



**Al-Mekhlafi v Sharja Shopping Mall & 2 others; Ahmed & 4 others (Interested Parties)
(Tribunal Case E1218 of 2022) [2023] KEBPRT 21 (KLR) (9 January 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 21 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E1218 OF 2022
A MUMA, VICE CHAIR
JANUARY 9, 2023**

BETWEEN

TAHA HAMOOD ALI AL-MEKHLAFI TENANT

AND

SHARJA SHOPPING MALL 1ST RESPONDENT

BASHIR MAMO 2ND RESPONDENT

MICROBIT CONSTRUCTION 3RD RESPONDENT

AND

AYAN AHMED INTERESTED PARTY

SIRAD SHARIF INTERESTED PARTY

FARDOSA YUSSUF MAALIM INTERESTED PARTY

FATUMA GUROW INTERESTED PARTY

HAKIMA MAHUBO ABDULLAHI INTERESTED PARTY

RULING

Parties and their Representatives

1. The tenant herein occupies the premises known as shop numbers F1, F5, and F17 (hereinafter referred to as the 'suit premises'), situate at the Sharja shopping mall Nairobi, within the Republic of Kenya.
2. The tenant is represented by the firm of Kusow & Company Advocates.
3. The 2nd respondent is the landlord of the suit premises that are the subject matter of the present suit and therefore responsible for performing the duties and obligations of the landlord.



4. The 2nd respondent is represented by the firm of Murgor & Murgor Advocates.
5. The 1st to 5th interested parties are occupants of the contended premises that are the subject matter of the present suit.
6. All the interested parties are represented by the firm of Sow Advocates LLP.

Dispute Background

7. Vide a notice of motion application dated december 15, 2022, the tenant herein approached this tribunal seeking inter alia, orders restraining the respondents and/or their servants, employees, agents to be prohibited forthwith by this tribunal from collecting rent directly from the tenant's subtenants and further interfering with the tenant's and subtenant's quiet possession over demised shops number F1a, F1b, F5a, F5b and F17a situate at Sharjah shopping mall pending the hearing and determination of this application.

The Applicants Case

8. The tenant's notice of motion application dated December 15, 2022 above mentioned is supported by key grounds being that the 1st respondent's action of unlawfully and directly collecting the sum total of KShs.190,000 from the sub-tenants, violation of enjoyment of quiet and exclusive possession is in utter violation of cap 301 laws of Kenya and is only meant to harass the tenant and Subtenants.
9. The application is supported by the affidavit of Taha Hamood Ali Al-Mekhlafi. The said affidavit gives the background, context and procedural history of acquisition of the suit premises by the tenant from the 1st respondent and proceed to provide the evidentiary support to the grounds above stated. He swore that the present suit is urgent and that the continued harassment by the respondents would ground his and those of the subtenants' operations to a halt if this tribunal does not intervene.

The Respondents Case

10. The 2nd respondents filed a notice of preliminary objection on January 9, 2023 stating that this tribunal lacks jurisdiction to determine this suit and application dated December 15, 2022 which allege a tenant/landlord relationship and disputed existence of tenancy/landlord relationship in respect of shop numbers F1, F5 and F17 between the tenant and the respondents, when no such relationship exists, by fact or implication. He stated that the tenant or purported subtenants/Interested Parties are not in occupation of or are not tenants of the respondents or at all. They further prayed that the tenant's notice of motion dated December 15, 2022 be struck out with costs as the same was fatally defective and void.
11. The 2nd respondent herein further filed a replying affidavit sworn by Bashir Mamo on January 16, 2023, asserting that there was no tenant-landlord relationship between the tenant and himself as head tenant or otherwise, or any of the respondents. He further averred that there is no written or oral tenancy agreement between the tenant and himself and that there is no legal entity known or registered as Sharja shopping mall, capable of suing or being sued.

Submissions

12. The preliminary objection proceeded for hearing before this tribunal and parties were directed to file and serve written submissions in respect of the present objection for disposal of, which the parties verily did. I shall proceed to consider the same.



Tenant's Submissions

13. Counsel for tenant filed his written submissions dated January 18, 2023. He submitted that a preliminary objection raises pure point of law which is argued on the assumption that all facts pleaded by the other side are correct and cannot be raised if any fact has to be ascertained from elsewhere or if the court is called upon to exercise judicial discretion.
14. He also submitted that the 2nd respondent's contention that there is no landlord-tenant relationship between the 2nd respondent and the tenant nor the tenant and the subtenants, the allegation that there is no entity registered as Sharjah shopping mall capable of suing or being sued were factual issues which can only be determined through substantive hearing and probing of evidence and not through a preliminary objection which ought to only deal with pure points of law.
15. Further, counsel submitted that the tenant's contention that he is a tenant of the respondents and that the Interested Parties are his subtenants, a fact denied by the respondents, especially the 2nd respondent makes it a disputed issue and cannot be heard by way of preliminary objection.
16. Counsel cited several authorities; *Celton Enterprises Limited & Another v Ravina Agencies Limited* (2022) eKLR, *Real Consult Agencies Ltd v Gerald Wachira Nguthi* (2016) eKLR, *Chuka Igamba Ng'ombe Development Association v County Government of Tharaka Nithi* (2019) eKLR to advance his arguments.
17. Counsel urged this tribunal to dismiss the preliminary objection and proceed for hearing.

The respondents' Submissions

18. Mr. Ouma, appearing on record for the 2nd respondent also filed written submissions dated January 13, 2023. He submitted that jurisdiction is everything and once it is challenged, a determination thereon should be made before the tribunal can proceed further with the disposal of any matter thereto.
19. Counsel further submitted *inter alia*, that the relevant facts can be discerned from the pleadings and documents filed by the tenant in support of his alleged claims, which do not demonstrate a landlord/tenant relationship or any relationship at all. He submitted that there was no written or oral tenancy agreement between the tenant and the landlord and that a careful examination of the tenant's documents it was apparent that there was no evidence showing Tenancy relationship, by fact or implication.
20. The learned counsel urged this tribunal to allow the preliminary objection and consequently strike out the application with costs.
21. The interested parties produced documents in their affidavits of agreements with the respondents and receipts of payments thus denying knowledge of the tenant and their head tenant.

Analysis And Determination

22. I have given full consideration to the 2nd respondent's preliminary objection, the rival affidavits, submissions, and the authorities cited. In my respectful view, I find that the sole issue that falls for determination is:



Whether the preliminary objection raised is sustainable.

23. The case of *Mukisa Biscuits Manufacturing Ltd –v- West End Distributors* (1969) EA 696 is notorious on the issue of what constitutes a preliminary objection where their Lordships observed thus:

“----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”.

24. At the heart of this preliminary objection is the issue of jurisdiction. It is a truism that jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction?
25. 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.
26. An objection to the jurisdiction of the court has been cited as one of the preliminary objections that consists a point of law. Indeed, the locus classicus case on the question of jurisdiction is the celebrated case of *Owners of the Motor Vessel “Lillian S”* where the court held:

“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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

27. The preliminary objection if allowed may dispose off the entire suit without giving parties the opportunity to be heard. This has to be done with caution that the tribunal has a duty to hear all parties and determine the case on merit. In addition, this Tribunal also has a duty to safeguard itself against abuse of its process.
28. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.
29. According to the subtenants, the documents annexed to the their replying affidavits dated January 16, 2023 show that the landlord in respect of the suit premises is one Sharja Management Agencies and not



- Taha Hamood Ali. As such the tenant is accused of being an imposter or trespasser in the premises. It is not clear the relationship between the landlord Sharja shopping mall and Sharja management company but from the rent payment receipts annexed to the affidavits of the interested parties, the same have been received for and on behalf of Sharja shopping mall and it is therefore safe to assume they have an agency relationship for purposes of property management.
30. I have looked at the rent payment receipts annexed to the replying affidavits of the interested parties/ subtenants sworn on January 16, 2023 and the same are issued in the name of Sharja management agencies which fact has not been disputed or controverted by the tenant in any way.
31. Further, the tenant contends that he entered into a tenancy agreement with the 2nd respondent in or about 2018. However, no evidence has been presented to prove the said allegation. Moreover, no evidence has been presented by the tenant to show occupancy of the suit premises he purports to be a tenant in.
32. In *Crystalized Tech Solutions v Ngong Butchers Co-Operative & another* [2021] eKLR, this tribunal considering a matter of similar nature held as follows:
- “...In absence of a landlord/tenant relationship, I entirely agree with the respondents that the Tribunal lacks the requisite jurisdiction under section 2 of the landlord and tenant (Shops, Hotels and Catering Establishments) Act, Cap 301, Laws of Kenya.”
33. Similarly, in *Warui v Kanini & another* (Tribunal Case E652 of 2021), it was held that:
- “I also note that the lease was entered into between the tenant and LodaJots Enterprises Ltd in which the 1st respondent is a director. As such, the proper landlord is the said company which has a different identity from its directors with capacity of suing and being sued. In absence of a landlord/tenant relationship between the tenant and the 1st respondent, this tribunal would have no jurisdiction.”
34. In the premises, in absence of landlord/tenancy this tribunal is bereft of jurisdiction to deal with this matter and the reliefs sought by the tenant/applicant in the application dated December 15, 2022 cannot be granted.
35. Whilst we empathise with the so called tenant his remedies indeed lie in another forum but not this tribunal as this tribunal deals with clear landlord tenant relationships any other relationships disputes ought to be canvassed in the proper forum.

Orders

36. In the upshot, this tribunal holds
- The preliminary objection dated January 9, 2023 is hereby allowed
 - The notice of motion application and reference dated December 15, 2022 are hereby dismissed with costs.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY BY HON A. MUMA THIS 2ND FEBRUARY 2023 IN THE PRESENCE OF OUMA FOR THE 2ND respondent landlord AND HOLDING BRIEF FOR ALL THE INTERESTED PARTIES AND IN THE ABSENCE OF THE tenant

HON A. MUMA



VICE CHAIR

BUSINESS PREMISES RENT TRIBUNAL

