



Mambo & another t/a Eastend Dental Clinic v Malde & others (Bros) (Tribunal Case E019 of 2023) [2023] KEBPRT 1295 (KLR) (14 April 2023) (Ruling)

Neutral citation: [2023] KEBPRT 1295 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E019 OF 2023
CN MUGAMBI, CHAIR
APRIL 14, 2023**

BETWEEN

**CHARLES GITAU MAMBO AND KELVIN MAMBO GITAU T/A EASTEND
DENTAL CLINIC TENANT**

AND

KIRAN MALDE AND OTHERS (BROS) LANDLORD

RULING

Introduction

1. The Respondent's notice of preliminary objection dated 23.1.223 is brought on the following grounds:
 - a. That the Applicants are not privy to the contract between Charles Gitau Mambo and the Respondent herein hence lack locus standi to commence, originate and/or otherwise maintain the subject application herein.
 - b. That there exists no landlord/tenant relationship between the Applicants and the Respondents herein as defined under Cap 301 as the only known and legal contract binding to the Respondents is that between the Respondent and Charles Gitau Mambo.
 - c. That the reference as taken out is in contravention of the legal doctrine of privity of contracts and violates the legal principles of landlord/tenant relationship hence scandalous and bad in law.
 - d. That the Applicant is non-suited and a stranger hence the instant application is an abuse of the due court process.



- e. That the application is fatally defective, unprocedural, bad in law and vexatious as it contravenes Section 19 of the [Civil Procedure Act](#) Cap 21 and order 3 rule 1(1), order 4 rule 1(1) and (2) of the [Civil Procedure Rules](#) 2010.
- f. That the Applicants are not properly before this court as there is no substantive suit upon which the notice of motion can stand hence this is an abuse of the court process and laid down procedures and should thus be struck out with costs to the Respondent.

The landlord's/Respondent's submissions

- 2. The landlord has submitted that the test of what constitutes a preliminary objection and threshold thereof was established in the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors (Ltd)* EA 696 and it is the landlord's further submission that the preliminary objection dated 23.1.2023 has been raised purely on points of law.
- 3. The landlord has also submitted that the Applicants do not have the locus standi to bring the instant suit and are also total strangers to the landlord.
- 4. The landlord further submits that the only parties giving rise to the tenancy between the parties are the Respondent and Chariles Gitau Mambo and the Applicants do not therefore derive any rights and/or obligations from the tenancy. It is further submitted that there is no evidence presented to show that there is any legally binding agreement between the Respondent and the Applicants.
- 5. The landlord has further submitted that the Applicants have approached the court by way of a notice of motion seeking interim orders without a main suit to anchor it on or a limb on which the interim application can stand.

The Applicants ought to have filed a plaint as a notice of motion is not considered as an original process under the law. The suit as filed is therefore incompetent.
- 6. The landlord therefore submits that there is no privity of contract between the parties herein and the whole suit an abuse of the due process of the court and ought to be struck out with costs.

The Tenant's submissions

- 7. The tenant has submitted that the landlord admits to the existence of a tenancy relationship between them and one Charles Gitau Mambo and what is disputed is therefore the business name under which the said Charles Gitau Mambo runs his business together with his son who happens to be his partner.
- 8. The tenant has further submitted that the Applicant qualifies to be a tenant as provided for under Section 2 of [Cap 301](#).
- 9. The tenant further submits that it is common knowledge that a person can run a business under a business name that is different from their own name.
- 10. That further, the landlord does not dispute the details in the license of the tenant as far as the location of the business premises is concerned.
- 11. Finally, the tenant submits that if the landlord is keen on ejecting the tenant from the suit premises, then the provisions of Section 4 of [Cap 301](#) are clear.

Analysis and determination

- 12. The landlord's preliminary objection revolves around two issues; that is, the lack of any contractual bond between the parties and the alleged fatal defect of the Applicants pleadings.



13. It is the landlord's submissions that the Applicants are total strangers to them and the only recognized party by the landlord is Charles Gitau Mambo. It is indeed true that all the rent demand notices by the Respondent have been addressed to Mr. Charles Gitau Mambo. The letter of offer dated 25.9.2019 and 5.1.2021 which form the basis of the tenancy are addressed to and executed by Charles Gitau Mambo. The instant suit has been brought by Charles Gitau Mambo and Kelvin Mambo Gitau t/a East End Dental Clinic against the Respondents. It may not be clear at this point how Kelvin Mambo Gitau ended up in the suit premises but what is clear is that Charles Gitau Mambo is a tenant of the landlord and even the landlord appreciates this fact.
14. From the heading of the pleadings, it is also clear that both Applicants are trading in a business name. Whereas there may be no privity of contract between the Respondents and the Kelvin Mambo Gitau, the same may not be said of Charles Mambo Gitau whose name appears in the letters of offer and other correspondence. I do not therefore think Charles Mambo Gitau can be non-suited at this stage.
15. Is it an accepted fact that both Applicants are not parties to the lease agreement? The Applicants have brought the suit as tenants and the Respondents deny the existence of any such relationship. This then disqualifies the Respondents preliminary objection from being a preliminary objection as by law and precedent defined: In *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited* (1969) EA 696, at page 700, the court stated;-

“The preliminary objection herein was raised by the defendants. Can it be said that they do accept the facts as pleaded by the plaintiff to be true, in which case they would then apply the provisions of Section 136(1) to it to make the plaintiffs pleadings a non starter? But the defendants defend this suit because they do not accept the plaintiffs facts as pleaded. Clearly therefore, the defendants' preliminary objection is not based on a commonly accepted set of facts and the set of facts herein would not therefore be the basis of a preliminary point of objection and a point of law as understood and defined in our jurisdiction.”

In *Oraro v Mbajo* (2005) KLR, the court also stated as follows:-

“As already remarked, 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 that needs to be tested by normal rules of evidence. If the Applicants instant matter required the affidavit of Barak Eston Mbaja dated and filed on 7th October 2004 to give it validity before the court, then it would not be allowed to stand as a preliminary objection which must be on a pure point of law.....”

16. In view of the above, I do not find any merits in the first limb of the objection and it is hereby dismissed.
17. The Respondent has also raised an objection that the tenants' application is not founded on any substantive suit and is therefore fatally defective as a notice of motion is not an originating process. It is the Respondents view that this matter ought to be originated by a plaint. But is this the case?
18. There is no requirement for the filing of a plaint in proceedings before the Tribunal under the provisions of [Cap 301](#). Under the said Act, there are basically two recognized procedures under which a party may move the court. Under Section 6 of [Cap 301](#), a party who wishes to oppose a notice to terminate tenancy or to alter the terms thereof, may file a reference to the Tribunal in the format provided under the said Act. Under Section 12(4) a party may move the Tribunal by way of complaint where the issues complained of do not touch on a response/objection to a notice under Section 4(2) which calls for a reference under Section 6 of the Act. The tenants in this matter have filed a complaint under Section 12(4) of [Cap 301](#) and the complaint the Tribunal is requested to investigate is that the



Respondent has threatened to evict the Tenant yet the Tenant has no rent arrears. The tenant has no rent arrears. Section 12(4) of [Cap 301](#) provides as follows:-

“In addition to any 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 therein as it deems fit.”

The relevant form for the filing of the complaint is provided for under the [Act](#).

19. I do not therefore agree with the Respondents submissions that the Tenants ought to have filed a plaint in this case. I also do not agree with the Respondent's submissions that the Applicants motion has no suit on which to find its standing. The Applicants motion is founded on the complaint filed by the tenants and is therefore properly before the Tribunal.
20. Consequently, and in view of the above findings, I find no merits in the Respondent's notice of preliminary objection dated 23.1.2023 and the same is hereby dismissed with costs to the tenants.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 14TH DAY OF APRIL 2023

HON. CYPRIAN MUGAMBI

CHAIRPERSON

14. 4.2023

Ruling delivered in the presence of;

Ms. Monyangi For The Tenants

Mr. Apollo For The Landlord.

