



**Watatu Development Limited v Kyengo & another (Tribunal Case
E270 of 2022) [2023] KEBPRT 1283 (KLR) (11 October 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 1283 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E270 OF 2022
P MAY, MEMBER
OCTOBER 11, 2023**

BETWEEN

WATATU DEVELOPMENT LIMITED LANDLORD

AND

MICHAEL KYENGO 1ST TENANT

CAROLINE KYENGO 2ND TENANT

RULING

1. The landlord commenced the present proceedings by filing a complaint in accordance with Section 12(4) of [CAP 301](#) alleging that the tenant had ignored notices and demand letters to have them pay rent. Contemporaneous with the complaint, the landlord filed an application under certificate seeking for a plethora of orders including orders of eviction against the tenant over rent arrears amounting to Kshs. 5,769,429.28.
2. The respondents duly entered appearance and filed a response in opposition to the application through the preliminary objection dated 18th January, 2023. The respondents noted that the Tribunal was divested with the jurisdiction to hear and determine the present dispute as there no longer existed landlord and tenant relationship. They stated further that the tenant had vacated the premises upon the expiry of the lease.
3. The parties were directed to canvass the application and the preliminary objection by way of written submissions. The Tribunal further directed that the rent inspector to inspect the demised premises. The rent inspector filed their report. I have considered the submissions on record and would proceed as follows:



4. It has been held repeatedly by courts that a preliminary objection should raise a pure point of law which requires no evidence to be adduced. In Mehuba Gelan Kelil & 2 others v Abdulkadir Shariff Abdirhim & 4 others [2015] eKLR Gikonyo J. rendered himself thus:

I need not re-invent the wheel. It is trite law that a preliminary objection should be based on pure points of law which do not require copious probing of evidence in order to ascertain. See the opinion by Law JA on this point in the case of; Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696 when he rendered himself thus:

“So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Similarly Sir Charles Newbold in the same case stated that:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. This improper practice should stop.”

5. In Oraro vs. Mbaja [2005] 1 KLR 141 Ojwang, J (as he then was) expressed himself as follows on preliminary objections:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. The first matter relates to increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop... The principle is abundantly clear. A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection



must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.....”

6. The question of whether there is tenancy relationship is one that is contested. Guided by the above authorities it is clear that the preliminary objection required additional evidence to be adduced. The Tribunal ordered for inspection as part of fact finding and the tenant’s items were still at the demised premises. The attempts to have them remove the same did not bear any fruit. It is then clear that the tenant did not yield up possession thus the tenancy relationship continued to subsist even after the lapse of the term of tenancy.
7. In the case of; *Kasturi Limited Vs Nyeri Wholesalers Limited* [2014] eKLR the Court of Appeal held as follows;

“A Tenant cannot impose or force himself on a Landlord. In the instant case, when the lease between the parties expired, it was incumbent upon the Appellant to give vacant possession.”
8. It is trite law that “equity will not allow the plaintiff to gain from his wrongful act nor will a court aid a man to derive advantage from his wrong for such would be unconscionable” (see the case of; *Mary Wanjiku & Challa Holdings Ltd – vs- Kenya Commercial Bank Ltd* (Mombasa HCCC No. 250 of 2000). The actions of the tenant of failing to yield up possession and failing to meet their obligation of paying rent reeks of impunity. The same cannot be entertained by any judicial body. It is unjustifiable and unlawful.
9. In the end, the application dated 13th December, 2022 is allowed in the following terms:
 - a. The tenant is ordered to forthwith pay the accumulated rent arrears up to the period of delivery of this ruling.
 - b. In default of (a) above, the landlord shall be at liberty to commence any lawful recovery process including levying of distress.
 - c. The landlord is awarded costs assessed at Kshs. 100,000/-
 - d. The tenant shall yield up possession and restore the demised premises to its original state within 3 days from the date hereof.
 - e. The OCS Diani Police station to ensure compliance.
 - f. Matter settled in the above terms

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 11TH OCTOBER 2023

HON. P. MAY - MEMBER

11. 10.2023

In the presence of;

Ms. Wambua holding brief for Obonyo for the landlord/Applicant

No appearance for the Respondents

