



**Kariuki v Micro and Small Enterprises Authority (Tribunal Case
E368 of 2022) [2023] KEBPRT 189 (KLR) (Civ) (28 February 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 189 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
CIVIL
TRIBUNAL CASE E368 OF 2022
GAKUHI CHEGE, VICE CHAIR
FEBRUARY 28, 2023**

BETWEEN

JAMES KAMAU KARIUKI APPLICANT

AND

MICRO AND SMALL ENTERPRISES AUTHORITY RESPONDENT

RULING

1. The applicant moved this tribunal by way of a complaint dated April 27, 2022 pursuant to 12(4) of cap. 301, Laws of Kenya complaining that the Respondent locked him out of the tenancy premises and issued irregular notice of termination. He also complains that the Respondent failed to provide electricity and rent payment receipts and was dumping garbage which emits toxic fumes outside the suit premises.
2. The Applicant simultaneously filed a motion dated April 27, 2022 seeking restraining orders against the Respondent *inter-alia* from evicting or attempting to evict, bar or in any other way interfering with his quiet and peaceful enjoyment of the tenancy premises known as Kariobangi Msea Centre of excellence.
3. The Applicant also seeks for an order compelling the Respondent to immediately reconnect three phase electricity to the tenancy premises aforesaid and that the OCS Buruburu Police Station or any other police officer of similar or higher rank from any other station ensures compliance with the Tribunal orders.
4. In his affidavit in support sworn on even date, the applicant deposes that he has been the Applicant's tenant since February 2016 in the suit premises paying a monthly rent of Kshs.10,000/- at Kariobangi Msea Centre of excellence which is a government centre.



5. The said rental payments cover payment of utilities which includes water and electricity. The business run by the tenant requires a three (3) phase power supply connection which the landlord failed to provide from the onset. As a result, the tenant had to connect his own three phase power supply with the landlord's authority.
6. The Applicant runs a business where he pilots clean energy hardware and fuels from the tenancy premises and derives his livelihood therefrom.
7. However, in May 2019, the applicant's electricity supply was disconnected making it impossible to continue working as he needs a three phase power supply to run his business. Despite requests and promises to fix the Respondent failed to do so. He annexes as 'JK1' copies of complaints lodged with the Respondent.
8. On April 10, 2022, the Applicant was issued with a three (3) months termination notice dated April 1, 2022 on the basis of disputed rent arrears. The said notice is exhibited as annexure 'JK2'. The Applicant deposes that he was up to date with rent payment as per annexure 'JK3'. The Applicant wrote to the Respondent stating that he did not intend to comply with the said notice.
9. According to the applicant, any arrears alleged against him relates to the period when the government compulsorily shut down all government centres that were not providing essential services and also waived fees and or payments for facilities due to the Covid-19 pandemic.
10. It is deposed that it is a matter of judicial notice that during the Covid period running from March 2020 to November 2020, the government of Kenya officially closed down all government facilities which were not considered essential and the tenancy herein was affected. Any fees payable for government facilities were waived.
11. The Applicant deposes that the government of Kenya directed individuals who were over 58 years of age where he falls to work from home.
12. The applicant deposes that the tenancy is controlled and subject to the jurisdiction of this Tribunal. The tenant had been barred from accessing the suit premises from November 2021 which crippled his business. He however continued to pay rent. It is on that basis that the Applicant seeks for restraining orders against the Respondent.
13. Interim orders were issued in favour of the tenant on April 28, 2022 pending hearing inter-partes on May 25, 2022. On May 25, 2022, the Respondent was given 14 days to file and serve replying affidavit/response to the application. The tenant was also given 14 days to file and serve submissions and any further affidavit in support of the application and the landlord 14 days thereafter to respond.
14. Electricity supply to the tenant's premises was ordered to be restored by Kenya Power and Lighting Co. Ltd with the case being slated for mention on July 18, 2022 to fix a ruling date. Interim orders were extended to that date.
15. On July 18, 2022, this Tribunal ordered its Rent Inspector to visit the suit premises and establish whether the same had electricity supply at the moment and file a report before August 15, 2022 when the matter was slated for mention.
16. The Rent Inspector visited the suit premises on September 23, 2022 and found that the tenant's premises had not been operating since 2019 as a result of which it was dusty. The tenant is the one who opened the door. The premises had three phase and single phase electricity supply. The single phase supply was used for lighting and was working but the three (3) phase was disconnected.



17. The application is opposed through a replying affidavit of Murithi Muriuki who is the Assistant Director of Infrastructure Development with the Respondent. It is therein deposed that the suit premises was not a controlled tenancy as defined under Cap. 301, Laws of Kenya as the relationship was one of incubator and incubatee on the suit premises owned by the Government of Kenya.
18. The respondent is an Authority established under [Micro and Small Enterprises Act](#) no. 55 of 2012 formerly domiciled under the Ministry of Industrialization, Trade and Enterprise Development whose mandate is to promote, develop and regulate micro and small enterprises in Kenya by providing suitable infrastructure facilities, capacity building, skills development programs for Mse's monitory evaluating implementation of existing policies and programmes related thereto.
19. The suit premises was established by the Government of Kenya under the said Ministry as an Industrial Development Centre in Kariobangi constituency under the name Kariobangi Centre of Excellence to provide a platform for technology acquisition and technical skills upgrading. Reference is made to annexure marked being a status report dated January 2016.
20. The applicant was allocated a room at the said centre on January 28, 2016 as an incubation room subject to terms and conditions *vide* agreement marked "MM2". Only a single phase electricity supply was connected to the said room by that time which was offered on an 'as-is' basis". Amount payable for the room in the sum of Kshs.10,000/- was incubation fees every month.
21. As at May 23, 2023, the Applicant was in arrears of Kshs.370,000/- in incubation fees as evidenced by annexure 'MM3'. It is denied that there was any waiver of rent by the Government in respect of the suit premises.
22. It is denied that the Respondent closed the suit premises during the incubation period and contends that the termination notice issued by it was necessitated by expiry of the Applicant's contractual incubation period under the incubation agreement and his continued breach of the agreement including arrears of incubation fees of Kshs.370,000/-.
23. I am required to determine the following issues:-
 - a. Whether this Tribunal has jurisdiction to determine the instant complaint and application dated April 27, 2022.
 - b. Whether the tenant is entitled to the reliefs sought in the complaint and application dated April 27, 2022.
 - c. Who is liable to pay costs of the suit?
24. Section 2(1) of [Cap. 301](#), Laws of Kenya, defines a controlled tenancy to mean "a tenancy of a shop, hotel or catering establishment:-

“

“(a) Which has not been reduced into writing, or

(b) Which has been reduced into riting 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 commencement thereof or



- (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 controlled tenancy”.

25. In his supporting affidavit sworn on April 27, 2022, the applicant states at paragraph 3 as follows:

“ 3. That the Kariobangi MSEA centre of Excellence is a government Centre”.

26. At paragraph 17, the applicant continues to depose as follows:-

“ 17. That it is a matter of judicial notice that during the covid period running from March 2020 to November 2020, the Government of Kenya officially closed down all government facilities which were not considered essential and my premises was affected.....”.

27. On its part the Respondent at paragraph 3 of the replying affidavit of Muriithi Muriuki sworn on November 10, 2022 deposes as follows:-

“ 3. That I am advised by my advocates whose advice I believe to verily be true, that the relationship between the parties of this suit does not constitute the subject of a controlled tenancy as defined under Cap. 301, Laws of Kenya. Further that from the onset, the relationship between the parties was one of incubator and incubate on the suit premises owned by the Government of Kenya as detailed herein below”.

28. There being consensus that the suit premises is owned by the government of Kenya, I have no doubt in my mind that it falls within the exception to the definition of a controlled tenancy under Section 2(1) of Cap. 301, Laws of Kenya. This by extension ousts the jurisdiction of this Tribunal.

29. In the case of Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited (1989) eKLR at page 8-9, Kwach J.A (as he then was) had the following to state on the question of jurisdiction:-

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

30. Having found that the relationship between the parties herein is not a controlled tenancy, the instant proceedings are a candidate for striking out as they were instituted in a forum without jurisdiction. The interim orders given herein were made without jurisdiction and therefore ought to be set aside or vacated.

31. Consequently, there being no jurisdiction to entertain the proceedings, the reliefs sought by the Applicant in the complaint and application dated April 27, 2022 cannot be granted.

32. As regards costs, the same are in the tribunal's discretion under Section 12(1) (k) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, cap. 301 Laws of Kenya but always follow the event unless for good reasons otherwise ordered. I have no reason to deny the Respondent costs.



33. In conclusion therefore, the final orders which commend to me in this matter are:-

a. The tenant's/applicant's complaint and application dated April 27, 2022 are hereby struck out for want of jurisdiction with costs.

b. The interim orders given on April 28, 2022, May 25, 2022 and August 28, 2022 are hereby vacated for want of jurisdiction.

c. The tenant shall pay Kshs.30,000/- to the respondent as costs of the suit.

It is so ordered.

RULING DATED SIGNED & DELIVERED VIRTUALLY THIS 28TH DAY OF FEBRAURY 2023.

HON. GAKUHI CHEGE

VICE CHAIR

BUSINESS PREMISES RENT TRIBUNAL

Ruling delivered in the presence of:-

Miss Wangui for the Tenant/Applicant

Miss Thiongo for the Landlord/Respondent

