



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 73 OF 2019**

**MUTUKU MWANZA.....PLAINTIFF**

**VERSUS**

**COUNTY GOVERNMENT OF KITUI .....1<sup>ST</sup> DEFENDANT**

**H.K. BUILDERS AND GENERAL**

**CONTRACTORS LIMITED .....2<sup>ND</sup> DEFENDANT**

**RULING**

1. In the Notice of Preliminary Objection dated 23<sup>rd</sup> July, 2019, the 1<sup>st</sup> Defendant has averred that the suit premises in question is an established shop; that Section 1 of the Landlord and Tenant (*Shops, Hotels and Catering Establishment*) Act defines a shop to mean a premise occupied wholly or mainly for the purposes of a retail or wholesale business and that Section 6 of the Act gives the Business Premises Rent Tribunal jurisdiction to determine matters where one is not satisfied with the Tenancy Notice of Appeal and not this court.
2. The Notice of Preliminary Objection proceeded by way of submissions. The 1<sup>st</sup> Defendant's Advocate submitted that the Plaintiff's Application dated 3<sup>rd</sup> July, 2019 and the entire suit should be struck out for want of jurisdiction because the suit premises in question is an established shop.
3. Counsel submitted that the Landlord and Tenant (*Shops, Hotels and Catering Establishment*) Act (*the Act*) defines what a shop is and that the issues raised in the current suit should be heard and determined by the Business Premises Rent Tribunal (*the Tribunal*). Counsel relied on several authorities which I have considered.
4. The Plaintiff's advocate submitted that a tenancy to which the 1<sup>st</sup> Defendant is a party cannot qualify to be termed a controlled tenancy; that the Act does not apply to the 1<sup>st</sup> Defendant and that the Business Premises Rent Tribunal cannot exercise jurisdiction over the 1<sup>st</sup> Defendant.
5. In the Plaint dated 3<sup>rd</sup> July, 2019, the Plaintiff averred that he has been a Tenant of the 1<sup>st</sup> Defendant in the premises known as KCC Hotel No. 1/24 Kitui Township since 1<sup>st</sup> January, 2010; that he has been paying a monthly rent of Kshs. 20,000 to the 1<sup>st</sup> Defendant and that the Plaintiff, through his wife, established a family business in the suit premises known as Best Outlet since the year 2010.
6. According to the Plaintiff, the 1<sup>st</sup> Defendant intends to evict him from the suit premises allegedly to put up a market and that a permanent injunction should issue to restrain it from erecting a barrier in front of the suit premises.
7. The 1<sup>st</sup> Defendant has averred in the Notice of Preliminary Objection that the suit premises is a shop and that under Section 6 of the Landlord and Tenant (*Shops, Hotels and Catering Establishment*) Act, it is only the Business Premises Rent Tribunal that has jurisdiction to grant to the Plaintiff the orders he has sought for in the Plaint.
8. The Landlord and Tenant (*Shop, Hotels and Catering Establishments*) Act applies to shops, hotels and catering establishments, and to controlled tenancy. A Controlled Tenancy under the Act is defined as follows:

***“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.”*

9. It is not in dispute that the suit premises fall into the definition of the word “shop”. It is also not in dispute that there is no agreement between the Plaintiff and the 1<sup>st</sup> Defendant in respect of the tenancy agreement, and the dispute would have ordinarily come under the purview of Business Premises Rent Tribunal established under the Act.

10. However, the proviso to the definition of the word “Controlled Tenancy” in the Act provides 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.

11. It is common knowledge that under Article 6 of the Constitution, there are two levels of government, that is the National and County Governments. In that respect, the 1<sup>st</sup> Defendant is a government as contemplated under the proviso of Section 2 of the Act.

12. Even if it is argued that the proviso to Section 2 of the Act does not contemplate the 1<sup>st</sup> Defendant to be “a government”, then the 1<sup>st</sup> Defendant will still fall under the category of “a local authority” which is also not governed by the Act. In fact, considering that the 1<sup>st</sup> Defendant was previously a local authority, it follows that the Act was never meant to apply to the National Government and the Local Authorities, now County Governments.

13. The proviso to Section 2 of the Act therefore removes County Governments, either as Tenants or Landlords, from the operation of the Act. The Business Premises and Rent Tribunal therefore does not have jurisdiction to deal with any dispute concerning a tenancy arrangement between an individual and a County Government.

14. For those reasons, I find the Notice of Preliminary Objection dated 23<sup>rd</sup> July, 2019 unmeritorious. The Notice of Preliminary Objection is dismissed with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 7<sup>TH</sup> DAY OF FEBRUARY, 2020.**

**O.A. ANGOTE**

**JUDGE**