



**Diamond East Africa Limited v Macharia & 2 others (Tribunal Case
E557 of 2023) [2023] KEBPRT 1197 (KLR) (2 August 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 1197 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E557 OF 2023
P MAY, VICE CHAIR
AUGUST 2, 2023**

BETWEEN

DIAMOND EAST AFRICA LIMITED TENANT

AND

CATHERINE NJERI MACHARIA 1ST RESPONDENT

JAMES IRUNGU MACHARIA 2ND RESPONDENT

EDWARD MWANGI MACHARIA 3RD RESPONDENT

RULING

1. The application before me is the tenant's notice of motion filed under certificate dated 31st May, 2023. The application sought for orders compelling the landlord to open the demise premises and grant the tenant quiet possession of the demised premises. The application is premised on the grounds stated on the face of the application and the supporting affidavit.
2. The tenant stated that they entered into a tenancy agreement with the 1st Respondent sometimes in April 2023. It was the tenant's contention that the terms of the tenancy agreement were explicit and reduced into writing. The tenant averred that the 2nd and 3rd Respondents were strangers to them and were perturbed when the said respondents without any justification closed down the demised premises despite them having paid rent as when it fell due. The tenant attached a lease agreement between themselves and the 1st Respondent as evidence.
3. The application was placed before the Tribunal on 5th June, 2023 whereby temporary orders were issued in favour of the tenant pending the inter partes hearing. The tenant was ordered to serve the application and pleadings upon the respondent.
4. The respondents duly entered appearance and filed their respective responses. The 2nd and 3rd Respondents equally filed an application under certificate seeking to have the orders issued previously



vacated. It was their position that the tenant was a stranger to them and had no right whatsoever to occupy the demised premises by dint of an order by the High Court in an ongoing probate proceedings.

5. This ruling will determine the two pending applications. The 2nd and 3rd Respondents also filed a replying affidavit in response to the application dated 31st May, 2023. They maintained that they were charged with the sole responsibility of managing the demised premises by virtue of being named executors in a will made by the proprietor who is deceased.
6. The respondents challenged the jurisdiction of this Tribunal on two fronts. First that the tenancy agreement was for a period of 6 years and secondly that the pending probate proceedings and the orders issued therein stripped this Tribunal of the requisite jurisdiction.
7. The parties were directed to canvass the applications by way of written submissions. I have considered the submissions on record and the preliminary issue that the Tribunal has to address is whether this Tribunal has the jurisdiction to determine the present dispute.
8. The jurisdiction of this Honorable Court is limited to controlled tenancies as provided for under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301 Laws of Kenya.

Section 2 of the Act defines a controlled tenancy 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.”

9. The court in the case of; Al-Riaz International Limited v Ganjoni Properties Limited [2015] eKLR in expounding on the requirements of Section 2 of the Act stated as follows:

“In my view, the provisions of section 2 of Cap. 301 are clear. Thus, if a tenancy satisfies any of the conditions provided at section 2, the tenancy automatically becomes a controlled one and subject to the provisions of Cap. 301 and it does not matter whether the parties had agreed that the provisions of Cap. 301 shall not apply to their relationship. Whether the tenancy relationship between the parties herein was a controlled one, which is subject to the provisions of Cap. 301, is a matter of law and cannot be ousted by agreement between parties because that would amount to contracting outside the law.

10. In the present case, the main issue is whether or not the alleged tenancy relationship between the Landlord and the Tenant qualifies as a controlled tenancy and therefore subject to the jurisdiction of this honourable court.
11. From a clear reading of the lease agreement between the parties it provides that the lease was for a period of 6 years commencing 1st April, 2023 to 1st April, 2029. It is also the observation of this Tribunal that the lease agreement under clause 6 of the agreement contains a termination clause prior to the intended date of expiry.



12. I would therefore proceed to assess whether this Tribunal has jurisdiction based on the proceedings at the High Court. It is not in contention that the respondents are parties to the ongoing probate proceedings. The order issued by the High Court dated 29th March, 2023 has not been disputed neither has its contents been disputed. The High Court issued an order maintaining status quo. The interpretation of this order is contested. The parties wish to invite the Tribunal to interpret the same for them. I note that the proceedings are active and are running concurrently with the present case. The Tribunal runs the risk of making orders that will contradict those issued by the High Court and cause an embarrassment to the judicial system.
13. In view of the foregoing, it is clear that the Tribunal lacks the jurisdiction to determine the pending applications and the reference as the germane issues raised can best be canvassed at other appropriate fora. The applications dated 31st May, 2023 and 9th June, 2023 are hereby dismissed with no orders as to costs.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 2ND DAY OF AUGUST 2023

HON. PATRICIA MAY

VICE CHAIR

02.08.2023

In the presence of;

Ongicho for the 2nd and 3rd Respondents

Otieno holding brief for Wangari for the 1st Respondent

Ms. Kaburu holding brief for Njeri Gacheru for the Tenant

