



**Gacheru v Lakamshi Khimji & Sons Limited & another (Environment & Land  
Petition E010 of 2023) [2024] KEELC 6685 (KLR) (24 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6685 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION E010 OF 2023**

**MD MWANGI, J**

**SEPTEMBER 24, 2024**

**IN THE MATTER OF ARTICLES 2,3, 10, 19, 20, 21, 22, 23, 24, 27, 28 , 40, 43,  
48, 50 53 & 258 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF: TENANT (SHOPS, HOTELS  
AND CATERING ESTABLISHMENTS) CAP. 301**

**AND**

**IN THE MATTER OF AUCTIONEERS RULES, 1997**

**AND**

**IN THE MATTER OF: ARTICLE 6(1) OF THE INTERNATIONAL  
COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

**BETWEEN**

**KAREN NJERI GACHERU ..... PETITIONER**

**AND**

**LAKAMSHI KHIMJI & SONS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**BALLON WANJALA NANGALAMA T/A HEBROS AUCTIONEERS .... 2<sup>ND</sup>  
RESPONDENT**

**RULING**

(In respect to the issue of the court's jurisdiction to hear and determine the petition)



## Background

1. The Petitioner initiated this matter against the Respondents vide the Petition dated 4th September, 2023. The Petitioner avers that she was a tenant of premises M14 and M15 situated on land parcel LR No. 209/523/23 –Dubois Road owned by the 1st Respondent.
2. The monthly rent for the said premises was Kshs. 35,000/- and a goodwill of Kshs. 500,000/= for each shop. The Petitioner states that the tenancy agreement was not reduced into writing making it a controlled tenancy. She argues that upon renting the premises, she used the premises to operate a beauty shop business. The Petitioner contends that it was mutually agreed with the 1st Respondent that the goodwill for M14 would be paid in installments through postdated cheques. However, the 1st Respondent/Landlord reneged on the agreement thereafter asserting that the Petitioner was in rent arrears.
3. The Petitioner asserts that the 1st Respondent, without notice shut down the Petitioner’s shops and proceeded to auction the Petitioner’s goods worth Kshs. 5,793,731.98 through the 2nd Respondent. She therefore seeks for orders that the shutting down of the said shops was illegal and that the auction of her goods was unlawful for non-compliance with the Auctioneers Rules on distress for rent. She also seeks damages.
4. The Respondents opposed the Petition vide the Replying Affidavit sworn by Nimish Nalinchandra Shah deponed on the 14th December, 2023. In the said response, the Respondents challenge the jurisdiction of this court. At Paragraph 8 thereof, the deponent deposes that, “.....I am further advised by our Advocates and without prejudice to the above, that this Honourable court lacks the Jurisdiction to hear a claim of controlled tenancy and the same ought to have been filed before the Business Premises Rent Tribunal and not in the form of a Petition before this Honourable court.”
5. The Court having noted on its own motion that the Respondents had raised an objection on the issue of jurisdiction directed that it be dealt with first. The Court directed parties to file submissions in respect to the issue of jurisdiction. Parties complied.

## Respondents’ Submissions

6. The Respondents’ submissions are dated 3rd May, 2024. They refer to Section 12 (1) (a) & (4) of the Landlord and tenant (Shops, Hotels and catering Establishment Act), Cap 301, Laws of Kenya. They submit that the section clothe the Business Premises Rent Tribunal (BPRT) with the jurisdiction to, amongst other things, to investigate any complaint relating to a controlled tenancy made to it by the Landlord or Tenant, and to make such order thereon as it deems fit.
7. They also refer to Section 15(1) of the same Act which confers this Court the appellate jurisdiction to hear appeals from the Tribunal. Therefore, in regard to issues or claims by a purported controlled tenant, this court can only entertain the same as an appeal and not a suit or a Petition at the first instance. They submit that the Petition was dead on arrival for lack of jurisdiction and ought to be dismissed with costs to them.
8. The Respondent cite the case of Kaka Mohamed –vs- Mohamed Ali (2018) eKLR where the Court held that,

“it is generally true that this Court has jurisdiction in matters of tenancy. But in matters of controlled tenancy, the first port of call is not this court...”



9. The Respondents further rely on the finding in the case *Ola Energy Kenya Limited –vs- Rashid Opondo Otieno t/a Kisumu Breakdown Services Limited (2021) eKLR*, where the Court held that, “.....pursuant to Section 15 of the Act, this Court only acts as an appellate Court in matters controlled tenancy.”

### **Petitioner’s Submissions**

10. The Petitioner’s submissions are dated 11th July, 2024. The Petitioner submits that the Landlord-Tenant relationship ceased to exist when the Respondents unlawfully evicted the Petitioner from the premises thus effectively terminating the tenancy. Counsel submits that the Petitioner’s rights were violated when the 1st Respondent failed to follow the laid down procedures under the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, which would have involved filing a claim in the Business Premises Rent Tribunal to evict the Petitioner. However, the Respondents unlawfully evicted the Petitioner thus terminating the tenancy.
11. In addition, the Petitioner is no longer in occupation of the premises and the 1st Respondent ceased to collect rent from her. Further, that there has been no renewal of the tenancy agreement which would re-establish the landlord-tenant relationship that previously existed. It is argued that in the absence of a landlord-tenant relationship between the parties herein, the Business Premises Rent Tribunal has no jurisdiction to determine the dispute. Counsel cites the case of *Nandlal Jiuraj Shah & 2 Others –vs- Kingfisher Properties Limited (2015) eKLR*, to support his argument.
12. Counsel further submits that the issues for determination before this court are denial, violation, infringement and threatening of the fundamental rights and freedoms of the Petitioner under *the Constitution*. The Petitioner also claims unlawful distress for rent against the 1st Respondent who failed to follow the laid-down procedures under the Auctioneers Rules, 1997. The Petitioner submits that these are not issues which the Tribunal has jurisdiction over. He affirms that the issues raised are properly before this Court. Counsel prays that the Respondents’ objection be dismissed with costs and the court proceeds with the hearing and determination of the Petition.

### **Analysis and Determination**

13. Jurisdiction is everything, and where a court or tribunal lacks jurisdiction, it must not proceed with the matter. It must lay down its tools. In the celebrated case of *Motor vessel M.V. Lillian –vs- Caltex Oil (Kenya) Limited (1989) eKLR*, the court stated that,
- “Jurisdiction must be acquired before judgment. It is for this reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on evidence before the court. It is immaterial whether the evidence is scanty or limited...the moment the court determines that it has no jurisdiction it has to down its tools and proceed no further.”:
14. On the same breath, the supreme court rendered itself in *Samuel Kamau Macharia & Another –vs- KCB & 2 Others*: Supreme Court Civil Application No. 2 of 2011 that,
- “A court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by the law. We agree with counsel for the first and second respondents in his submission 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.”

15. The jurisdiction of the Business Premises Rent Tribunal is governed by the Landlord and Tenant Shops Hotels and Catering Establishments Act, Cap 301. The preamble to the Act states that it is:

“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.”

16. Section 2 of the Landlord and Tenant (Shops, Hotels, and Catering Establishments) Act, Cap 301 defines a controlled tenancy to mean: -

“A shop, hotel or catering establishment-

- (a) Which has not been reduced into writing
- (b) Which has been reduced into writing and which –
  - (i) Is for a period not exceeding five years; or
  - (ii) contains provisions 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 a tenant, shall be a controlled tenancy”.

17. The Tribunal’s jurisdiction is circumscribed in Section 12 of the [Landlord and Tenant \(shops, Hotels and Catering Establishments\) Act](#) under which sub rule (4) provides:

- (4) In addition to any other powers specifically conferred on it by or 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 order thereon as it deems fit..... (emphasis mine)

18. The above provision was subject of discussion by Simpson and Chesoni, JJ (as they were) in *Re Hebtulla Properties Ltd.* [1979] KLR 96; [1976-80] 1 KLR 1195 in which the Learned Judges dealt in extenso with the said provision. Simpson, J held inter alia as follows:

“Under section 12 of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act the tribunal’s powers are restricted to the “area of its jurisdiction”, that is the determination of references made to it under Section 6. These can be made only by a receiving party, that is, a tenant, who wishes to oppose a notice of termination or alteration of the terms or conditions of his tenancy or a landlord who wishes to oppose a notice by a tenant seeking re-assessment of rent or the alteration of any terms and conditions of the tenancy. It has power to do “all things which it is required or empowered to do” under the Act.

This may be tautological, but it must refer to section 5(3) and 6, the provisions of which are procedural only, and to the provisions of section 9, which set out what the tribunal, can do on a reference. In addition to these powers the tribunal has the specific powers contained in paragraphs (a) to (n) of section 12(1). The expression “all things”, being qualified by the



words “which it is required or empowered to do by or under the provisions of this Act”, no room is left for the application of the ejusdem generis rule.....

The specific powers include the powers to make an order for the recovery of possession from a tenant, or indeed from any person in occupation. Such an order would be an order made on an application of the landlord. No corresponding power is given to make an order on the application of a tenant who has been forcibly dispossessed by a landlord. The powers specifically conferred can be exercised on a reference, which is defined in section 2 as “a reference to a tribunal under section 6 of this Act”.

In addition, the tribunal may investigate any complaint made by a landlord or tenant. A clear distinction is made throughout the Act between a “reference” and a “complaint” ..... A party to a reference has a right of appeal to the High Court against any determination or order made therein, but the maker of a mere complaint has no such right. The word “complaint” is referable only to minor matters.”

19. 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..... It would be erroneous to think that section 12(4) confers on the tribunal any extra jurisdiction to that given by and under the Act elsewhere....”

Section 12(4) of the Act must be read together with the rest of the Act and, when this is done it becomes apparent that the complaint must be about a matter the tribunal has jurisdiction to deal with under the Act and that is why the complaint has to relate to a controlled tenancy.... The Act uses the words “any complaint” and the only qualification is that it must be “relating to a controlled tenancy” ..... The “recovery of possession” under section 12(1)(e) of the Act mean and means, recovery of possession by, and not from the landlord. The legislature deemed it necessary to empower the tribunal to order recovery of possession by the landlord. If the reverse had been intended, it would have been expressly provided since the intention of the Act is to protect tenants.

It is therefore clear that Parliament never intended that the tribunal should have power to order recovery of possession by a tenant where such possession has been seized by a landlord and it never gave that power to the tribunal. That power cannot be implied. In the premises “forcible taking of possession” is not a matter within the area of jurisdiction of a tribunal and that being the case, the tribunal cannot investigate any complaint about forcible possession of the premises by a landlord, such matter being for the courts. The complaint was outside the area of jurisdiction of the tribunal and jurisdiction was wanting.”



20. Madan, J (as he then was) on his part in *Pritam vs. Ratilal and Another* Nairobi HCCC No. 1499 of 1970 [1972] EA 560 expressed himself as follows:

“There is no doubt that the decisions of statutory tribunals are subject to review by the High Court and also that the High Court has jurisdiction to review a decision of the Business Premises Rent Tribunal which is a statutory tribunal. The court may investigate whether the tribunal acted in excess of its jurisdiction. It must be a rare case when the court will substitute itself to exercise the powers conferred upon a statutory tribunal but in a proper case the court will not hesitate to inquire whether the tribunal acted properly and within the framework of its statutory powers, and set right that which ought to be set right..... As stated in the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* itself, it is 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. The scheme of this special legislation is to provide extra and special protection for tenants. A special class of tenants is created.

Therefore, the existence of the relationship of landlord and tenant is a pre-requisite to the application of the Act and where such relationship does not exist or it has come to or been brought to an end, the provisions of the Act will not apply. The applicability of the Act is a condition precedent to the exercise of jurisdiction by a tribunal; otherwise the tribunal will have no jurisdiction. There must be a controlled tenancy as defined in section 2 to which the provisions of the Act can be made to apply. Outside it, the tribunal has no jurisdiction.” (emphasis added)

21. The presence of a lord-tenant relationship is a prerequisite for the Tribunal to exercise its jurisdiction and authority over any matters filed before it. In the instant case, the Petitioner was evicted and her goods auctioned. The Petitioner is no longer in occupation of the premises and the 1st Respondent ceased to collect rent from her. The landlord- tenant relationship ceased to exist the moment the Petitioner as evicted.
22. Consequently, the Business Premises Rent Tribunal lacks jurisdiction to hear and determine the dispute herein. This Court is properly clothed with the jurisdiction to determine the dispute.

**Disposition:**

23. The upshot of the foregoing is that I find no merit in the Respondents’ objection. This court has the jurisdiction to hear and determine this matter and shall proceed to do so.
24. Considering that the court picked out the issue on its own motion from the Respondents’ replying affidavit, I make no orders as to cost at this juncture.

It is so ordered

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:

Ms. Njuguna for the Petitioner



Ms. Kubai for the Respondents

Court Assistant: Yvette

