



REPUBLIC OF KENYA



**Mati v Athman & another (Environment & Land Case E034 of 2022)  
[2023] KEELC 22312 (KLR) (14 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22312 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE E034 OF 2022  
NA MATHEKA, J  
DECEMBER 14, 2023**

**BETWEEN**

**DOUGLAS KILONZO MATI ..... PLAINTIFF**

**AND**

**ARAFAT ABDALLA ATHMAN ..... 1<sup>ST</sup> DEFENDANT**

**SIRAJI MABONGA WAWIRE T/A MUSIKOMA AUCTIONEERS .... 2<sup>ND</sup>  
DEFENDANT**

**RULING**

1. The 1<sup>st</sup> Defendant raised a Preliminary Objection on a point of law seeking to strike out the suit on the following grounds that this Honourable court does not have jurisdiction to hear this matter because;
  - a. The tenancy in dispute is a controlled tenancy within the meaning of Section 2(1) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*.
  - b. The Plaintiff is a Protected tenant within the meaning of section 2 (1) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*.
  - c. The Plaintiff himself admits he is a Protected Tenant at paragraph 35 (iv) (a) of his Plaint dated 29.03.2022.
  - d. The Primary Jurisdiction to resolve Controlled Tenancy disputes vests with the Business Premises Tribunal established under Section 11 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*.
2. The preliminary objection raised herein by the 1<sup>st</sup> defendant is dated 29<sup>th</sup> September 2023. It is premised on the ground that this court lacks the jurisdiction to hear and determine the dispute which was described as a controlled tenancy which is a reserve of the Business Premises Tribunal established by Section 11 of the *Landlord and Tenant (shops, hotels and catering establishments) Act*.



3. The law on Preliminary objection was settled in *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696*, where it was held that;

“ 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 the contract giving rise to the suit to refer the dispute to arbitration.

4. The Supreme Court settled the question of jurisdiction in the case of *Samuel Kamau Macharia vs Kenya Commercial Bank & 2 Others (2012) eKLR* wherein the Court stated as follows;

“ A court’s jurisdiction flows from either *the constitution* of legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submissions that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings.”

5. Both parties agree that the dispute arose out of the tenancy agreement dated 3<sup>rd</sup> June 2019 between Arafat Abdalla Athman (landlord) and Douglas Kilonzo Mati (tenant). Where the landlord let two shops known as Peleleza Bar along Mwinyi Babu Road Likoni near Kona ya Police in Likoni to the plaintiff. The agreed rent was Kshs 32,000/= per month for one year starting September 2019, increasing by Kshs 3,000/= after every two years. The tenancy agreement was for a term of 20 years expiring in September 2039. The plaintiff claims that on 26<sup>th</sup> May 2021, while still carrying out renovations on the shops, the 1<sup>st</sup> defendant carried an illegal distress for rent and carried away goods on unknown value and evicted the plaintiff’s staff from the shop. The plaintiff moved to the Business Premises Rent Tribunal and filed Case No. 138 of 2021 on 10<sup>th</sup> June 2021 to stop the illegal eviction and orders to be reinstated into the business premises. Soon after the plaintiff became aware that the premises was leased to another tenant one Kogo Ngoa, and it is the plaintiff’s case that new tenancy between Kogo Ngoa and the 1<sup>st</sup> defendant extinguished the tenancy between himself and the 1<sup>st</sup> defendant. Hence the tribunal ceased jurisdiction since the eviction of the plaintiff was completed and a new tenant installed in the premises. The plaintiff proceeded to withdraw the reference before the tribunal and filed the suit herein where he sought inter alia a refund of the costs incurred during renovation of the premises, general damages for the illegal eviction and a declaration that he is a protected tenant during an illegal distress of rent by the 1<sup>st</sup> defendant.

6. The jurisdiction of Business Premises Rent Tribunal was discussed in *Republic vs Business Premises Rent Tribunal & another Ex parte Albert Kigera Karume (2015) eKLR*, where the court determined the power of the tribunal to issue orders of injunction. It was held that;

“ In this case, the orders which the applicant seeks to quash were injunctive orders. Simpson and Chesoni, JJ (as they were) in *Re Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195* dealt in extenso with the provisions of section 12 of the said Act. Chesoni, J on his part expressed himself 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.”

7. The tenancy agreement entered into by the plaintiff and the 1<sup>st</sup> defendant on 3<sup>rd</sup> June 2019 was to lapse in September 2039, it was running for a duration of 6 years. Clause 5 of the said agreement stated “that the party to this tenancy agreement shall give two months notice of intent to terminate the tenancy to the other party.” Section 2 (1) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* defines controlled tenancy to mean a tenancy of a shop, hotel or catering establishment-

- (a) 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 (emphasis added);
  - (iii) Relates to the premises of a class specified under sub section (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.

8. Section 12 (1) of the *Landlord and Tenants (Shops, Hotels and Catering Establishments) Act* provides for the powers of the tribunal which include the power to determine whether or not any tenancy is controlled. The tenancy agreement between the plaintiff and 1<sup>st</sup> defendant was dated 3<sup>rd</sup> June 2019 and was meant to last for a period of 20 years and also specified how rent was to be paid as well as the increment thereto. From the definition of controlled tenancy in Section 2 of the Act cited above it is clear that any tenancy agreement that has been reduced into writing and which exceeds five years is not subject to the tribunal and as such it has no jurisdiction over it. The tenancy agreement dated 3<sup>rd</sup> June 2019 was for a term of 20 years which automatically knocks off the jurisdiction of the tribunal. The court in *Republic vs Chairman Business Premises Rent Tribunal & 2 others Ex-Parte Abdulkadir Hubess (2017)* eKLR, held that;

“It is my finding therefore that no stretch of imagination can place the tenancies in issue within the ambit of controlled tenancies. It is my considered view that by virtue of the provisions of Section 2(a) (i) and (ii) of Cap. 301, the tenancies do not qualify to be controlled tenancies. Having so held, it follows that the BPRT had no jurisdiction to hear the application filed before it by the interested parties. Muchemi J. in the case of *Mugo Holdings Limited vs Attorney General & Another* [2016] eKLR held that a tenancy agreement that was for a duration of 6 years was not a controlled tenancy within the meaning of section 2 of Cap. 301.”



9. Therefore, this court has jurisdiction to adjudicate upon the issues before it and grant the orders sought. I find the 1<sup>st</sup> defendant's notice of preliminary objection dated 29<sup>th</sup> September 2023 devoid of merit and is hereby dismissed with costs to the plaintiff.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 14<sup>TH</sup> DAY OF DECEMBER 2023.**

**N.A. MATHEKA**

**JUDGE**

