



**Pekas Mgadini Hardware Limited v B.O.M St. John's Girls Secondary School & another  
(Tribunal Case E323 of 2023) [2024] KEBPRT 851 (KLR) (5 July 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 851 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E323 OF 2023  
J OSODO, CHAIR & GAKUHI CHEGE, MEMBER  
JULY 5, 2024**

**BETWEEN**

**PEKAS MGADINI HARDWARE LIMITED ..... APPLICANT**

**AND**

**B.O.M ST. JOHN'S GIRLS SECONDARY SCHOOL ..... 1<sup>ST</sup> RESPONDENT**

**BEATRICE MISIGO ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**A.Dispute Background**

1. Before us are two Notices of Preliminary Objection. The first Notice of Preliminary Objection dated 20<sup>th</sup> February, 2024 has been raised by the Attorney general and is based on the following grounds; -
  - i. That the tribunal lacks jurisdiction to hear and determine this case by virtue of Section 2 (1)(b)(ii) of Cap 301 which states that; "Provided no tenancy to which the government, the community or a local authority is a party whether as landlord or tenant shall be a controlled tenancy."
  - ii. That the contract has no termination clause and therefore not within the jurisdiction of this tribunal.
  - iii. That the signatory to the alleged agreement dated 10<sup>th</sup> January, 2023 had no locus to enter into a contract for the school.
  - iv. That the 2<sup>nd</sup> respondent has been wrongly sued in her personal capacity.
  - v. That the signatory to the rent waiver agreement had no capacity to contract with the applicant at the time of signing the contract.
  - vi. That there is no landlord/tenant relationship in existence between the parties herein.



2. The second Notice of Preliminary Objection dated 6<sup>th</sup> March, 2024 has been raised by the 1<sup>st</sup> respondent and is based on the following grounds; -
  - i. That the tribunal lacks jurisdiction to hear and determine the matter because of the following reasons; -
    - a. That there is no controlled tenancy as defined by [Cap 301](#) Laws of Kenya because the 1<sup>st</sup> respondent is a government entity within the meaning of Section 43 (1)(a) of the [Basic Education Act](#).
    - b. That Section 2(1) of [Cap 301](#) Laws of Kenya provides that no tenancy to which the government, the community or local authority is a party, whether as a landlord or as a tenant, shall be a controlled tenancy.
    - c. That the 1<sup>st</sup> respondent is not the applicant's landlord within the meaning of Section 2(1) because the 1<sup>st</sup> respondent was not entitled to rents and profits from the premises.
3. At a court hearing on 11<sup>th</sup> March, 2023, it was directed that both Notices of Preliminary Objection be disposed of by way of written submissions.
4. Only the tenant/applicant complied by filing his written submissions dated 8<sup>th</sup> April, 2024. We however note that the tenant/applicant's written submissions are with regard to the Notice of Preliminary objection dated 6<sup>th</sup> March, 2024 only.
5. We also note that at a court mention on 14<sup>th</sup> April 2024, Counsel for the respondent stated that they had filed their submissions on the two Notices of Preliminary Objection but the same are not in the court file and neither have they been uploaded on the online filing portal. The tribunal shall therefore only consider the tenant/applicant's written submissions.
6. The applicant/tenant in his submissions states that he has not sued a government entity which is a school as submitted by the 1<sup>st</sup> respondent. That the 1<sup>st</sup> respondent which is established under Section 55 of the [Basic Education Act](#) is an independent body charged with the responsibilities of management and running the affairs of the school and as such cannot be construed to be a government entity.
7. The applicant/tenant also states that the 2<sup>nd</sup> respondent is an individual who is a Secretary to the 1<sup>st</sup> respondent hence, she is not a government entity and consequently Section 43 (i)(a) of the [Basic Education Act](#) and 2(i)(b) of [Cap 301](#) do not apply.
8. The tenant/applicant further emphasizes in his submissions that he has sued the Board of Management of St. John's Girls Secondary School being the 1<sup>st</sup> respondent and one Beatrice Misigo, the 2<sup>nd</sup> respondent being the Secretary to the 1<sup>st</sup> respondent and that the applicant has not sued St John's Girls Secondary school as a government entity.

## **B. Analysis and Determination**

9. The test of what constitutes a Preliminary objection was settled in the locus classicus case of [Mukisa Biscuits Manufacturing Ltd v West End Distributors](#) [1969] EA 696 wherein it was stated as follows:

“ ---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 a contract giving rise to the suit to refer the dispute to arbitration”

In the same case, Sir Charles Newbold, P. stated:

“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 preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

10. In the instant case, the respondents have raised a preliminary point that this tribunal lacks jurisdiction by virtue of Section 2 (1)(b)(iii) of Cap 301 Laws of Kenya which provides that no tenancy to which the government, the community or local authority is party whether as a landlord or tenant shall be a controlled tenancy and that the contract entered into herein has no termination clause.
11. We have perused the documents filed in this matter and we find that there is no evidence filed by the respondents to prove that the 1<sup>st</sup> respondent in this matter is a State Corporation.
12. In addition, we shall rely on the decisions in the cases of Ubah Ismail Mohamed v Gapco Kenya Limited & Another [2019] eKLR and Greenstar Systems Limited v Kenyatta International Convention Center (KICC) and 2 Others [2018] eKLR. Based on these decisions, we are not convinced that the 1<sup>st</sup> respondent is exempt from the provisions of Cap 301 Laws of Kenya as it does not fit the description of the term “Government” under Section 2 (1) of the said statute.
13. The other issue raised in the Attorney General’s Notice of Preliminary Objection is that of jurisdiction by virtue of the fact that the contract between the parties has no termination clause. The court is unable to determine the said allegation as no contract between the parties has been filed in support of the same. There is therefore need for further investigation to be carried out by this tribunal to prove the said allegation.
14. In view of the above analysis, we find that the Notices of Preliminary Objection dated 20<sup>th</sup> February, 2024 and 6<sup>th</sup> March, 2024 do not pass the test of what constitutes a Preliminary Objection. We therefore dismiss the same and order this matter proceed for hearing and determination on the merits.

### C. Orders

15. In view of the foregoing, the following orders commend to us; -
    - a. The Notices of preliminary Objection dated 20<sup>th</sup> February 2024 and 6<sup>th</sup> March, 2024 are hereby dismissed.
    - b. The application and reference dated 19<sup>th</sup> February, 2024 shall proceed by way of written submissions.
    - c. Parties shall file and exchange their written submissions within the next 28 days with each party taking 14 days and the tenant starting.
    - d. Costs shall abide the outcome of the application and reference.
- It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 5<sup>TH</sup> DAY OF JULY 2024.**



**HON. JOYCE AKINYI OSODO**

**(PANEL CHAIRPERSON)**

**BUSINESS PREMISES RENT TRIBUNAL**

**HON GAKUHI CHEGE**

**(MEMBER)**

**In the absence of:**

**Parties**

