



**Kabogo & another v Njoroge & 2 others (Tribunal Case E387 of 2023)
[2023] KEBPRT 726 (KLR) (8 December 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 726 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E387 OF 2023
A MUMA, AG. CHAIR
DECEMBER 8, 2023**

BETWEEN

ANTHONY MAINA GICHUHI KIBOGO 1ST APPLICANT

SUSAN WOTHAYA GITITIA 2ND APPLICANT

AND

JACKSON NJOROGE 1ST RESPONDENT

SAMUEL NJOROGE 2ND RESPONDENT

JULIUS OPUKA 3RD RESPONDENT

RULING

Parties and their Representatives

1. The Applicants herein is the current owners of the Suit Premises occupied by the Tenants being rentals erected on LR. No. Ruiru West Block 1/1206 in Ruiru within the Republic of Kenya.
2. The Applicants are represented by the Firm of Kimani Kahete & Company Advocates.
3. The Respondents are the Tenants occupying the premises owned by the Landlords being rentals erected on LR. No. Ruiru West Block 1/1206 in Ruiru within the Republic of Kenya.
4. The Respondents are represented by the Firm of Ngochi Wanjiku & Company Advocates.

Dispute Background

5. Vide a Reference dated 21st February 2023, the Landlords herein approached this Tribunal registering a complaint that the Tenants refused to pay their monthly rent and also to deliver vacant possession of the premises hence the need to terminate their tenancy. Subsequently, the Landlords filed a Notice of Motion dated 12th April 2023 seeking Orders *inter alia* that the Landlord be issued with an Order



to levy distress into the premises and that the Tenants be ordered to pay the rent arrears owing. Vide an Order dated 12th May 2023, this Tribunal granted the Landlord leave to levy distress against the Tenants at the suit premises and in the alternative, Tenants ordered to pay the rent arrears owing to the Landlord.

6. Subsequently, on 4th August 2023, the Tenants filed a Notice of Motion of even date seeking Orders inter alia that this Tribunal be pleased to set aside the ex-parte Ruling issued on 12th May 2023 and all consequential orders granted to the Landlord, that the Tribunal be pleased to join John Okello Opuk as an Interested Party in the matter and that an Order of stay of execution be issued in relation to the Order to levy distress issued on 12th May 2023.
7. In response, the Landlords filed a Replying Affidavit sworn on 1st September 2023 contending that the Tenants' Application dated 4th August 2023 is an outright misuse and abuse of Court process, vehemently opposed the same and urged this Tribunal to dismiss the same with costs. On 9th August 2023, the Tribunal issued an order allowing the Tenants' Application joining John Okello Opuk as an Interested Party and granting an Order staying the execution of the Order to levy distress issued on 12th May 2023.
8. On 1st September 2023 the Landlords filed a Preliminary Objection contending the jurisdiction of this Tribunal to hear and determine the present matter. It is the said Preliminary Objection that is the subject of this Ruling.

The Landlords' Case

9. The Landlords filed written submissions dated 9th October 2023. They submitted that this Tribunal lacks jurisdiction to entertain the matter since there has never been a Landlord/Tenant relationship between the parties herein. They further submitted that the premises were acquired by the current owners through sale by public auction and that after ownership had passed, the Tenants who were the Tenants of the Interested Party refused to sign tenancy agreements with the current owners and consequently, they were forced to levy distress as they could no longer continue occupying the premises and running business while refusing to pay rent.
10. The Respondents further submitted that the Tenants did not deny eviction out of the suit premises and that after the said distress, the Tenants never went back to the premises neither is there evidence of payment of any rent to the new owners/landlords. That being the case, the Landlord/Tenant relationship had been brought to an end by the time the application dated 4th August 2023 was filed. They submitted that the application was time barred and therefore, the Tribunal does not have jurisdiction to preside over the matter.
11. The Respondents also submitted that there was no basis for this Tribunal not to believe that the Landlord/Tenant relationship had come to an end. Ultimately, the Respondents submitted that there being no existing Landlord/Tenant relationship between the parties herein, they urged that this Tribunal had no jurisdiction to entertain the instant application as the same was incompetent from inception and therefore should be dismissed with costs.
12. Notably, the Tenants did not file submissions in respect of the Preliminary Objection.

Issues for Determination

13. I have given full consideration to the Tenant's Reference dated 21st February 2023, Applications dated 12th April 2023 and 4th August 2023 respectively and Preliminary Objection dated 1st September 2023 and submissions in support.



14. In my respectful view, I find that the sole issue that falls for determination is:

Whether this Tribunal has jurisdiction to hear and determine the present matter.

Analysis and Determination

15. The gravamen of this case is the vexed question of “preliminary objections.” Newbold, J.A. (as he then was) gave the legal fraternity the most commonly cited definition of a preliminary objection when he famously surmised as follows in *Mukisa Biscuit Co Ltd v West End Distributors Ltd* [1969] E.A. 696:

“ 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”.

16. He went on to further state that;

“The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues.”

17. Such was the eminence of a preliminary objection at the time, a position which still prevails to date owing to its determinative nature in the event that it is successfully canvassed. It is in the matter before me and it is against the foregoing backdrop that the Landlord invites this Tribunal to so consider.

18. 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 or a Tribunal can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a Court or Tribunal 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.

19. Section 2 of the [Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#) provides as follows:

For the purposes of this Act, unless the context otherwise requires—

“catering establishment” means any premises on which is carried out the business of supplying food or drink for consumption on such premises, by persons other than those who reside and are boarded on such premises;

“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 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 commencement thereof; or conta



- (iii) relates to premises of a class specified under subsection (2) of this section:

Provided that no tenancy to which the Government, the Community or a local authority is a party, whether as landlord or as tenant, shall be a controlled tenancy;

20. In view of the above provisions, it is clear that this Tribunal only has jurisdiction to hear and determine disputes in cases where Agreements are not in writing but if reduced to writing, Agreements which do not exceed a period of 5 years.

21. In the *locus classicus* of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd.* (1989), in this subject, this Court pronounced itself as follows:

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

22. Further, in the case of *Joseph Muthee Kamau & Another v. David Mwangi Gichure & Another* (2013) eKLR, the Court considered the issue of jurisdiction and stated as follows:

“When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being *Kagenyi v. Musirambo* (1968) EA 43. We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing.”

23. I have considered the pleadings and evidence on record. The Landlords allege that after taking over the ownership of the premises, the Tenants refused to sign the Tenancy Agreements. However, the said Tenancy Agreement has not been produced before this Tribunal.

24. Under section 109 of the *Evidence Act*, Cap. 80, Laws of Kenya:-

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person”.

25. Section 107(1) of the same *Act* provides that:-

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”.

26. In view of the foregoing, I am not convinced that the Landlords have tendered sufficient proof that the Tenants refused to sign the Tenancy Agreements.

27. This Tribunal takes further interest with the Landlords averments vis-à-vis their actions. On one hand the Landlords have forwarded a complaint that the Tenants have defaulted in their rent payments and are seeking refuge from this Tribunal. On the other hand, they proffer the position that there is no



existing Landlord/Tenant relationship between the parties. I think this is what is called double-speak and therefore the dirt of double-speak discolours the Landlords' genuinity.

28. Even in the absence of the Tenancy Agreement, the Landlords continued the Tenancy of the Tenants from whom they were accepting rent payments until the latter defaulted. To my mind, this created an implied Landlord/Tenancy relationship. I do find that even in the absence of a written agreement between the parties, what existed was a contract between the Tenants and the previous owners which contract was inherited by the current owners and therefore amounts to a periodic tenancy. In *Ukwala Supermarket (Eldoret) Limited v Amritral Sojpar Shah Wholesalers Limited* [2017] eKLR, the Environment and Land Court (Ombwayo J) while considering the intricacies of a periodic tenancy held as follows:

“A periodic tenancy is a tenancy that continues for successive period until the tenant gives the landlord notification that he wants to end the tenancy. The period depends on how the rent is paid. For calendar month, it becomes monthly tenancy. If rent is paid quarterly, it becomes a quarterly tenancy and if paid yearly, a yearly tenancy.

29. Section 57(2) of the *Land Act* 2012 provides that if the owner of land permits to exclusive occupation of the land or any part of land or any part of it by any person at a rent but without any agreement in writing, that occupation shall be deemed to constitute a periodic tenancy.
30. It would follow that the agreement between the Landlords and Tenant not being reduced in writing is a periodic tenancy and therefore, is a controlled tenancy under the provision of section 2(1) (a) of the *Landlord and Tenancy Act (Shops, Hotels and Catering Establishment Act)*, Cap. 301, Laws of Kenya and therefore, if the Landlords wished to terminate, they should do so in accordance with the Act thus by an Order of the Tribunal.

Determination

31. Having considered the above reasoning, the consequent holding and orders that commend itself to this Tribunal are as follows:
- a. The Landlords' Preliminary Objection dated 1st September 2023 is hereby dismissed with costs to the Tenants capped at KShs.15,000.00 the same to be offset from rent.
 - b. The Reference dated 21st February 2023 is hereby set down for hearing within 60 days failure to which the suit stands dismissed.
 - c. Mention on 19th February 2023 to confirm compliance.

HON. ANDREW MUMA

MEMBER/AG. CHAIRPERSON

**RULING DATED, DELIVERED AND SIGNED AT NAIROBI ON THIS 8TH OF DECEMBER 2023
IN THE ABSENCE OF PARTIES.**

HON. ANDREW MUMA

MEMBER/AG. CHAIRPERSON

