



**REPUBLIC OF KENYA**

**IN THE BUSINESS PREMISES RENT TRIBUNAL AT NAIROBI**

**TRIBUNAL CASE NO. E138 OF 2021**

**PATRICK KARIUKI GITHINJI T/A CINDY CATERERS....APPLICANT/TENANT**

**VERSUS**

**POWER GENERAL CONTRACTORS.....1<sup>ST</sup> RESPONDENT/LANDLORD**

**PYRAMIND AUCTIONEERS.....2<sup>ND</sup> RESPONDENT/AUCTIONEERS**

**PARAGON PROPERTY CONSULTANTS LIMITED...3<sup>RD</sup> RESPONDENT/AGENT**

**RULING**

**PARTIES AND THEIR REPRESENTATIVES**

1. The Applicant herein is the Tenant occupying the premises known as The Fourth Season Centre (*hereinafter referred to as the 'Suit Premises'*), situate at the Jomo Kenyatta International Airport Nairobi, within the Republic of Kenya.
2. The Applicant is represented by the Firm of Okemwa & Company Advocates. *Email: infokemwa@gmail.com*
3. The 2<sup>nd</sup> Respondent is Firm of Auctioneers appointed by the 1<sup>st</sup> Respondent
4. The 3<sup>rd</sup> Respondent is a property management company instructed by the 1<sup>st</sup> Respondent
5. All the Respondents are represented by the Firm of Waruiru Karuku & Mwangale Advocates. *Email: info@wkmadvocates.co.ke*

**DISPUTE BACKGROUND**

6. Vide a Notice of Motion Application dated **21<sup>st</sup> May 2021** and reference of even date the Applicant herein approached this Tribunal seeking *inter alia*, orders restraining the 1<sup>st</sup> Respondent and/or its servants, employees, agents be prohibited forthwith by this Tribunal from unlawfully intercepting, harassing, intimidating, evicting, closing, attaching, threatening, interfering, tampering, disposing by hand or in any manner whatsoever or howsoever with the Applicant's quiet occupation and lawful enjoyment of the suit premises at Jomo Kenyatta International Airport Fourth Seasons Building at Cargo Area pending the hearing and determination of this Application.

**THE TENANTS/APPLICANTS CASE**

7. The Applicant's Notice of Motion Application dated **21<sup>st</sup> May 2021** above mentioned is supported by key grounds being that the Applicant's 1<sup>st</sup> Respondent's action of sending the 2<sup>nd</sup> Respondent and threatening the Applicant with attachment and eviction occasioning untold hardship to the Applicant and its Clientele and that the distress is a sham and in utter violation of **Cap 301 Laws of Kenya** and is only meant to harass and evict the Applicant. He also averred that he was a Protected Tenant.

8. The Application is supported by the affidavit of **Patrick Kariuki Githinji**. The said Affidavit gives the background, context and procedural history of acquisition of the Suit Premises by the Applicant from the 1<sup>st</sup> Respondent and proceed to provide the evidentiary support to the grounds above stated. He swore that the present suit is urgent and that the proclamation of his goods conducted by the 2<sup>nd</sup> Respondent would ground his operations to a halt if this Tribunal does not intervene.

**THE LANDLORD/RESPONDENTS CASE**

9. The Respondents filed a Notice of Preliminary Objection on **7<sup>th</sup> June 2021** stating that the Lease relating to the suit premises was reduced to writing for a period exceeding five (5) years and does not contain a termination clause within five years from the commencement of the Lease and as such this Tribunal lacks the jurisdiction to hear and determine this matter. The further prayed that the Applicant's Notice of Motion dated **21<sup>st</sup> May 2021** be struck out with costs as the same was frivolous, vexatious, bad in law and abuse of Court process.

10. The Respondents herein further filed a Replying Affidavit sworn by **Faith M. Mutie** on **8<sup>th</sup> June 2021**, asserting that the Applicant herein had come to this Tribunal to prevent them from levying distress upon the it which action is a right they are entitled to. She further stated that the Applicant had been served with several demand letters communicating the need for him to settle his outstanding rent arrears with a punitive notice that the Respondents would resort to levy for distress if the same remain unpaid.

11. Further, that the Applicant had approached the 3<sup>rd</sup> Respondent pleading for extension of time to settle his outstanding rent arrears after the lapse of the fourteen days granted by law after a notice of distress has been issued. She swore that afterwards, the Applicant was granted extension of time twice for a cumulative period of five (5) weeks after making a commitment to pay the outstanding rent arrears plus interest accrued thereon. She further swore that the Applicant owes the 1<sup>st</sup> Respondent a cumulative amount of **KShs. 550,900.00** being rent for the period between **January to June 2021** inclusive of balances brought forward as stipulated in the Lease Agreement.

12. Further, she swore that the Lease Agreement was reduced into writing for a period exceeding five (5) years and does not contain a termination clause within five years from the commencement of the Lease and therefore the suit does not fall within the jurisdiction of this Tribunal. She further averred that present suit was brought by the Applicant in bad faith and in an effort to frustrate the Respondents. She prayed that the orders of this Tribunal issued on **25<sup>th</sup> May 2021** should be vacated to allow the Respondents simultaneously levy distress for rent and evict the Applicant from the suit premises.

### **SUBMISSIONS**

13. The Application proceeded for hearing before this Tribunal virtually owing to the prevailing Covid-19 global pandemic on **9<sup>th</sup> June 2021** Parties were directed to file and serve written submissions in respect of the present Application for disposal of, which the Parties verily did. I shall proceed to consider the same.

### **APPLICANTS SUBMISSIONS**

14. Counsel for Applicant filed his written submissions dated **7<sup>th</sup> July 2021**. He submitted that the Lease Agreement relating to the suit premises had expired and consequently had no effect in law; that while the Lease Agreement was for five (5) years and three (3) months, the same already lapsed and that the 1<sup>st</sup> Respondent could not revive and rely on the same. in the same vein he submitted that this Tribunal cannot rely on the same to support that the terms exist. He maintained that the Court does not make, rewrite contracts or imply terms that were not part of the contract. He also submitted that the Applicant cannot rely on lapsed Lease and purport to oust the jurisdiction of the Tribunal.

15. Further, Counsel submitted that by the 1<sup>st</sup> Respondent's action to seek orders to have the outstanding rent deposited in the Tribunal does not oust the Tribunal's jurisdiction but affirms it. He submitted that the 1<sup>st</sup> Respondent's further action to demand mesne profits or have the same collected by the Tribunal is misconceived and has no basis in law.

16. The Learned Counsel also submitted that the 1<sup>st</sup> Respondent's assertion that the Applicant is in unlawful occupation has no meaning in law and by virtue of the 1<sup>st</sup> Respondent demanding rent arrears way outside the Lease period is a clear intention of parties to create legal relations outside the expired Lease. He submitted that there is no illegality committed and that if any, such has not been pointed to this Tribunal.

17. Counsel finally submitted that the suit premises is a catering establishment under **Section 2(1) of Cap 301 Laws of Kenya**. Further, that the Applicant is only needed to satisfy any one of the conditions **under Section 2(1)(b) of Cap 301 Laws of Kenya** which has been satisfied by the Applicant and therefore this Tribunal has jurisdiction. He cited several authorities; **Kenya Knitting & Weaving Mills Limited vs Trancewood Products Limited [2018] eKLR**, **Owners of Mottor Vessel Lilian S vs Caltex Oil (Kenya) Ltd [1989] eKLR** and **Al-Riaz International Limited vs Ganjoni Properties Ltd [2015] eKLR** to advance his arguments.

18. Counsel urged this Tribunal to dismiss the Preliminary Objection and proceed for hearing.

### **THE RESPONDENTS' SUBMISSIONS**

19. Mr. Nyaribo, appearing on record for the Respondents also filed written submissions dated **23<sup>rd</sup> June 2021** and indicated reliance on the Replying Affidavit of Faith M. Mutie earlier sworn on **8<sup>th</sup> June 2021**. The Learned Counsel presented to this Tribunal two issues for determination namely; whether this Tribunal lacks jurisdiction over the matter and whether the Applicant is a Protected Tenant.

20. On whether this Tribunal lacks jurisdiction over the matter, Counsel submitted that to the affirmative that the Lease Agreement dated **1<sup>st</sup> March 2016** ousts the jurisdiction of this Tribunal under **Cap 301 Laws of Kenya**. Counsel further submitted that the Lease Agreement was reduced into writing for a period exceeding 5 years and did not provide for a termination clause prior to the expiry of the Lease Agreement. Counsel also submitted that systems of law require a considerable degree of certainty and uniformity and such certainty and uniformity would not exist if the Courts and bodies exercising Judicial Authority were freed to arrive at decisions in matters not within their purview owing to jurisdictional limits. Counsel relied on; **Mugo Holdings Limited vs Attorney General & Another [2016] eKLR** and **Owners of Motor Vessel Lilian S vs Cltex Oil (K) Ltd** to advance his position.

21. As regards the issue whether the Applicant is a protected tenant, the Learned Counsel submitted that the relationship between the Applicant and the 1<sup>st</sup> Respondent is not of Landlord-Tenant within the meaning of **section 2 of Cap 301 Laws of Kenya**. He submitted that the Lease Agreement between the Applicant and the 1<sup>st</sup> Respondent terminated due to effluxion of time and has since not been renewed.

22. The Learned Counsel further submitted that the Applicant has been in continued occupancy of the suit premises after the expiry of the Lease Agreement and that he has not advanced any evidence before this Tribunal to prove the existence of a Tenancy relationship between him and the 1<sup>st</sup> Respondent. He further submitted that the Applicant has not demonstrated that he remits any rent payments to the 1<sup>st</sup> Respondent or that the 1<sup>st</sup> Respondent has accepted any remittance from the Applicant thus no tenancy relationship has been created under the Act.

23. Counsel further submitted that for one to fall within the ambit of a protected tenant under **Cap 301 Laws of Kenya**, such person has to pay rent for the period in question which is not the case as the Applicant has failed to pay rent for the period he claims to be a protected tenant neither has the 1<sup>st</sup> Respondent accepted any rent from the Applicant. He submitted that the foregoing situation makes the 1<sup>st</sup> Respondent entitled to mesne profits and not rental income. Counsel maintained that the Applicant cannot be allude to be a protected tenant under **Cap 301 Laws of Kenya**. He cited *Attorney General vs Halal Meat Products Limited [2016] eKLR* and *Dubai Bank Kenya Limited vs Insurance Company of East Africa Limited [2013] eKLR* to buttress this line of argument.

24. The Learned Counsel urged this Tribunal to find that; this Tribunal lacks jurisdiction to hear and determine the matter and should thus down its tools and finally urged the Tribunal to dismiss the Applicants' Notice of Motion dated **21<sup>st</sup> May 2021** with costs.

### **ANALYSIS AND DETERMINATION**

25. I have given full consideration to the Applicants' Notice of Motion Application, the Respondents' Notice of Preliminary Objection, the rival affidavits, submissions, and the authorities cited.

26. In my respectful view, I find that the issues that fall for determination are:

a) Whether this Tribunal has jurisdiction to hear and determine the present Application.

b) The effect of the finding on (a) above.

a) **Whether this Tribunal has jurisdiction to hear and determine the present Application.**

27. At the heart of this case is the issue of jurisdiction. It is a truism that jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction?

28. In common English parlance, 'Jurisdiction' denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a Court or a Tribunal can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a Court or Tribunal therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity *ab initio* and any determination made by such court will be amenable to being set aside *ex debito justitiae*.

29. **Section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act** provides as follows:

*For the purposes of this Act, unless the context otherwise requires—*

***“catering establishment” means any premises on which is carried out the business of supplying food or drink for consumption on such premises, by persons other than those who reside and are boarded on such premises;***

***“controlled tenancy” means a tenancy of a shop, hotel or catering establishment—***

***(a) which has not been reduced into writing; or 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 controlled tenancy.***

30. In view of the above provisions, it is clear that this Tribunal only has jurisdiction to hear and determine disputes in cases where Agreements are reduced to writing or not, and which agreements do not exceed a period of 5 years. A closer reading of the Lease Agreement between the Applicant and the 1<sup>st</sup> Respondent indicates that the term of the said Lease is 5 years and 3 months. The said Lease commenced on **1<sup>st</sup> March 2016**. That being the case, it ought to terminate on **1<sup>st</sup> June 2021**.

31. However, the Applicant's case was instituted in this Tribunal on **21<sup>st</sup> May 2021** in relation to a dispute arising from the said Lease Agreement. In my respectful view, the cause of action arose during the subsistence of the Lease Agreement and/or at a time when the Lease Agreement was still in force and/or and the provisions therein binding upon the parties. The net effect therefore, is that in view of the term of the Lease, this Tribunal has no jurisdiction to hear and determine any matter arising from the said Lease Agreement if the cause of action arose within the lifetime of the Lease Agreement. Such is the case in the present case.

32. I am not persuaded that that proposition by the Applicant is correct in law. Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court clothed with jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself.

33. In the *locus classicus* of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd. (1989)**, in this subject, this Court pronounced itself as follows:

***"Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."***

34. Further, in the case of **Joseph Muthee Kamau & Another v. David Mwangi Gichure & Another (2013) eKLR**, the Court considered the issue of jurisdiction and stated as follows:

***"When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being Kaganyi v. Musirambo (1968) EA 43. We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing."***

35. It is clear from the foregoing that the claim by the Applicant was filed before a Tribunal devoid of jurisdiction. The suit was a nullity ab initio.

b) **The effect of the finding on (a) above**

36. Having established that this Tribunal had no jurisdiction when the suit was filed, the consequent holding is that this Tribunal proceeds to down its tools and is unable to proceed to hear and determine the dispute.

**DETERMINATION**

37. In the upshot, I make orders as follows:

- a) The Respondents' Preliminary Objection is allowed and consequently the Applicant's application dated **21<sup>st</sup> May 2021** lacks merit and is dismissed with costs. In view of my findings the Reference dated **21<sup>st</sup> May 2021** is also devoid of merit and the same is dismissed with costs.
- b) Any sum of monies paid to the Tribunal on a without prejudice basis to the preliminary point of law pursuant to the directions issued on **9<sup>th</sup> June 2021**, the same to be released to the 1<sup>st</sup> Respondent.
- c) The Applicant does pay monthly mesne profits due to the 1<sup>st</sup> Respondent from the period this matter was filed before this tribunal being the monthly rent as set out by the expired lease on the date of its expiry.
- d) Applicant to pay costs assessed at **Kshs 10,000/-** to the Respondents.

**HON. A. MUMA**

**VICE CHAIR**

**BUSINESS PREMISES RENT TRIBUNAL**

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY BY HON A. MUMA THIS 6TH AUGUST, 2021 IN THE PRESENCE OF MS NASAMBA HOLDING BRIEF FOR MACHARIA FOR THE RESPONDENT.**

**HON. A. MUMA**

**VICE CHAIR**

**BUSINESS PREMISES RENT TRIBUNAL**