



**Salat v Nnicom Investment Company & 2 others (Tribunal Case
E103 of 2023) [2023] KEBPRT 624 (KLR) (11 October 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 624 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E103 OF 2023
A MUMA, MEMBER
OCTOBER 11, 2023**

BETWEEN

ARTAN NOOR SALAT APPLICANT

AND

NNICOM INVESTMENT COMPANY 1ST RESPONDENT

NYAKACH INSURANCE & COMMERCIAL AGENCIES 2ND RESPONDENT

DAVID NJORGE JOHANA 3RD RESPONDENT

RULING

Parties and Their Representatives

1. The Applicant herein is the current occupant of the Suit Premises owned by the Landlord being Room No 10 on Title No Nyahururu Municipality Block 6/403 within the Republic of Kenya.
2. The Applicant is represented by the Firm of Kean Advocates LLP.
3. The 1st Respondent is the owner of the Suit Premises occupied by the Applicant.
4. The 2nd Respondent is the Agent managing the 1st Respondent's Premises.
5. The 3rd Respondent is an Auctioneering Firm instructed by the 1st Respondent to levy distress upon the Applicant.
6. The Respondents are represented by the Firm of Wachira Mbuthia & Company Advocates.

Dispute Background

7. Vide a Reference dated 15th June 2023 and Notice of Motion Application of even date, the Applicant herein approached this Tribunal seeking inter alia, orders that the Respondents be compelled to reopen



the Premises unconditionally pending the hearing and determination of the case. Further, that the Respondents be restrained from howsoever interfering with the Applicant's quiet occupation and lawful enjoyment of the premises.

8. Subsequently, on 27th June 2023, the Respondents filed a Preliminary Objection contending the jurisdiction of this Tribunal to hear and determine the present matter. It is the said Preliminary Objection that is the subject of this Ruling.

The Respondents' Case

9. The Respondents filed written submissions dated 31st July 2023. They submitted that this Tribunal lacks jurisdiction to entertain the Tenant's complaint because by dint of section 2(1)(b)(ii) of [cap 301](#), the Lease agreement on the basis of which the Tenant commenced the proceedings falls outside the purview of the said section and therefore the Tribunal has no jurisdiction over the matter.
10. The Respondents further submitted that it is clear that if a tenancy agreement has provision for termination otherwise than breach of contract, within five (5) years from the commencement of the term, then it is a controlled. However, that if the provision for termination is for breach of the contract and therefore not a blanket provision that gives parties liberty to terminate at any time and for any reason within the term of the lease, then such tenancy falls outside the purview of section 2(1)(b)(ii) of [cap 301](#) and this Tribunal does not have jurisdiction.
11. The Respondents also submitted that the termination clause in the present case is neither a blanket one or other than for breach of covenant and the reading of the said clause leaves no doubt to that. The Respondents relied on [Khalif Jele Mohamed & Another v Republic & Another](#) [2019] eKLR, [Patrick Kariuki Gitthinji t/a Cindy Caterers v Power General Contractors & 2 Others](#) [2021] eKLR and [Ann Njoki Kiura v Warungu Holdings Limited](#) [2021] eKLR in support of their case.
12. Ultimately, the Respondents urged this Tribunal to find that it is not clothed with jurisdiction in the present case and down its tools by sustaining the preliminary objection.

The Applicant's Case

13. The Applicant also filed written submissions dated 1st August 2023. He submitted that he entered into a lease agreement with the Respondents in respect of the premises where he was to pay a monthly rent to the Respondents. He further submitted that he was told to renovate the shop which he did and paid deposit, rent and goodwill. However, in a sudden turn of events, the 3rd Respondent wants to take the shop for his own use without refunding the entire sum used up in the renovation, deposit and advance rents paid.
14. The Applicant also submitted that the applicable law, [cap 301](#) applies in this matter in that the premises is a shop which is a premise of a class specified in section 2(1)(b)(iii) of [cap 301](#) and therefore falls within the realm of controlled tenancy, which this Tribunal has jurisdiction to handle.
15. The Applicant further submitted that the Lease agreement at clause 8 provides for termination of the tenancy within the tenancy period which can be any time within the 5 years, by giving three months' notice and it therefore satisfies the requirements of a controlled tenancy. In his view, the termination clause did not exclude termination within 5 years from the commencement of the tenancy. The termination as worded, brought the tenancy within the meaning of a controlled tenancy under section 2(1)(b)(ii) of the [Act](#), clothing this Tribunal with the jurisdiction over the tenancy.
16. It was also the Applicant's submission that had the termination clause included the fact that the tenancy can only be terminated after the expiration of the 5 years after commencement and not earlier,



then the same would have fallen outside the ambit of [cap 301](#). The Applicant relied on [Khalif Jele Mohamed & Another v Republic & Another](#) [2019] eKLR, [Al-Riaz International Limited v Ganjoni Properties Limited](#) [2015] eKLR in support of his case.

17. The Respondents urged that the tenancy being that of a shop and with a blanket termination clause, it is a controlled tenancy and therefore this Tribunal has jurisdiction to hear and determine the matter. He urged this Tribunal to dismiss the Preliminary objection with costs.

Issues For Determination

18. I have given full consideration to the Tenant's Reference and Notice of Motion Application, Preliminary Objection, the rival affidavits, submissions, and the authorities cited.

19. In my respectful view, I find that the sole issue that falls for determination is:

Whether this Tribunal has jurisdiction to hear and determine this Application.

Analysis And Determination

20. The gravamen of this case is the vexed question of "preliminary objections." Newbold, J.A. (as he then was) gave the legal fraternity the most commonly cited definition of a preliminary objection when he famously surmised as follows in *Mukisa Biscuit Co Ltd v West End Distributors Ltd* [1969] E.A. 696:

"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".

21. He went on to further state that;

"The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues."

22. Such was the eminence of a preliminary objection at the time, a position which still prevails to date owing to its determinative nature in the event that it is successfully canvassed. It is in the matter before me and it is against the foregoing backdrop that the Landlord invites this Tribunal to so consider.

23. In common English parlance, 'Jurisdiction' denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a Court or a Tribunal can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a Court or Tribunal therefore proceeds to hear a dispute without jurisdiction, then the result will be nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae.

24. Section 2 of the [Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#) provides as follows:

For the purposes of this [Act](#), unless the context otherwise requires—

"catering establishment" means any premises on 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

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- (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;

25. In view of the above provisions, it is clear that this Tribunal only has jurisdiction to hear and determine disputes in cases where Agreements are reduced to writing, Agreements which do not exceed a period of 5 years.

26. Moreover, jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint one in the court clothed with jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself.

27. In the locus classicus of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd.* (1989), in this subject, this Court pronounced itself as follows:

“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 downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

28. Further, in the case of *Joseph Muthee Kamau & Another v David Mwangi Gichure & Another* (2013) eKLR, the Court considered the issue of jurisdiction and stated as follows:

“When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being *Kagenyi v Musirambo* (1968) EA 43. We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing.”

29. I have considered the Lease agreement dated 2nd June 2023 which created the Landlord/Tenant relationship between the Tenant and the 1st Respondent. Clause 1 stipulates that term of the lease would be for a period of five (5) years one(1) month with effect from 1st June 2023. Further, Clause 8 of the Lease agreement provides for termination for breach of the covenant which is counter the intention of section 2(1)(ii) of *cap 301*. It is therefore my view that on the basis of the said provisions,



the tenancy relationship between the Tenant and the Landlord is beyond the scope of the jurisdiction of this Tribunal.

30. Having now considered the above reasoning, the Tribunal finds that lack of jurisdiction can dispose of the matter preliminarily without having to resort to ascertaining of facts. Be that as it may, the Tribunal has found that it is devoid of jurisdiction to determine the present matter and therefore cannot proceed to determine the parties' contention on the Landlord/Tenant relationship.

Determination

31. Having established that this Tribunal had no jurisdiction when the suit was filed, the consequent holding is that this Tribunal proceeds to down its tools and is unable to proceed to hear and determine the dispute.
32. Consequently, the Tenant's Reference and Application are dismissed with costs to the Landlord capped at KShs.15,000.00.

RULING DATED, DELIVERED AND SIGNED AT NAIROBI ON THIS 11TH DAY OF OCTOBER 2023 IN THE PRESENCE OF MBUTHIA FOR THE LANDLORD, NO APPEARANCE FOR THE TENANT.

HON A. MUMA

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

