



**Mon-Bet Enterprises Limited v Gilanis Supermarket Limited & another (Tribunal
Case E123 of 2023) [2023] KEBPRT 687 (KLR) (1 December 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 687 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E123 OF 2023
P KITUR, MEMBER
DECEMBER 1, 2023**

BETWEEN

MON-BET ENTERPRISES LIMITED TENANT

AND

GILANIS SUPERMARKET LIMITED LANDLORD

AND

MASIOKI AUCTIONEERS AUCTIONEER

RULING

A. Parties And Background

1. The Landlord is the owner of the building erected on Title Numbers Nakuru Municipality Block 5/7 & 5/8.
2. The Tenant herein carries on business on the 9th floor of the said building as a Tenant to the Landlord.
3. The Landlord is represented by the firm of Mukite Musangi & Company Advocates.
4. The Tenant is represented by K. K Njenga & Associates Advocates.

B. The Dispute Background

5. The Landlord and the Tenant entered into a Lease Agreement dated 1st September 2018 for premises no. 2 and no. 3 on the 9th floor (suit premises) of property known as Nakuru Municipality Block 5/7 & 5/8 for a term of six years.
6. The tenancy continued uninterrupted until sometime in June 2023 when the Landlord, through the Auctioneer herein commenced the process of distress for rent.



7. The Tenant thereafter proceeded to file a complaint against the Landlord under s. 12(4) of the [Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#), cap 301.
8. The Landlord additionally filed an Application dated 18th July 2023 with the following prayers;
 - i. That the Application herein be certified as urgent and the same be heard ex-parte in the first instance on priority basis in view of its urgency and service of the same be dispensed herewith for reasons of urgency.
 - ii. That this Honourable court be and is hereby pleased to issue an order that the 1st Respondent be barred from closing the Applicant's/Tenant's premises pending the hearing and determination of this application.
 - iii. That this Honourable court be and is hereby pleased to issue a temporary injunction restraining the Respondents whether by themselves, servants, employees, agents, Nasioki Auctioneers or any other person claiming under them from conducting the auction scheduled to take place at the premises on the 21st July 2023 as advertised in the Star Newspaper, trespassing, remaining, damaging, removing and or in any way interfering with the Applicant/Tenant's tenancy and the Applicants tools of trade within premises marked N02 and N03 on the 9th Floor known as SOZOS SPA of Tower One Building situate in Nakuru Town without due process of the law pending inter-partes hearing and determination of this Application or further orders of this Honourable court.
 - iv. That this Honourable court be and is pleased to issue an order raising and/or suspending the proclamation by Nasioki Auctioneers dated 8th June 2023 for the auction scheduled for the 21st July 2023
 - v. That the OCS Nakuru Central Police Station ensure superintendence of these court orders.
 - vi. That this honourable court do issue any further orders as it deems just to grant in the circumstances.
 - vii. That the costs of this application be provided for.
9. In response, the Landlord filed a Replying Affidavit sworn on 9th August 2023 alongside a Notice of Preliminary objection of even date raising the following points of law;
 - i. That Section 12 (4) of [Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#) grants this Tribunal jurisdiction to deal with matters pertaining to controlled tenancies.
 - ii. That Section 2(1) (a) of the [Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#), stipulates that a controlled tenancy is a tenancy which has been reduced into writing and whose term does not exceed five(5)years.
 - iii. That without much inference or extrapolation, it is clear and plain pikestaff that the relevant tenancy in this case is not as a controlled tenancy, being for a term of six (6) years, and this Tribunal has no jurisdiction to deal with this matter.
 - iv. That therefore, the present proceedings, together with the ex-parte orders issued on 21st July, 2023, are nullity ab initio and this Tribunal should down its tools as prescribed in the classical case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR.
10. Parties took directions and agreed to dispose of the Notice of Preliminary Objection by way of Written Submissions which were duly filed by both parties.



C. List Of Issues For Determination

11. Having given full consideration to the Preliminary Objection raised, the issue for determination is;
 - i. Whether this Tribunal has Jurisdiction to hear and determine the matter by dint of section 2 of the Landlord and Tenant (Hotels, Shops and Catering Establishments) Act.

D. Analysis And Findings

12. Jurisdiction is everything and once challenged, a determination should be made before the Tribunal can proceed with further disposal of any matter thereto. The Tribunal has no option but to down its tools where want of jurisdiction is deemed or assumed not to exist. In the case of Owners of the Motor Vessel 'Lillian' (s) versus Caltex Oil (Kenya) Ltd [1989] KLR1, the Court stated as follows:

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court had no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion

12. The question therefore arising is whether there exists a tenancy relationship between the Tenant and the Landlord subject to the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.
13. Under Section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, a controlled tenancy means a tenancy of a shop, hotel or catering establishment;
 - 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 date thereof or
 - iii. Relates to premises of class specified under subsection (2) of this section.
12. The Lease availed before this Tribunal shows that the Tenancy is to run for a period of Six years. The same also does not contain a termination clause otherwise than for breach of covenant at any time during the pendency of the Lease.
13. In Republic v Chairperson - Business Premises Rent Tribunal at Nairobi & another Ex-Parte Suraj Housing & Properties Limited & 2 others [2016] eKLR, the Judge cited with approval the case of Pritam vs. Ratilal and Another Nairobi HCCC No. 1499 of 1970 [1972] EA 560 where it was stated as follows:

“Therefore the existence of the relationship of landlord and tenant is a pre-requisite to the application of the Act and where such 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 a Tribunal; otherwise the Tribunal will have no jurisdiction. There must be a 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.”
12. From the foregoing, the Tenancy herein cannot be termed as a controlled tenancy, which therefore ousts this tribunal's jurisdiction to hear and determine the dispute.



13. I therefore proceed to order as follows;

E. Orders

- a. The Landlord's Preliminary Objection is hereby upheld.
- b. The Tenant's Reference and Application are hereby struck out.
- c. Costs are awarded to the Landlord.

HON P. KITUR

BUSINESS PREMISES RENT TRIBUNAL

Ruling dated, signed and delivered virtually by Hon P. Kitur this 1st day of December 2023 in the presence of Njenga for the Tenant and Ms. Obiero holding brief for Makora for the Landlord.

HON P. KITUR

