support of their respective cases.

30. It is noteworthy that as I deliver this ruling, neither of the parties, however remotely attempted to offer any insight or evidence on the kind of business that was to be run by the tenant or as to which business the tenant was running as the parties carried proceedings in court.

31. There is no way to tell that the kind of business that was being carried out by the tenant was a service or commodity business or whether it was one of those envisaged under Section 2 of the Act.

32. That without any indication on the type of business is run by the tenant, and in view of the clear wording of the lease agreement that the same was founded under the [Land Act](#) No. 6 of 2012 and [Land Registration Act](#) No. 3 of 2012, I have no difficulty in concluding that the matter before me has legitimate residence before the Environment and Land Court.

33. Article 162 (2) of the [Constitution](#) provides that:

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to -

c. the environment and the use and occupation of, and title to land.”

34. The [environment and Land Court Act](#) Chapter 12 A in its preamble provides that:

“It is an Act of Parliament to give effect to Article 162 (2) (b) of the Constitution; to establish a Superior Court to hear and determine disputes relating to the environment and the use and occupation of and title to, land, and to make provision for its jurisdiction functions and powers and for corrected purposes.”

35. The jurisdiction of the Environment and Land Court is eloquently demonstrated under Section 13 thereof.

### **Whether The Landlord Is Entitled To Levy Distress Against The Tenant:**

36. Having rendered myself effectively as the question of jurisdiction, it then follows that this particular issue is answered in the negative.

### **Final Disposition:**

37. Having found that the court lacks jurisdiction to preside over this matter, it incumbent to down the tools that govern the functionality of this court and make no other step in this proceedings but to terminate the same. The orders that therefore commend themselves to me are as follows:

i. That both the reference dated 5/6/2023 by the tenant and the notice of motion dated 8/8/2023 are dismissed and/or struck out for want of jurisdiction.



- ii. That the tenant having failed in his reference and the landlord in her notice of motion, each party will bear its own costs.
- iii. This file will be closed unless otherwise moved by either party.

**RULING DELIVERED ON THE 24<sup>TH</sup> DAY OF OCTOBER 2024 IN THE PRESENCE OF :**

M/s Wanjala for the landlord/applicant

M/s Kandenya for the tenant/respondent

**HON. NDEGWA WAHOME, MBS**

**MEMBER**

**BUSINESS PREMISES RENT TRIBUNAL**

**24/10/2023.**

