



**Sigilai t/a Miles Filing Station v Too (Tribunal Case E051 of 2022)
[2022] KEBPRT 811 (KLR) (Civ) (3 November 2022) (Ruling)**

Neutral citation: [2022] KEBPRT 811 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
CIVIL
TRIBUNAL CASE E051 OF 2022
GAKUHI CHEGE, VICE CHAIR
NOVEMBER 3, 2022**

**BETWEEN
PHILEMON KIPRIRUI SIGILAI T/A MILES FILING STATION APPLICANT
AND
ANDREW TOO RESPONDENT**

RULING

1. The Landlord moved this Tribunal by a motion dated 4th July 2022 seeking in material part for stay of execution and implementation of the orders issued on 22nd June 2022 pending hearing inter-partes. He also sought for setting aside of the ex-parte orders issued on 22nd June 2022 and that his preliminary objection dated 27th May 2022 be heard and determined on priority basis.
2. The main ground for the application is that the landlord was not notified of the hearing date of 20th June 2022 when the impugned orders were given. The landlord contends that having filed a preliminary objection dated 27th May 2022, the same ought to have been heard first before proceeding with the tenant's application. As such the landlord contends that it was not accorded a fair hearing and was condemned unheard.
3. The landlord contends that by allowing the application dated 4th July 2022, the tenant will not be prejudiced in any way and that it was in the interest of justice and overriding objective of the law that the orders be granted. The landlord swore a supporting affidavit raising the same issues discussed above.
4. An interim order of stay of the orders of 22nd June 2022 was given on 15th July 2022 and the application was fixed for hearing on 18th August 2022.
5. I have checked the CTS portal for a replying affidavit or grounds of opposition to the application dated 4th July 2022 and I did not find any. As such, the said application is unopposed and a candidate for



allowing. In absence of any opposition to the application, I shall allow the same and therefore set aside the ex-parte orders issued on 22nd June 2022.

6. On 13th August 2022, the preliminary objection dated 27th May 2022 was directed to be disposed of together with the application dated 4th July 2022 by way of written submissions. The landlord was granted 7 days to file and serve replying affidavit to the application and complaint/reference.
7. The landlord filed his replying affidavit sworn on 23rd August 2022 in respect of the motion dated 26th April 2022 wherein it is deposed that the parties herein entered into oral an lease agreement for a portion of plot no. 297, Chepseon Township within Kericho County in the year 2011.
8. The agreement was for use of a portion of the land parcel at an agreed rent of Kshs 2000 subject to review and increment every year. The lease was for indeterminate period but rent was payable monthly. There were no rent arrears.
9. In a preliminary objection dated 27th May 2022, the landlord opposes the tenant's reference on the following grounds:-
 - i. That the honourable tribunal lacks jurisdiction to hear and determine the reference herein as the subject property does not fall within the preview of the Landlord and Tenant(Shops, Hotels and Catering Establishments) Act.
 - ii. That the reference herein is fatally defective, incompetent, misconceived and an abuse of the Tribunal's process and therefore ought to be dismissed with costs.
10. The landlord's counsel filed submissions in support of the preliminary objection. Section 2 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* is cited on the definition of shop, hotel and catering establishment and concludes by submitting that the instant dispute does not involve a controlled tenancy within the meaning of the said Act as it involves a parcel of land which was leased to the tenant around September 2011. It is submitted that what was created is a periodic lease as defined by section 57 of the *Land Act*, 2012 as what was leased is a parcel of land and not a shop, a hotel or a catering establishment.
11. According to the landlord, the lease period of the respondent's parcel of land was indeterminate and begun way back in 2011 and therefore falls outside the jurisdiction of the Tribunal. The reference and application dated 26th April 2022 ought to be dismissed with costs to the Respondent.
12. The landlord cites the decisions in the following cases in support of the foregoing submissions:-
 - i. *Samuel Kamau Macharia & another - vs- Kenya Commercial Bank Ltd & 2 others* (2012) eKLR.
 - ii. *Republic - vs- Business Premises Rent Tribunal and Another ex-parte Albert Kigera Karume* (2015) eKLR.
 - iii. *David Cullen - vs- Samuel Kiptalai & 2 others* (2021) eKLR.
13. In the case of *Oraro - vs- Mbaja* (2005) eKLR at page 3/8, the High Court observed as follows:-

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood is now well identified as and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection and yet it bears factual



aspects calling for proof or seeks to adduce evidence for authentication, is not as a matter of legal principle, a true preliminary objection which the court should allow to proceed”.

14. In the instant case, this Tribunal requires to interrogate the use of the suit premises, the terms of the tenancy, the date in which the agreement to lease was entered into and the length of the tenancy all of which are matters of evidence and turn on the issues raised in the notice of preliminary objection.
15. According to the notice dated 11th March 2022 served by the Landlord upon the tenant annexed to the supporting affidavit marked ‘PKS1’, the lease agreement is indicated to have been entered into on 23rd September 2022 (which I guess is wrong) and requires the tenant to vacate with effect from 1st May 2022. On the other hand, the tenant contends that the lease agreement began on 23rd November 2021.
16. On his part, the landlord states in his replying affidavit that the lease agreement was entered into orally around September 2011 and not 23rd November 2021. All this shows that the issue of when, how and for how long the lease was entered into and was to last is contested. In the case of *Mukisa Biscuits Manufacturing Co Ltd – vs- West End Distributors Ltd* (1969) EA 696 at page 704, the court defined a preliminary objection as follows:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and on occasion confuse the issues. This improper practice should stop”.

17. Guided by the two decisions, I am not satisfied that the preliminary objection raised by the landlord passes the test laid down therein. The matter shall therefore proceed to hearing on the merits.
18. Consequently, the preliminary objection dated 27th May 2022 is hereby dismissed. Costs thereof shall abide the outcome of the reference.

It is so ordered.

RULING SIGNED, DATED & DELIVERED VIRTUALLY THIS 3RD DAY OF NOVEMBER 2022.

HON. GAKUHI CHEGE

VICE CHAIR

BUSINESS PREMISES RENT TRIBUNAL

Ruling delivered in the presence of:-

Mr. Kirui for Tenant/Applicant

No appearance for the Landlord

Further order: Both parties to comply with Order 11 of the CPR by filing witness statements and documents in support of their respective cases for hearing of the main complaint/Reference by way of viva voce evidence within Thirty (30) days hereof.

Order to be served upon the Respondent.

Mention on 8th December 2022.

Interim orders extended till then.

HON. GAKUHI CHEGE



VICE CHAIR

BUSINESS PREMISES RENT TRIBUNAL

3/11/2022



<https://new.kenyalaw.org/akn/ke/judgment/kebprt/2022/811/eng@2022-11-03>