



**Wambui & another v Njambi & another (Tribunal Case E902 of 2022)
[2023] KEBPRT 192 (KLR) (17 February 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 192 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E902 OF 2022
GAKUHI CHEGE, VICE CHAIR
FEBRUARY 17, 2023
VIEW PARK TOWERS 7TH & 8TH FLOOR**

BETWEEN

CATHERINE WAMBUI 1ST APPLICANT

ROBERT KAMAU 2ND APPLICANT

AND

ELIZABETH NJAMBI 1ST RESPONDENT

DERICK MWANIKI 2ND RESPONDENT

RULING

1. The tenants moved this Tribunal through a complaint under Section 12(4) of [Cap 301](#), Laws of Kenya in which they complained that the 1st Landlord maliciously issued them with a seven (7) days notice to vacate the suit premises and that the said notice was not in the prescribed form. The tenants state that their rent was fully paid and that they had invested approximately Kshs 4,800,000/- which was at the risk of being lost unless this Tribunal intervened.
2. The tenants also filed a motion dated October 5, 2022, seeking for restraining orders against the landlord and caretaker from interfering with their tenancy at the premises situated at Jamhuri and a declaration that the notice served upon them was illegal.
3. Interim orders were given on October 11, 2022 directing the tenants to avail evidence of payment of rent by October 14, 2022.
4. The application is supported by the affidavit of 1st tenant sworn on October 5, 2022 and the grounds on the face thereof. The tenants depose that they run a grocery store at the suit premises at a monthly rent of Kshs 60,000/- which is paid through the 2nd Respondent as the landlord's caretaker.



5. The 1st Respondent issued a notice dated September 30, 2022 directing the tenants to vacate therefrom on the basis that they were trespassers thereon having entered into the property illegally and built a structure on the said parcel which they use as a shop without authority or colour of right. The notice is marked 'CW1'.
6. The tenants depose that they were allowed into the suit premises by the 2nd Respondent as caretaker without disclosing existence of the 1st Respondent.
7. The tenants contend that they have invested a sum of Kshs 4.8 million and were ready to continue paying rent to the rightful owner. They had been on the premises for three (3) months and as such have not recovered their investment.
8. On October 25, 2022, the tenants filed a supplementary affidavit of even date wherein it is deposed that the 2nd Applicant entered into a lease agreement for the suit premises with the 2nd Respondent on May 1, 2022 at an agreed monthly rent of Kshs 60,000/-. The agreement is attached as annexure 'CW1'.
9. At the time of entering into the agreement, the 2nd Respondent passed himself as the Landlord of the suit premises and given that he had physical control of the suit premises, the former had no reason to doubt him.
10. The 2nd Respondent did not disclose that the premises belonged to the 1st Respondent and the Applicants only came to know of a rift between the Respondents through the notice to terminate the tenancy.
11. All rent payments were being made to the 2nd Respondent with the last payment having been paid via Mpesa on October 3, 2022. The rent payment print out is marked 'CW2'.
12. The Applicants therefore deny being trespassers on the suit premises in view of the tenancy agreement and evidence of payment of rent. It is their case that in the event of being required to vacate from the premises, they ought to be refunded the amount expended on setting up the necessary infrastructure to get the shop up and running as they had a legitimate expectation to operate the same until expiry of the lease. The lease is for 5 years one month as per clause 1 thereof.
13. The application is opposed through the 1st Respondent's replying affidavit sworn on October 17 wherein it is deposed that she is jointly registered as proprietor of the suit property with her husband one Benjamin Wanjohi Mugambi having bought it from one Roselyne Gacheri Kimathi as per annexures marked 'ENW1&2'.
14. The Applicants and the 2nd Respondent are accused of trespassing on the suit property and proceeding to unlawfully build a structure thereon currently being utilized as a shop. There is no tenancy agreement entered into with the applicants and their entry into the suit property was without her knowledge and authority which amounts to trespass. The structures erected thereon are thus illegal.
15. As such, no compensation is payable to the Applicant's for the illegal structures and occupation of the suit property without the 1st Respondent's consent as legal owner. The Applicants are accused of coming to this Tribunal with unclean hands.
16. The 1st Respondent admits having issued the impugned notice marked 'ENW5' upon the Applicants and the 2nd Respondent on September 30, 2022. The 2nd Respondent is said not to have been authorized whether orally or in writing to utilize the property whether for commercial gain or otherwise.



17. It is deposed that the actions of the 2nd Respondent smacks of opportunism, treachery and a choreographed plan to deprive the 1st Respondent of her hard earned property known as Nairobi/Block 63/374 in utter disregard of her rights as a registered owner of the same. The 1st Respondent prays for dismissal of the application by the applicants.
18. It is further deposed that there is a pending case between the 1st and 2nd Respondents before the Environment and Land Court vide Nairobi ELC No E264 of 2022 (Milimani) regarding trespass on the suit property as evidenced by annexure 'ENW6'.
19. It is the 1st Respondent's case that there is no landlord/tenant relationship of whichever form between her, Benjamin Wanjohi Mugambi (her husband) and the Applicants or 2nd Respondent and this case ought to be dismissed.
20. On January 12, 2023, the Applicants filed yet another application of even date seeking to pay the amount payable as rent into court or as directed pending the outcome of the application. All the arguments and depositions made in the previous application are repeated therein and I need not reproduce the same herein.
21. I am required to determine the following issues in this matter:-
 - a. Whether there exists a landlord/tenant relationship between the Applicants and 1st Respondent herein.
 - b. Whether this Tribunal has jurisdiction to adjudicate over the dispute herein.
 - c. Whether the Applicants are entitled to the reliefs sought in the complaint and applications dated October 5, 2022 and January 12, 2023.
 - d. Who is liable to pay costs of the suit?
22. I propose to deal with the first three (3) issues together as they are intertwined. I shall finally deal with the last issue alone.
23. It is not in dispute that the suit premises is situate on L R No Nairobi/Block 63/374 which is registered in the name of the 1st Respondent jointly with her husband one Benjamin Wanjohi Mugambi as per annexure marked 'ENW2' attached to the 1st Respondent's replying affidavit.
24. The Applicants took possession of the suit premises by dint of the tenancy agreement dated May 1, 2020 entered between them and the 2nd Respondent as landlord marked 'CW1' attached to the 1st Applicant's supplementary affidavit sworn on October 25, 2022. It is deposed in the said affidavit that the Applicants had no reason to doubt the 2nd Respondent who passed himself as the landlord in respect of the suit premises as he had actual control, access and egress thereof and received rent in that capacity.
25. I have examined the said agreement and noted that it is for a period of 5 years 1 month thereby removing it from the definition of a controlled tenancy under Section 2 (1) of Cap. 301, Laws of Kenya. It follows that the tenancy being unprotected under the Act, this Tribunal lacks Jurisdiction to adjudicate upon the dispute in line with the decision in the case of Owners of Motor Vessel Lillian S' vs Caltex Oil (Kenya) Ltd (1989) eKLR at page 8-9/27 where it was 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



more 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”.

26. I wish to add that a court is obligated to satisfy itself that it is clothed with jurisdiction before proceeding to determine a matter before it on the merits. In this case, I am afraid that the Tribunal being a creature of Cap 301, Laws of Kenya cannot arrogate itself the power to deal with the instant dispute and the tenant’s complaint and applications herein are candidates for dismissal for want of jurisdiction.
27. As regards costs, the same are in the Tribunal’s discretion under Section 12(1)(k) of [Cap 301](#), Laws of Kenya but always follow the event unless for good reasons otherwise ordered. I have no reason to deny the 1st Respondent costs.
28. In conclusion, the final orders which commend to me in this matter are:-
 - a. The Applicants complaint and applications dated October 5, 2022 and January 12, 2023 are hereby dismissed for want of jurisdiction.
 - b. The tenant shall pay the 1st Respondent Kshs 25,000/- as costs of the case.
 - c. The interim orders given on October 11, 2022 are hereby vacated or set aside.

It is so ordered.

RULING DATED, SIGNED & DELIVERED VIRTUALLY THIS 17TH DAY OF FEBRUARY 2023.

HON GAKUHI CHEGE

VICE CHAIR

BUSINESS PREMISES RENT TRIBUNAL

Ruling delivered in the present of:

Matwere for the Tenant

Kariithi for the Respondent

Kiprotich holding brief for Miss Muka for the 1st Respondent

