



**Khisa v Mbaya (Tribunal Case E041 of 2023)  
[2023] KEBPRT 1386 (KLR) (15 November 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 1386 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E041 OF 2023  
M MAKORI, MEMBER  
NOVEMBER 15, 2023**

**BETWEEN**

**JOTHAM KHISA ..... APPLICANT**

**AND**

**SAMMY MUTHIORA MBAYA ..... RESPONDENT**

**RULING**

1. The present claim was filed vide a Reference Dated the 17<sup>th</sup> of August, 2023 accompanied by an Application of even date and supported by an affidavit sworn by Jotham Khisa, the tenant/Applicant herein.
2. The Landlord/Respondent responded vide Grounds of Opposition Dated the 16<sup>th</sup> of October 2023 and a Notice of Preliminary Objection of even date challenging the jurisdiction of this Tribunal.
3. Both parties have filed their respective submissions.
4. From the totality of the pleadings filed by parties and submissions several issues arise for determination. In arriving at a determination on the matter I am required to determine the following issues: -
  - I. Whether this tribunal has the jurisdiction to hear and determine this matter.
  - II. Whether there was a subsisting Landlord/Tenant relationship. III. Costs of this suit.
  - i) Whether This Tribunal Has the Jurisdiction to Hear and Determine This Matter



5. The principles of a preliminary objection are set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 as follows:

“...a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit...”

6. In addressing the question of jurisdiction, I place reliance on the case of *Republic vs. Business Premises Rent Tribunal & Another Ex- Parte Albert Kigera Karume* [2015] eKLR which cited with approval the case of *Re Hebtulla Properties Ltd.* [1979] KLR 96; [1976-80] 1 KLR 1195 where the Court dealt with the provisions of Section 12 of *Cap 301* and stated as follows:

“The Tribunal is a creature of statute and derives its powers from the statute that creates it. Its jurisdiction being limited by statute it can only do those things, which the statute has empowered it to do since its powers are expressed and cannot be implied... The powers of the Tribunal are contained in section 12(1) of the Act and anything not spelled out to be done by the Tribunal is outside its area of jurisdiction. It has no jurisdiction except for the additional matters listed under section 12(1) (a) to (n). The Act was passed so as to protect tenants of certain premises from eviction and exploitation by the landlords and with that in mind the area of jurisdiction of the Tribunal is to hear and determine references made to it under section 6 of the Act. Section 9 of the Act does not give any powers to the Tribunal, but merely states what the Tribunal may do within its area of jurisdiction..... It would be erroneous to think that section 12(4) confers on the Tribunal any extra jurisdiction to that given by and under the Act elsewhere...Section 12(4) of the Act must be read together with the rest of the Act and, when this is done it becomes apparent that the complaint must be about a matter the Tribunal has jurisdiction to deal with under the Act and that is why the complaint has to relate to a controlled tenancy.... The Act uses the words “any complaint” and the only qualification is that it must be “relating to a controlled tenancy”.

7. This Tribunal therefore derives its jurisdiction from the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, with respect to certain premises for the protection of tenants of such premises from eviction or from exploitation and for matters connected therewith and incidental thereto.

8. Under Section 2(i) of *CAP 301*, 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.
9. It is clear from the Addendum of the lease agreement at page 6 that the Lease term was for 3 years from the date of commencement which was 16<sup>th</sup> of May, 2022. The tribunal notes that this therefore renders the relationship between the Landlord and the Tenant a controlled tenancy.



9. Based on the above assertions it is clear that the tribunal has power to entertain this suit and proceeds to make a determination on the other issue raised.

**ii) Whether There Was a Subsisting Landlord/Tenant Relationship.**

10. I have considered the Application before this Tribunal and the submissions from both parties. In addressing this issue, I shall consider two aspects:
- i. The formal requirements of a notice for termination of a tenancy agreement.
  - ii. The Landlord's grounds for termination of the tenancy.
11. I am guided by section 4(2) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* Cap 301 Laws of Kenya (hereinafter referred to as the "Act") which provides that; -
- "A landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the tenant, any term or condition in, or right or service enjoyed by the tenant under, such a tenancy, shall give notice in that behalf to the tenant in the prescribed form."
12. Additionally, Section 4(4) provides that no tenancy notice shall take effect until such date, not being less than two months after the receipt thereof by the receiving party, unless the terms and conditions of the tenancy provide for a period exceeding two months or the parties to the tenancy agree in writing to a lesser period of notice.
- "The Act lays down clearly and in detail, the procedure for the termination of a controlled tenancy. Section 4(1) of the Act states in very clear language that a controlled tenancy shall not terminate or be terminated, and no term or condition in, or right or service enjoyed by the tenant of, any such tenancy shall be altered, otherwise than in accordance with specified provisions of the Act. These provisions include the giving of a notice in the prescribed form. The notice shall not take effect earlier than 2 months from the date of receipt thereof by the tenant. The notice must also specify the grounds on which termination is sought. The prescribed notice in Form A also requires the landlord to ask the tenant to notify him in writing whether or not the tenant agrees to comply with the notice."
13. According to Section 4(2) mentioned above, the Notice of Termination of tenancy should be the prescribed form, specifically Form A, as provided for in the *Landlord and Tenant (Shops, Hotels and Catering Establishments) (Tribunal) (Forms and Procedure) Regulations*, 1966.
14. The tribunal notes that the goods belonging to the Applicant had already been sold on the 24<sup>th</sup> of August 2023 pursuant to the landlord's right to distress for rent and that the premises was left vacant. No amendments to the Application was done.
15. As to whether there was a substituting landlord-tenant relationship, the tribunal finds the relationship still exists and that the same is scheduled to come to an end on 1<sup>st</sup> of June 2024.
16. Given that no notice was given, the Tenancy still subsists and the Preliminary Objection fails and is accordingly dismissed.
17. In the upshot and based on the foregoing the Tribunal finds that the reference by the Tenant is merited and makes the following orders; -
- i. That the tenant shall retain possession of the premises until the termination of the tenancy agreement.



- ii. That the Landlord shall forthwith restore water services to the suit premises and maintain said services until such time as the tenancy is lawfully terminated.
- iii. That an injunction is hereby issued restraining the Respondents jointly and severally, whether by themselves, their agents, managers, servants and/or employees from evicting, interfering, meddling, disturbing the Applicant's peaceful and quiet possession, and occupation of the suit premises.
- iv. The Applicant is at liberty to claim for compensation.

**HON. MIKE MAKORI**

**MEMBER**

**BUSINESS PREMISES RENT TRIBUNAL**

Ruling dated, signed and delivered virtually by Hon Mike Makori this 15<sup>th</sup> day of November, 2023 in the absence of the parties.

**HON. MIKE MAKORI**

**MEMBER**

**BUSINESS PREMISES RENT TRIBUNAL**

