



REPUBLIC OF KENYA



KENYA LAW
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Salim (Suing as the administrator of the Estate of the Late Mohamed Salim Mbarak) v Abdalla t/a Baitulaman House (Environment & Land Case 80 of 2021) [2023] KEELC 18211 (KLR) (14 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18211 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 80 OF 2021**

**MAO ODENY, J
JUNE 14, 2023**

BETWEEN

SALIM MOHAMED SALIM (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE MOHAMED SALIM MBARAK) PLAINTIFF

AND

SIDIKI ABDULREHMAN ABDALLA T/A BAITULAMAN HOUSE DEFENDANT

RULING

1. This ruling is in respect of a Notice of a Preliminary Objection dated October 27, 2021 by the Defendant challenging the court's jurisdiction to hear and determine the suit.
2. The Plaintiff commenced this suit against the Defendant for breach of contract, particularly a lease agreement dated July 1, 2004 and a lease variation agreement dated March 11, 2009. According to the Plaintiff, the Defendant agreed to lease the property identified as Lamu/Block III/160 together with the buildings thereon for a period of 25 years at an agreed monthly rent.
3. That the Defendant had *inter alia* failed to pay the rent as prescribed, maintain the premises, and had sublet the suit property to a third party contrary to the agreements and prayed for inter alia an order for vacant possession and injunction, and damages for breach of contract.

Defendant's Submissions

4. Counsel for the Defendant submitted that the objection stems from Section 12 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Cap 301 and cited a series of cases to explain the meaning and import of Preliminary Objections namely *Samuel Waweru v Geoffrey Muhoro Mwangi* [2014] eKLR; *IEBC v Jane Cheperenger and 2 others* [2015] eKLR; *Mukisa Biscuits Manufacturing Co Limited v West End Distributors Ltd; Kalpana Rawal and 2 others v JSC and 6*



others [2016] eKLR. He submitted that the tribunal established under the said Section 12 was the right forum to determine the issues herein, as opposed to this court.

5. On costs, counsel relied on the cases of *Reid Hewitt and Co v Joseph* AIR 1918 Cal 71; *Myres v Defries* [1880] 5 Ex D180; and *Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR and urged the court to allow the Preliminary Objection.

PLAINTIFF'S SUBMISSIONS

6. Counsel for the Plaintiff submitted that the tribunal established under the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* [the Act], had no jurisdiction over the present matter by virtue of the fact that the Act relates only to controlled tenancies described under Section 2 thereon. That the relationship between the parties herein did not fit within that description. Counsel relied on the case of *Ali Mwinyimvita v Star Transport Co Limited* [2016] eKLR.
7. Counsel added that the termination clause in the lease agreement that required a party to give six months' notice in writing did not make the tenancy a controlled and relied on the case of *Republic v Chairman Business Premises Rent Tribunal and 2 others*, Ex-parte Abdulkadir Hubes [2017] eKLR. Counsel urged the court to dismiss the preliminary objection with costs.

Analysis And Determination

8. The scope of Preliminary Objections is now settled. In *Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors* (1969) EA 696, it was held; -

“...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”.

“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”.

9. An objection to the jurisdiction of the court as stated above consists a point of law. The locus classicus case on the question of jurisdiction is the celebrated case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR 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.”

10. It is also trite that a court's jurisdiction flows from either the *Constitution* or legislation or both. The Act that forms the basis of the objection herein describes the Act as “An Act of Parliament to make provision 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”. Section 11 thereon establishes a tribunal which jurisdiction is listed under section 12 as below; -

- 1 A Tribunal shall, in relation to its area of jurisdiction have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in addition to and without prejudice to the generality of the foregoing shall have power—
 - a. to determine whether or not any tenancy is a controlled tenancy;
 - b. to determine or vary the rent to be payable in respect of any controlled tenancy, having regard to all the circumstances thereof;
 - c. to apportion the payment of rent payable under a controlled tenancy among tenants sharing the occupation of the premises comprised in the controlled tenancy;
 - d. where the rent chargeable in respect of any controlled tenancy includes a payment by way of service charge, to fix the amount of such service charge;
 - e. to make orders, upon such terms and conditions as it thinks fit, for the recovery of possession and for the payment of arrears of rent and mesne profits, which orders may be applicable to any person, whether or not he is a tenant, being at any material time in occupation of the premises comprised in a controlled tenancy;
 - f. for the purpose of enabling additional buildings to be erected, to make orders permitting landlords to excise vacant land out of premises of which, but for the provisions of this Act, the landlord could have recovered possession;.....

11. Section 2 of the Act further provides-

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

“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 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 a controlled tenancy;



12. In the present case, the agreement was reduced into writing and for a period exceeding five years. It contained a termination clause tailored as follows; -

“The Lessee may terminate the tenancy/lease by giving the other notice in writing of at least six 6 months of the intention to do so.”

13. In the case of *Republic v Chairman Business Premises Rent Tribunal and 2 others, ex-parte Abdulkadir Hubes* (supra) held that the provisions of the Act in relation to a termination clause is to the effect that a tenancy if reduced in writing and contains a termination provision allowing parties a window to terminate the agreement within five years from the commencement date of the agreement, the tenancy converts to a controlled tenancy. The termination clause in the lease agreement herein does not fit that description.

14. In the circumstances, I find that the lease agreement between the parties herein does not fit the jurisdiction of the tribunal established under the Act. The upshot is that the Notice of Preliminary Objection is dismissed with costs to the Plaintiff.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 14TH DAY OF JUNE 2023.

M A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

