



**Njau v Wamae (Tribunal Case E732 of 2021)  
[2023] KEBPRT 359 (KLR) (Civ) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 359 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
CIVIL  
TRIBUNAL CASE E732 OF 2021  
GAKUHI CHEGE, VICE CHAIR  
JUNE 15, 2023**

**BETWEEN**

**JIDRAPH MUIGAI NJAU ..... TENANT**

**AND**

**SAMUEL MAINA WAMAE ..... LANDLORD**

**RULING**

1. Through a motion dated 10<sup>th</sup> March 2023, the tenant moved this Tribunal seeking in material part for an order to set aside and/or review the order of the honourable Tribunal dated and issued on 17<sup>th</sup> February 2023 on account of “an obvious and grave error on record”.
2. In the alternative, the Tribunal be pleased to enlarge the time/period within which the Tenant should vacate the premises to 31<sup>st</sup> March 2024. The tenant also seeks that costs of the application be provided for.
3. According to the tenant, the lease agreement between him and the landlord which formed the basis of the consolidated reference before the Tribunal is for a term of five years and six months as per Clause 1 thereof. As such, the tenancy does not fall under the category of a controlled tenancy as defined in Section 2 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*. On that basis, the Tribunal did not have the jurisdiction ab initio to hear and determine the dispute.
4. It is contended that the Tribunal did not have authority with regard to the dispute between the parties herein and any orders and directions issued in relation to the matter was not permitted in law. It is on that basis that the Tribunal is urged to review and set aside its ruling of 17<sup>th</sup> February 2023 on account of a grave error on record.



5. In the alternative, the tenant seeks for enlargement of the period within which he should vacate the suit premises as having invested heavily required time to wide up his business including the bar, restaurants, saloons, butchery, garage etc and find an alternative premises. He also required time to prepare his employees for imminent loss of jobs to enable them look for alternatives. As such, it was in the interest of justice and fairness that the orders sought be granted.
6. The application is supported by the affidavit of the tenant sworn on 10<sup>th</sup> March 2023. Among the documents annexed to the affidavit is an agreement to lease dated 1<sup>st</sup> July 2020 marked as annexure “JMN-2”.
7. The landlord filed a replying affidavit sworn on 20<sup>th</sup> April 2023 wherein he opposes the application as unmeritorious, incompetent, fatally defective and an abuse of court process. The landlord gives a chronology of the matter and his relationship with the tenant from inception of the lease contract.
8. According to the landlord, the tenant wants to hold the court hostage in order to remain in possession of the suit premises until 2024 at his detriment. He accuses the tenant of forum shopping in order to frustrate him from enjoying the fruits of judgment.
9. According to the landlord, this Tribunal has no mandate or jurisdiction to extend/enlarge time or period in which the tenant should vacate the premises as it cannot be part of the contract/agreement but a mediator.
10. The landlord contends that the tenant’s advocate is not properly on record and should seek leave to come on record after judgment and the application should be dismissed at the onset.
11. It is deposed that the issue of jurisdiction raised by the tenant is meant to frustrate the Respondent from enjoying the fruits of judgment considering the fact that the Applicant was the first to approach the court and that “such a minor error should not be reason why this court will not uphold its decision of granting orders of evicting the tenant from the suit premises”.
12. The landlord therefore prays that the ruling of 7<sup>th</sup> February 2023 be upheld and the tenant’s application be dismissed.
13. The application was directed to be disposed of by way of written submissions but only the tenant’s advocate complied. I shall consider the submissions together with the issues for determination.
14. The following issues arise for determination in the application before me:-
  - a. Whether this Tribunal had jurisdiction to hear and determine the instant case.
  - b. Whether the Tenant is entitled to the reliefs sought in the application dated 10<sup>th</sup> March 2023.
  - c. Who is liable to pay costs?
15. The parties herein entered into an agreement for lease dated 1<sup>st</sup> July 2020 in respect of Land Reference no. 12715/2225 (part) and 12715/2226 (part) Mavoko Subcounty, Machakos County. Clause 1 of the agreement stipulates the term of the lease to be five (5) years six(6) months commencing on 1<sup>st</sup> July 2020 to 31<sup>st</sup> January 2026.
16. It is submitted that the tenancy created by the said agreement is not a controlled tenancy as defined in Section 2 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* as it exceeds five (5) years. The lease agreement is annexed as “JMN-2” to the supporting affidavit. As such, the Tribunal is said to have entertained the matter without jurisdiction.



17. The tenant's counsel relies on the decisions in the cases of *Owners of Motor Vessel Lilian "S" – Vs- Caltex Kenya Limited* (1989) KLR 1, *Public Service Commission & 4 Others – vs- Cheruiyot & 2 Others* (2022) KECA 15 (KLR), *In the matter of interim Independent Electoral Commission* (2011) eKLR, *Samuel Kamau Macharia & Another – vs- Kenya Commercial Bank Limited & 2 Others* (2012) eKLR, *Shanzu Investments Limited – vs- Commissioner for Lands* (Civil Appeal no. 100 of 1993) and *Benjoh Amalgamated Limited & Another -vs- Kenya Commercial Bank Limited* (2014) eKLR to buttress the point on lack of jurisdiction and the effect thereof.
18. The tenant cites Order 45 Rule 1 of the Civil Procedure Rules in submitting that there is sufficient reason for the Tribunal to review and set aside its decision. He relies on the case of *Shanzu Investments Limited – vs- Commissioner for Lands* (supra) wherein the Court of Appeal held as follows:-
 

“Any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the court by Section 80 of the *Civil Procedure Act* and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous”.
19. Section 12(1) of Cap. 301, provides one of the powers conferred upon the Tribunal to be to vary or rescind any order made by the Tribunal under the provisions of the Act”. This is a discretionary power which is to be exercised judicially like all other discretions.
20. In the case of *Phoenix of E.A Assurance Company Limited – vs- S.M. Thiga t/a Newspaper service* (2019) eKLR at paragraph 2, the Court of Appeal had the following to state on the issue of jurisdiction: -
 

“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 can be seized of a matter, it must satisfy itself that it has authority to hear and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae”.
21. After the question of jurisdiction was raised in this matter, the landlord's answer in the replying affidavit was that “such a minor error should not be reason why this court will not uphold its decision of granting orders of evicting the tenant from the suit premises”.
22. The foregoing is a tacit admission that this Tribunal had no jurisdiction to entertain the dispute between the parties herein under Section 2 of Cap. 301, Laws of Kenya and as such, the ruling of 17<sup>th</sup> February 2023 and all the previous proceedings and orders are a nullity in line with the decision in *Phoenix of E.A Assurance Co. Ltd – vs- S.M. Thiga t/a Newspaper service* (Supra). Consequently the proceedings and orders made herein ought to be set aside and the consolidated references struck out.
23. It therefore follows that prayer 3 of the application dated 10<sup>th</sup> March 2023 ought to succeed. This renders prayer 4 of the application Otiose.
24. As regards costs, the same are in the Tribunal's discretion under Section 12(1)(k) of Cap. 301, Laws of Kenya. I note that both parties had an obligation to raise the issue of jurisdiction at the earliest possible opportunity in the proceedings which they failed to do until conclusion thereof. I shall therefore direct each party to bear own costs of the entire proceedings.



25. In conclusion therefore the following orders commend to me under Section 12(i) (1) & 12 (1) (k) of Cap. 301, Laws of Kenya.

- a. The application dated 10<sup>th</sup> March 2023 is allowed in terms of prayer 3 thereof.
- b. The Ruling and orders of 17<sup>th</sup> February 2023 are hereby set aside.
- c. The proceedings and all orders emanating from the consolidated cases are hereby struck out for want of jurisdiction.
- d. Each party shall bear own costs of the proceedings.

It is so ordered.

**RULING SIGNED & VIRTUALLY DELIVERED THIS 15<sup>TH</sup> DAY OF JUNE 2023.**

**HON. GAKUHI CHEGE**

**VICE CHAIR**

**BUSINESS PREMISES RENT TRIBUNAL**

**In the presence of:-**

Kinoti for the Landlord/Respondent

Maalim holding brief for Ndaci for the Tenant

