



Wangui & 10 others v General of the Salvation Army Kenya & 2 others (Tribunal Case E070 of 2024) [2024] KEBPRT 1335 (KLR) (21 August 2024) (Ruling)

Neutral citation: [2024] KEBPRT 1335 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E070 OF 2024
N WAHOME, CHAIR & JOYCE MURIGI, MEMBER
AUGUST 21, 2024**

BETWEEN

**GRACE NJERI NJOROGE W. WANGUI 1ST APPLICANT
JOSEPHINE W. WANGUI 2ND APPLICANT
BONIFACE MACHARIA KIARIE 3RD APPLICANT
MILLICENT WANJIRU GITHATU 4TH APPLICANT
JAMES MWAURA NDUNGU 5TH APPLICANT
EPHANTUS GIKONYO GUTHERA 6TH APPLICANT
REBECCA MALEMBA 7TH APPLICANT
SARAH W. KAMAU 8TH APPLICANT
SHARATH BERAKHA 9TH APPLICANT
ROSEMARY KATHAMBI 10TH APPLICANT
EDWARD NDUATI NJOROGE T/A EDETEL ODEAL TECHNOLOGY 11TH
APPLICANT**

AND

**THE GENERAL OF THE SALVATION ARMY KENYA 1ST RESPONDENT
PICTURESQUE PROPERTIES LTED 2ND RESPONDENT
FUNAN CONTRUCTION COMPANY LTD 3RD RESPONDENT**



RULING

1. This Ruling relates to the Applicants Notice of Motion application dated 22nd January 2024. The motion is anchored on Section 12(4) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* (Cap 301) hereinafter “the act”.
2. The application sought for the following reliefs among others :-
 - i. That the Tenants be allowed to deposit their respective rents with the Tribunal.
 - ii. Respondents be ordered to allow the Tenants quiet possession of the demised premises namely LR NO.209/1951.
 - iii. On who between the Respondents was allowed to collect rent.
 - iv. The Tenants were entitled to refund of their respective deposits paid to the 3rd Respondent or same be handed over to the successor of the 3rd Respondent.
 - v. The purported increment of rent to the respective Tenants and the demand for goodwill be declared illegal and contrary to the provisions of Cap. 301 of the Laws of Kenya.
 - vi. The goodwill paid in the year, 2003 either be refunded or the same be treated as advance trance rent and be offset against such accruing rent.
 - vii. The Tribunal do declare that the Tenants be at liberty to recover goodwill paid upon commencement of the tenancy on its termination or recover the same from the incoming Tenants.
 - viii. The OCS Kamukunji Police Station to ensure compliance with any ensuing orders and that costs be provided for.
3. We have listed those prayers by the Applicants in brief but they capture the very explicit content of the Applicants plea to this court. The motion was supported by the annexed affidavit of Edward Nduati Njoroge the 11th Tenant/Applicant.
4. Thereafter the Applicants filed the further affidavit sworn by the 11th applicant Edward Nduati Njoroge on the 10th April 2024 and the submissions dated 9th April 2024.
5. The case for the Tenants/Applicants is that:-
 - i. They had a tenancy agreement with the 3rd Respondent on property owned by the 1st Respondent and where the 2nd Respondent was the purported agent thereof.
 - ii. They all had made rent deposits as security and further paid different amounts in terms of goodwill.
 - iii. A stranger to them by the name of Funan consolidated company Limited had purported to assume the lease by the 3rd Respondent and had increased rent and demanded for further deposits in terms of rent security and goodwill.
 - iv. Some of them had been coerced to pay the increased rents, rent deposit for security and good will and wanted the same declared illegal.



- v. The 1st and 3rd Respondents had not officially handed them over to the 2nd Respondent who was an imposter and was out to harass and intimidate them.
 - vi. They needed to know as to who was their true landlord and to whom they would pay rent.
 - vii. Their suit against the 1st Respondent was properly before the court.
 - viii. They were protected Tenants under the law.
6. In further support of their case, the Applicants replied on the following:-
- a. Orders and Regulations for officers of the Salvation army on principles and procedures of the 1st Respondent.
 - b. The *Landlord and Tenant (Shops, Hotels and catering Establishments) Act* (Cap. 301).
 - c. Case No. ELC 474 of 2010 at Milimani Law Courts Nairobi. Samuel Musau & 33 Others – vs- Andrew Makau & 10 Others.
7. On its part, the 1st Respondent filed the notice of motion application dated 12th April 2024, the Replying Affidavit sworn by Arthur Lord on the 18th March 2024 and finally the submissions dated 10th June 2024. The case for the 1st Respondent is that:-
- a. It was a stranger to the Applicant and it was wrongly brought to this court.
 - b. The 3rd Respondent was its lessee from 1st October 2013 but which lease had terminated on the 30th September 2023.
 - c. It had since entered into a new lease agreement with a legal entity known as Funan consolidated Company Limited.
 - d. It was a stranger to the rent increment, rent deposits for security and goodwill payment complained about by the Applicants.
 - e. It had not in anyway dealt with the Applicants either directly or otherwise.
8. The 1st Respondent also relied on the following decided court cases in support of its case:-
- a. Islamia Madrassa Society – vs- Zafar Niaz & 8 Others (2021) eKLR,
 - b. Elijah Sakano & Another – vs- Mara Conservancy & 5 Others HCCC No. 37 of 2013,
 - c. Sections 107 and 108 of the *Evidence Act* Cap. 80 Laws of Kenya.
9. The 2nd Respondent on the other hand filed the Replying Affidavit sworn by Mr. David Ndiangui on the 15th March 2024. The case for the 2nd Respondent was that:-
- i. The Applicants were for 12 years the Tenants of the 3rd Respondent but which tenancy expired on the 30th September 2023.
 - ii. It was never an agent of the 3rd Respondents but of M/S Funan consolidated company limited.
 - iii. A meeting was held on the 7th August 2023 where the 1st Respondent, 2nd Respondent, the representative of the 3rd Respondent and some of the applicants were present and renewal of the Applicants leases was discussed (annexture “DW3”).
 - iv. At the meeting, the applicants were informed that the new lessee M/S Funan consolidated Ltd had appointed the 2nd Respondent as its agent.



- v. The 3rd Respondent had informed the Applicant that its lease was coming to an end and they will require to enter into new tenancy agreements on such terms that would be agreed between the parties.
 - vi. The Applicants have never paid any rent to the new lessee namely Funan consolidated Company Ltd.
 - vii. The new lessee M/S Funan consolidated Company Limited was not a party to the present proceedings.
 - viii. The 11th applicant had filed BPRT Case No. E1189/2023 and where orders granted thereof were discharged after there was none payment of rent.
 - ix. It was not a party to any rent deposited as security or goodwill and it would only engage the Applicants on new terms.
 - x. The Applicants suit be dismissed with costs.
10. Having perused the parties respective pleadings, documents and submissions except for the 3rd Respondent who never appeared in court nor actioned any filings in response to the Applicants application dated 22nd January 2024, we are of the view that the issues that arise herein for determination are the following:-
- A. Whether the applicants application dated 22nd January 2024 is competent.
 - B. Whether the Applicants application dated 22nd January 2024 has merit,
 - C. Who should bear the costs of these proceedings.

ISSUE NO. A- Whether the Applicant's application dated 22nd January 2024 is competent.

11. The said application dated 22nd January 2024 is a stand alone in these proceedings. There is no evidence from the physical file nor the court's portal that the same was anchored on a suit. Suits before this court are either by way of a reference or a complaint. This is provided for under Section 6 and Section 12 (4) of the Act.
12. Section 6 provides that"
- "A receiving party who wishes to oppose a tenancy notice, and who has notified the requesting party under Section 4(5) of this Act that he does not agree to comply with the tenancy notice, may, before the date upon such notice is to take effect, refer the matter to a Tribunal, whereupon such notice shall be of no effect until and subject to, the determination of the reference by the Tribunal".
13. On the other hand, Section 12 (4) of the Act provides that:-
- "In addition to other powers specifically conferred on it by or under this Act, a Tribunal may investigate any complaint relating to a controlled tenancy made to it by the landlord or the Tenant, and may make such order thereon as it deems fit".
14. It is clear therefore that any proceedings originated in this Tribunal outside the filing of a reference under Section 6 or a complaint under Section 12(4) cannot stand the test of legitimacy and such a suit would be null and void ab-initio.



15. The courts have in related experiences delivered themselves on that question of how suits should be originated. In the Case of Proto energy Ltd – vs- Hashi energy Ltd (2019) e KLR the court stated the following:-

“Order 3 Rule (i) and (ii) provides that every suit shall be instituted by way of a plaint. As a general Rule a suit can only be instituted by way of a plaint, petition or an originating summons. A notice of motion is not legally recognized as an originating process. A notice of motion can only be filed within a properly instituted suit. The applicants failed to file any originating process in this matter. I find that the attempt to institute this suit by way of a notice of motion renders the entire suit defective”.

16. To answer this question, we have also put reliance in the case of Rajab Kosgei Magut – vs- Nuru Jepleting Choge (2020) e KLR where the court held that:-

“I am also of the view that an Applicant cannot use short cuts to access justice where there are laid down procedures to be followed.....Having considered the preliminary objection and the submissions therein, I find that the preliminary objection has merit and is therefore upheld. The Applicant’s application dated 19th May 2020 is hereby struck out with costs to the 1st Respondent”.

17. Further in the case of Samuel Chege Thiari – vs- Eddah Wanjiru Wangaru & 3 Others (2018) e KLR the court held that:-

“In the end, I find that the applicant is not properly before this court as there is no suit upon which the notice of motion can stand. The court cannot invoke its inherent jurisdiction to cure that defect”.

18. Finally, from the applicants service of the primary documents herein by email on 26th January 2024 it is clear that the documents served did not include a reference or a complaint. This can be deciphered from the Affidavit of service by one Samuel Maina Waruge sworn on the 2nd February 2024. The email message on the documents served states as follows:-

“find the attached application under certificate of urgency dated 22nd January 2024 and a court order dated 24th January 2024 indicating that the matter will be coming up for hearing on 8th February 2024 for your attention and consideration”.

19. We therefore would strike out the notice of motion application dated 22nd January 2024 for being incompetent. However, in case we are wrong on this aspect of this matter, we proceed to the second issue on whether the Applicants application has merit. We are of the considered view that the error in presenting the 1st Respondent to this court the way it was done could be excused. Order 1 Rule 10(2) provides that:-

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined whether as plaintiff or defendant or whose presence before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in the suit, be added”.



20. However we do not agree with the Applicants that the name in the lease agreement dated 1/10/2023 between the 1st Respondent and the 3rd Respondent is the same name that they have used in these proceedings. In the said lease and in the orders and Regulations for officers of the Salvation Army – principles and procedures, the 1st Respondent is referred to as :The General of the Salvation Army (Registered trustees).
21. On their part, the Applicants sued an entity known as the General of the Salvation Army of Kenya. Those two cannot be descriptive of a single entity. We therefore decline the Applicants invitation to declare as such and also that the 1st Respondent was approbating and reprobating in respect to its true title.
22. We have not seen any lota of evidence by the Applicants that they ever entered into any Landlord and Tenant relationship between themselves and either the 1st or the 2nd Respondents. There is also no evidence that any rent has been paid to the 1st or 2nd Respondents by either of the Applicants to establish the existence of a landlord and Tenant relationship.
23. Section 2(1) of the Act defines a Landlord as:-
- “In relation to a tenancy, means the person for the time being entitled, between himself and the tenant, to the rents and profits of the premises payable under the terms of the tenancy”.
24. On the other hand, Section 2(1) of the Act defines a Tenant as:-
- “In relation to a tenancy means the person for the time being entitled to the tenancy whether or not he is in occupation of the holding, and includes a subtenant”.
25. In this matter, the only nexus between the Applicants and title no. L.R NO. 209/1951 off River Road/Racecourse Road in Nairobi is the 3rd Respondent. However, there is no dispute that the 3rd respondents lease and which gave the applicants access to the suit premises lapsed and/or expired on the 30th September 2023. Indeed the Applicants have annexed “ENN-4” which is a letter dated the 1st July 2023 by the 3rd Respondent to that effect.
26. Of particular importance is the 3rd paragraph of the said letter marked “ENN-4” where a representative of the 3rd respondent communicates to the applicants as follows:-
- “In light of the lease expiration, you will be informed about the new agent with whom you shall be able to agree on terms and conditions of the tenancy”.
27. There is no evidence in court that the applicants challenged that communication by the 3rd Respondent and it appears to us that the Landlord/Tenant relationship between the 3rd Respondent and the Applicants resolved amicably by the 30th September 2023 and this courts jurisdiction over the parties terminated at that particular time.
28. It is therefore clear from the fore going that the question of the alleged rent security deposit and goodwill allegedly paid by the applicants to the 3rd Respondent is now outside the jurisdiction of this court and vests in the province of civil courts. That issue is now well settled and would wish to refer to the case of Pritam – vs- Ratilal and Another (1972) E.A in that regard. In the matter the court held that:-
- “Therefore the existence of the relationship of Landlord and Tenant is a pre-requisite to the application of the provision of the Act. Where such a relationship does not exist or it has



come to or been brought to an end, the provisions of the Act will not apply. The applicability of the act is a condition precedent to the exercise of jurisdiction by the tribunal. Otherwise the Tribunal will have no jurisdiction. There must be no controlled tenancy as defined in section 2 to which the provisions of the Act can be made to apply. Outside it the tribunal has no jurisdiction”.

29. We therefore make a determination that there is no Landlord and Tenant relationship between the Applicants and the 1st Respondent on the one hand and the applicants and the 3rd Respondent on the other hand as is envisaged under Section 2(1) of the Act and the Application dated 22nd January 2024 cannot have any merit in that regard.
30. In relation to the 2nd Respondents, it is an agent of M/S Funan consolidated company Limited. The later is the lessee of the 1st Respondent.
31. A letter dated 1st August 2023 to that effect and marked “DN1” was annexed to the 2nd Respondents Replying Affidavit sworn by David Ndiangui on the 15th March 2024.
32. There is also annexure “DN3” which are minutes of an alleged meeting between the Applicant, the 2nd Respondent and representatives of the 3rd Respondent and M/S Funan Consolidated Company Limited.
33. It appears that some of the Tenants then in occupation of the subject matter herein complied with the proposed terms of the meeting and then had a change of mind whereas others did not and the reason for the application before this court.
34. At face value, the suit against the 2nd Respondent by the Applicants cannot be tenable. From the evidence on record by the Applicants, it is clear that they were communicated about the lapse of the 3rd respondents lease with the 1st respondent and that m/S Funan consolidated company Ltd had taken over the same. They were also aware that the 2nd respondent was merely an agent of M/S Funan Consolidated Company Ltd which is not a party in this matter.
35. It then leaks of mischief on the part of applicants with all the information in their possession to drag the Respondents in court and leave out M/S Funan Consolidated Company Ltd who should be the principal prayer in this suit. For clarity, the suit against the 2nd Respondent therefore cannot stand in the absence of M/S Funan Consolidated Company Ltd in these proceedings.
36. Therefore and in anyway that we look at this matter, the same is not properly before court and is incompetent and even when looked through the provisions of wanting to do substantive justice to the parties, the same lacks in any merit and it is one for dismissal.

Issue No. C- Who should bear the costs of the application.

37. It is trite law that costs follow the event. We have no reason nor justification to deny the Respondents costs on the application dated 22nd January 2024 which we have determined is for dismissal.
38. In the final analysis, the orders that commend to us are the following:-
 - i. That the application dated 22nd January 2024 is struck out.
 - ii That the Respondents are awarded Kshs.10,000/- each.Those are the orders of the court.



RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF AUGUST, 2024.

HON. NDENGWA WAHOME - PANEL CHAIRPERSON MEMBER

MBS HON. JOYCE MURIGI - MEMBER

BUSINESS PREMISES RENT TRIBUNAL BUSINESS PREMISES RENT TRIBUNAL

M/S Gikonyo holding brief for Mr. Thuita for the Tenants/Applicant for the 1st Respondent and no appearance for the 2nd Respondent.

