



**AVL Capital Limited v Xunwen & 2 others (Tribunal Case
E880 of 2023) [2024] KEBPRT 266 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 266 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E880 OF 2023
A MUMA, AG. CHAIR & J ROP, MEMBER
MARCH 14, 2024**

BETWEEN

AVL CAPITAL LIMITED APPLICANT

AND

LUO XUNWEN 1ST RESPONDENT

NW REALITE LIMITED 2ND RESPONDENT

GARAM INVESTMENTS AUCTIONEERS 3RD RESPONDENT

RULING

A. Parties and Representatives

1. The applicant, AVL Capital Limited, is a Tenant who rented space for business at Duplex Apartment Upper Hill Office No. 24. (the “Tenant”).
2. The Firm of Harry Karanja & Company Advocates represents the Applicant/Tenant.
3. The 1st Respondent, Luo Xunwen is that owner of the Premises and thus the Landlord of the suit premises. (the “suit premises”).
4. The 2nd Respondent, NW Realite Limited, is the manager of the suit premises and hence an agent of the Landlord.
5. The 3rd Respondent, Garam Investments Auctioneers, are auctioneers and hence an agent of the Landlord.
6. The Firm of G. Mutua Molo & Company Advocates appears for 1st, 2nd and 3rd Respondents.



B. The Dispute Background

7. The Tenant moved this Tribunal vide a Reference and an Application dated 8th September 2023 seeking inter alia, orders certifying the matter as urgent, restraining the Landlords, its servants, agents and employees from unlawfully evicting, demolishing, disconnecting electricity power, water supply or interfering with the Tenant's quiet enjoyment of the suit premises.
8. Having considered the Tenant's Application, this Honorable tribunal issued Orders dated 13th September 2023 restraining the 3rd Respondent from proclaiming, attaching and selling the Tenant's tools of trade pending the hearing and determination of the matter.
9. Further, the Court issued orders restraining the Landlord from interfering with the Tenant's quiet enjoyment of the suit premises pending the hearing and determination of this matter and set the reference for hearing on 21st November 2023.
10. In response to the Application, the respondents filed a notice of preliminary objection dated 20th November 2023.

C. Tenant's Case

11. The Tenant claims that the tenancy between it and the Landlord was based on a letter of offer dated 23rd January 2019 for a term of 5 years 2 months and which lapsed in April 2023.
12. Further, the Tenant claims that it has remained in occupation of the premises while paying rent at regular intervals and the Landlord receiving the said rent. It is the Tenant's case that in the absence of a written tenancy agreement, the tenancy had been reduced to a controlled tenancy that is not in writing.
13. In its submissions dated 20th February 2024, the Tenant submits that this Tribunal has jurisdiction to hear and determine this matter.

D. Landlord's Case

14. It is the Landlord's case that this matter is *res judicata* as it has been previously heard and determined by this Court in Tribunal Case No. E926 of 2022.
15. The Landlord indicates that the Court dismissed the Tenant's Reference and Application dated 13th October 2022 for lack of jurisdiction.

E. Issues For Determination

16. I have carefully perused all the pleadings and evidence presented before this Honorable Tribunal by the parties. It is therefore my respectful finding that the following issues are ripe for determination;

Whether this Court has jurisdiction to hear and determine this matter?

F. Analysis And Findings

Whether this Court has jurisdiction to hear and determine this matter?



17. This Honourable Tribunal has the duty to interrogate the question of jurisdiction and satisfy itself before making any further step guided by the celebrated case of *Owners of the Motor Vessel 'Lillian S' Vs Caltex Oil (Kenya) Limited* [1989] eKLR where the Court of Appeal held as follows:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

18. This Court is further guided by the decision of the Supreme Court of Kenya in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR where the Court observed that:

“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. The jurisdiction of the Business Premises Rent Tribunal is governed by the *Landlord and Tenant (Shops Hotels and Catering Establishments) Act*, Cap 301 Laws of Kenya (the “Act”). The preamble to the Act states that:

“It is an Act of Parliament to make provisions with respect to certain premises for the protection of tenants of such premises from eviction or from exploitation and for matters connected therewith and incidental thereto.”

20. Further, according to the Act, the jurisdiction of this Honourable Tribunal is limited to controlled tenancies. What then is a controlled tenancy?

21. A controlled tenancy is defined under Section 2 of the Act as follows: -

“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:

Provided that no tenancy to which the Government, the Community or a local authority is a party, whether as landlord or as tenant, shall be a controlled tenancy;

22. The Landlord’s contention that the Tribunal lacks jurisdiction to hear this matter is hinged on the fact that the matter has previously been heard and determined in Tribunal Case No. E926 of 2022.



23. I have had a chance to peruse the file for Tribunal Case No. E926 of 2022. I confirm that the matter was in deed heard and determined and a ruling delivered on 30th August 2023. Further, I confirm that the matter was dismissed because the matter had been filed on 13th October 2022, when the lease agreement for a term of 5 years 2 months was still in effect. Consequently, the Tribunal was devoid of jurisdiction.
24. However, I note that the said lease agreement expired in May 2023. Further, I note that the Tenant remained in occupation of the premises and has continued to pay rent to the Landlord at regular intervals.
25. Since there is no evidence of parties signing a tenancy agreement that ousts the jurisdiction of this Court, I am convinced that the tenancy between the parties herein was reduced into an unwritten controlled tenancy. As I see no lease or letter of offer duly signed. In the circumstances, this court is clothed with the requisite jurisdiction to hear and determine this matter.

G. Orders

26. The upshot is that the Landlord's Notice of Preliminary Objection dated 20th November 2023 is hereby dismissed. The matter be mentioned for directions on the Tenant's Reference on 4/4/2024.

HON. A MUMA - AG. CHAIR/MEMBER

HON JACKSON ROP - MEMBER

BUSINESS PREMISES RENT TRIBUNAL

RULING DATED, DELIVERED AND SIGNED AT NAIROBI ON THIS 14TH DAY OF MARCH 2024 IN PRESENCE OF WANJIRU FOR THE LANDLORD AND IN THE ABSENCE OF THE TENANT.

HON. A MUMA - AG. CHAIR/MEMBER

HON JACKSON ROP - MEMBER

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