



**REPUBLIC OF KENYA**

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

**ELC. CASE NO.187 OF 2017**

**KENYA MEAT COMMISSION.....PLAINTIFF**

**VERSUS**

**DORCAS MUSEMBI.....1<sup>ST</sup> DEFENDANT**

**RAPHAEL KIOKI MWAILU .....2<sup>ND</sup> DEFENDANT**

**FAITH NDINDA NDONYE .....3<sup>RD</sup> DEFENDANT**

**PETER MUOKI .....4<sup>TH</sup> DEFENDANT**

**RULING**

1. In the Notice of Preliminary Objection dated 11<sup>th</sup> September, 2017, the 2<sup>nd</sup> and 4<sup>th</sup> Defendants have averred that the Environment and Land Court does not have the original jurisdiction to hear and determine the suit; that the Application offends the provisions of Sections 2(1) (c) and 8(2) of the Rent Restriction Act and that the Application is incompetent.
2. In response to the Notice of Preliminary Objection, the Plaintiff filed Grounds of Opposition in which it averred that there is no dispute that the tenancies herein are service tenancies; that the Plaintiff let the suit premises to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who are its employees and that by virtue of Section 2(1) (b) of the Rent Restriction Act, the Rent Restriction Tribunal is bereft of jurisdiction to preside over this matter.
3. According to the Plaintiff, this court can still transfer this suit to the Tribunal pursuant to the provisions of Section 18(1) (a) and (b).
4. In his submissions, the Defendants' advocate submitted that it has not been controverted that the 4<sup>th</sup> Defendant has been paying rent of the sum of Kshs. 2,500 to the Plaintiff for house number 02 in New Camp Estate.
5. Counsel submitted that this court will be encroaching on the jurisdiction of the Rent Restriction Tribunal should it entertain the current Application and that the Rent Restriction Act applies to all dwelling Houses which have a standard rent not exceeding Kshs. 2,500 per month.
6. Counsel submitted that the 4<sup>th</sup> Defendant is not and has never been an employee of the Plaintiff and therefore the issue of "service tenancy" does not apply to him.
7. The Plaintiff's advocate on the other hand submitted that the Plaintiff entered into tenancy agreements with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who are their employees; that the said tenancy agreements allowed the Plaintiff to deduct Kshs. 2,500 from their salaries and that they were not required to sub-let the said premises. Having breached the tenancy agreements, counsel submitted that the Plaintiff issued to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants notices to vacate.
8. Counsel submitted the Rent Restriction Act exempts "Dwelling house let on service tenancies".
9. Counsel submitted that the court ought to ascertain this claim if indeed the 4<sup>th</sup> Defendant entered into a non-staff agreement with the Plaintiff and that in event, the Rent Restriction Tribunal cannot issue the orders being sought in the Plaintiff.
10. The Plaintiff has pleaded in the Plaintiff that at all material times, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were employees of the Plaintiff by virtue of which the Plaintiff let to them residential premises located at its headquarters.

11. The Plaintiff pleaded that it entered into tenancy agreements dated 12<sup>th</sup> March, 2013 and 16<sup>th</sup> October, 2006 with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively for house Nos. C15 and 02 and that they were required to pay monthly rent of KShs. 2,500 per month.

12. According to the Plaintiff, contrary to what it had agreed with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, they leased the suit premises to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. It is the Plaintiff's case that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants have trespassed on the suit land and should be evicted.

13. The Defendants did not file Defences denying the averments of the Plaintiff. Instead they filed the current Preliminary Objection.

14. Having not joined issue by filing their Defences, this court takes the Plaintiff's averments in so far as the tenancy agreements between the Plaintiff and the Defendants to be the correct position.

15. If that is so, then the Rent Restriction Act is not applicable in this matter in so far as the Plaintiff's claim is, being that it entered into a service tenancy agreements with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who have unlawfully leased the suit premises to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Section 2 of the Rent Restriction Act provides as follows:

***“This Act shall apply to all dwelling houses, other than-***

***a. Exempt dwelling houses;***

***b. Dwelling-house let on service tenancies;***

***c. ...***

16. Section 3 of the Act has defined service tenancy to mean *“a letting by the Landlord to an employee in connection with his employment.”*

17. From the pleadings, it is undisputed that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are employees of the Plaintiff. The Plaintiff has sued the two on the basis of the service tenancies which it entered into with them and of which they have breached by leasing the premises to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants.

18. If the 3<sup>rd</sup> and 4<sup>th</sup> Defendants let the suit houses from the Plaintiff independently, then that is a factual issue that cannot be determined as a preliminary point of law. It is trite that a Preliminary Objection cannot be raised if any fact is to be ascertained at trial or by way of affidavit evidence. (*See Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) E.A 696*).

19. In any event, the Plaintiff is seeking for an order of eviction of the Defendants from the suit premises, including the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, general damages for breach of contract and general damages for trespass. The Rent Restriction Tribunal does not have the jurisdiction to issue those orders. Consequently, and considering that the Tribunal cannot confer on itself the jurisdiction that it does not have, it is only this court that can grant the orders that the Plaintiff is seeking.

20. It is for those reasons that I find the Preliminary Objection dated 11<sup>th</sup> September, 2017 to be unmeritorious. The Notice of Preliminary Objection is therefore dismissed with costs to the Plaintiff.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 13<sup>TH</sup> DAY OF APRIL, 2018.**

**O.A. ANGOTE**

**JUDGE**