



**Kyengo & another v Watamu Development Ltd (Appeal
E009 of 2024) [2025] KEELC 4180 (KLR) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4180 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
APPEAL E009 OF 2024**

**AE DENA, J
MAY 29, 2025**

BETWEEN

MICHAEL KYENGO 1ST APPELLANT

CAROLINE KYENGO 2ND APPELLANT

AND

WATAMU DEVELOPMENT LTD RESPONDENT

*(appeal against the ruling of Hon. Patricia May dated 11th October
2023 in Mombasa Business Premises Rent Tribunal No. E270 of 2022.)*

JUDGMENT

1. The subject of this appeal is the ruling of Hon. Patricia May dated 11th October 2023 in Mombasa Business Premises Rent Tribunal No. E270 of 2022. The Appellant is the tenant. The Landlord commenced the proceedings in the Tribunal by way of a Plaint dated 13/12/2022 for inter alia eviction and vacant possession of the respondent tenants from the suit premises following alleged breach of the terms of a lease agreement entered between the parties. The Applicant Landlord also prays for special damages in terms of rent arrears amounting Kshs 5,769,429.28/-.
2. Alongside the plaint was filed a Notice of Motion dated 13/12/2022 seeking orders of injunction restraining the respondents tenants from selling or disposing of the suit property or interfering with it in any manner, leave to evict the tenants from shop E-F and attendant auctioneers costs if required, and a declaration that the rent arrears above are due and owing.
3. In response the tenants responded by filing a preliminary objection on the following grounds; -
 1. THAT there is no Landlord Tenancy Relationship between the parties, the same having been terminated in the year 2017



2. THAT the Tribunal has no jurisdiction to hear and determine the matter under section 2 of Cap 301 since there exist a signed lease Agreement commencing on 1st October 2011 for a period of 6 years which has since lapsed.
3. THAT the Respondents vacated the premises on expiry of the lease and are neither in occupation or possession of the premises.
4. The tribunal delivered a ruling dated 11/10/2023 which is the subject of this judgement.

Grounds of Appeal.

5. The respondent tenant being aggrieved by the entire determination has filed the present appeal vide a Memorandum of Appeal dated 31st July 2024 on the following grounds;-
 1. THAT the learned Chairperson erred in law by acting suo motto
 2. THAT the learned Chairperson failed to appreciate that what was before her was a Preliminary Objection on jurisdiction of the Tribunal
 3. THAT the learned Chairperson failed to appreciate that she had no jurisdiction over the matter since no landlord/Tenant relationship existed
 4. THAT the learned Chairperson failed to appreciate that the tenancy was governed by an agreement which had long lapsed and no new tenancy had been created either periodic or otherwise
 5. THAT the learned chairperson erred in law and in fact in giving a final judgement as she did without hearing the parties herein and by so doing, she acted on fanciful speculations and conjectures
 6. The Appellant prays that the ruling is set aside and be substituted with an order that learned chairperson had no jurisdiction to entertain the proceedings before her. That alternatively if the court is of the view, she had jurisdiction the case be remitted for hearing on merits.

SUBMISSIONS.

7. The appeal was heard by way of written submissions. The appellants submissions are dated 1/10/2024 filed by the firm of B.W. Kenzi & Company Advocates and the respondents/Landlord 18/11/2024 by the firm of Lawrence Obonyo Legal Advocates. The court has considered the submissions in rendering its determination.

Appellants Submissions.

8. Reviewing the provisions of section 2 of Cap 301 on definition of a controlled tenancy vis a vis clauses 4 and 8 of the lease it is reiterated that the lease herein run from 1/10/2011 to 30/09/2017 a period of 6 years automatically removing the relationship between the parties from the jurisdiction of the Tribunal which only applied for arrangements not exceeding Five years. Referring to page 72 of the inspection report stating that the premises were locked by an employee of the tenant who handed the keys to the Landlords Manager, it is submitted that no new lease was signed upon lapse of the previous lease, the tenant ceased paying rent and thus no new tenancy was ever created. That the period of lease was a pure point of law. That the tribunal ought to have downed its tools which it did not and therefore acted in vain.



9. Referring to sections 12 and 4 of Cap 301 it is further submitted that the proceedings were commenced by way of plaint instead of a reference and which was erroneous. In the absence of the primary document being form C of the first schedule to the Act, there were no proceedings before the tribunal. The tribunal got into the arena and sought to formulate the landlords claim while there was none.
10. The appellant submitted that submissions filed by counsel for both parties were clearly titled 'Submissions on the Preliminary Objection'. That the landlord even urged in its submissions that the tribunal should not condemn it unheard. However, the tribunal proceeded to render itself on the application by allowing it and made final orders on the suit without giving an opportunity to be heard. The court was referred to the case of Mary Wairimu Gakere Vs. Muiruri Raphael Njuguna ELC land case E005 of 2022 on the principle of natural justice. The court is invited to allow the appeal as prayed.

Respondents Submissions.

11. The respondents submitted that the fulcrum of this appeal hangs entirely on the preliminary objection. Citing the case of Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd (1969)EA 696 on the nature of a preliminary objection as a point of law it is submitted that the question whether there was a tenancy was one that is contested and additional evidence was required. Consequently, the tribunal as part of fact finding ordered an inspection of the suit properties which found the tenants goods were still in the premises. Attempts by the land lord to have them remove the same yielded no results and the tenancy relationship continued to subsist even after the lapse of the tenancy. The appeal is termed as lacking in merit as the trial court had the requisite jurisdiction to deal with the matter.

Analysis And Determination.

12. Having considered the pleadings and the submissions of the parties, in my view two issues arise for determination namely 1) whether the tribunal had jurisdiction to deal with the matter and 2) whether the trial court erred by determining the application dated 13/12/2024.
13. The court must however first resolve what was before the tribunal for determination. Was it just the ruling on the preliminary objection raised or both the PO and the application dated 13/12/2024? Paragraph 3 of the impugned ruling is to the effect that; -

'The parties were directed to canvass the application and preliminary objection by way of written submissions'
14. The appellant states that the matter was for determination only of the PO. Counsel only referred the court to the submissions of the parties filed before the tribunal in confirmation of this. The 1st and 2nd respondent submissions are dated 8/9/2023. My perusal of the same reveals the subject as 'Tenants/ Respondents Submissions to the Preliminary Objection herein dated 18th January 2023'. The content aligned to the title. The applicants filed submissions dated 11/09/2023 they are titled ' Applicants Submissions on the 1st and 2nd respondents Preliminary Objection dated 18th January 2023.' My review of this set of submissions reveals that it only addressed the PO and refers to the proceedings as an application and not a suit.
15. It would appear that both parties addressed the Tribunal on the PO only meaning therefore both counsels did not deal with the application and none of the parties was placed at a disadvantage against the other. The Hon Chairperson simply relied on what was already on record.
16. But I think the above notwithstanding the crux of this appeal is the preliminary objection on the jurisdiction of the Tribunal to determine the dispute. Firstly, the court must enunciate the jurisdiction of the BPRT.



17. The Business Premises Rent Tribunal is classified as a subordinate court under article 169(1) of *the Constitution* of Kenya 2010. It is established under Section 11 of Landlord & Tenant Shops Hotels & Catering Establishments Act Chapter 301 of the laws of Kenya. The tribunals jurisdiction is conferred under section 12 therein basically to handle complaints arising from a controlled tenancy as follows:-

Section 12(4)

“In addition to any other powers specifically conferred on it by us under this Act, a Tribunal may investigate any complaint relating to a controlled tenancy made to it by the Landlord or the Tenant and may make such orders thereon as it deems fit.

18. Section 2 provides as follows on controlled tenancy;-

A controlled tenancy means a tenancy of 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.

19. Drawing from the definition of a controlled tenancy above it is contended that the Tribunal has no jurisdiction as there existed a signed lease for a period of 6 years which elapsed without renewal and thus expressly removed the tenancy under the control of the Tribunal.

20. The court has read the tribunals ruling. The Hon Chairperson after citing the case of *Mehuba Gelan Kelil & 2 Others Vs. Abdulkadir Shariff Abdirhim & 4 Others (2015)eKLR* which referred to the case of *Mukisa Biscuit Manufacturing Co.Ltd Vs. West End Distributors* on the nature of a preliminary objection decanted one issue of determination thus– ‘whether there is a tenancy relationship was what was contested’. The tribunal guided by the authorities cited observed that it was clear that the preliminary objection required additional evidence to be adduced.

21. My understanding of the above statement that the preliminary objection required additional evidence to be adduced meant that the preliminary objection was not properly raised since the court would require to look into additional facts or evidence to be able to ascertain whether there was a tenancy relationship. This is what has been emphasized by the court in the case of *Oraro Vs Mbaja (2005) 1 KLR 141* where Ojwang J stated thus;-

‘.....any assertion, which claims to be a ‘preliminary objection’ yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not a matter of legal principle a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point....Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.....’

22 The question that arises is what is the court supposed to do once it has made a finding that a preliminary objection is not on a pure point of law? From the above dictum it clearly follows that the court is supposed to let the matter be heard on its merits. Having made the observation that evidence was required, the tribunal was obligated to dismiss the preliminary



objection. But though no specific finding was listed in the determination this does not go to the root of the matter since it is clear the court found the preliminary objection was not on a pure point of law.

23 But was the above finding correct? In my view the preliminary objection could not sail through as a pure point of law. I say so because the existence of the tenancy after the expiry was a contested issue. The tenants do not look at their acts of leaving equipment in the suit premises as an act of continuance of the lease arrangements while the landlord thinks otherwise. The tribunal would have to probe a number of facts to resolve the issue.

24 Having agreed with the tribunal that the preliminary objection was not on a pure point law the tribunal could then proceed to determine the application dated 13/12/22.

25 The Hon Chairperson further noted that the tribunal had ordered for an inspection as part of the fact finding and the tenants items were still at the demised premises. That the attempts to have them remove the same did not bear any fruit. It is then clear that the tenant did not yield up possession thus they (sic) tenancy relationship continued to subsist even after the lapse of the term of the term of tenancy.

26. Arising from the foregoing it means the tribunal made a finding that there existed a tenancy. The court notes that thereafter based on the doctrines of equity found the actions of the tenant of failing to yield up vacant possession and failing to meet their obligation of paying rent reeks of impunity, unjustifiable and unlawful and which could not be entertained by any judicial body.
27. The tribunal then proceeded to allow the application dated 13/12/2022 on terms that required immediate payment of rent arrears upto the date of the ruling in default the land lord was at liberty to commence any lawful recovery process including levying distress, the tenant was to yield up vacant possession and restore the demised premises to its original state. With finality the court noted the matter was settled on the above terms.
28. It is clear the court made a final determination of the matter based on the inspection report at a preliminary stage. The court was to consider the application and whether the orders sought could be issued. I say so because there was still the main suit which was to be determined as the matter was commenced by plaint, the plaint is attached at page 5-7 of the Record of Appeal. The Notice of Motion is a separate matter at page 18-20.
29. The application sought several orders key among them was an order declaring that an accumulated rent and service charge arrears of Kenya Shillings 5,769,429.28/- is due and owing to the landlord by the respondents/tenants, leave to evict the tenant to recover vacant possession of the premises, enforcement by the OCS Diani and cost of the execution. These prayers largely echo the prayers (ii) and (v) of the plaint. This would therefore mean that grant of the prayers in the application would amount to a final determination of the matter.
30. On the final orders made on the application dated 13/12/2024 the court agrees with the appellant that the tribunal erred in giving a final judgement without hearing the parties. For me the only orders that could have been considered would be the orders of temporary injunction restraining the respondents' tenants from selling disposing off alienating the demised premises subject to satisfying the requirements for grant of orders of injunction.
31. I have noted the appellant submission that the learned Chairperson erred in law by acting suo motto by treating the suit commenced by way of plaint as a complaint filed in accordance to section 12(4) of the Cap 301. I have already noted elsewhere in this judgement that the suit was commenced by way of plaint and I take the view that the court looks at access to justice. Moreover courts exist to serve



substantive justice for all parties to a dispute before it. Both parties deserve justice and their legitimate expectation is that they will each be allowed a proper opportunity to advance their respective cases upon the merits of the matter. This is the fundamental principle of natural justice as enunciated in *Wachira Karani vs. Bildad Wachira Civil Suit No. 101 of 2011 [2016] eKLR*.

32. The upshot of the foregoing is that the appeal succeeds to the extent that the tribunal erred in law by giving a final judgement without hearing the parties. The matter shall therefore be remitted to the tribunal for hearing on merits.

33. Let each party bear its own costs of the Appeal.

Orders accordingly.

JUDGEMENT DATED SIGNED AND DELIVERED THIS 29 DAY OF MAY 2025

HON LADY JUSTICE A.E DENA

JUDGE

29/5/2025

Mr. Otieno for the Respondent/Landlord

No appearance for the Appellant/Tenant

Asmaa Maftah-Court Assistant

