



**Mohamed v Gikomba Business Center (Tribunal Case
E1255 of 2024) [2024] KEBPRT 843 (KLR) (14 June 2024) (Ruling)**

Neutral citation: [2024] KEBPRT 843 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E1255 OF 2024
J OSODO, CHAIR & GAKUHI CHEGE, MEMBER
JUNE 14, 2024**

BETWEEN
BASHIR ABDALLAH MOHAMED APPLICANT
AND
GIKOMBA BUSINESS CENTER RESPONDENT

RULING

A. Dispute Background

1. Before us is a Notice of Preliminary Objection dated 11th March, 2024 which is based on the following grounds; -
 - i. That this tribunal does not have jurisdiction to hear the matter.
 - ii. That the matter is *res-judicata*.
 - iii. That the entire suit is bad in law on grounds that the tenant has filed a reference under Section 6 of Cap 301 which reference is not supported by the landlord's notice to terminate or alter terms of tenancy and that the tenant has filed a plaint herein which is a strange document before this court.
 - iv. That a levy for distress is a legitimate action by the landlord to get recourse for unpaid rent and does not amount to illegality.
2. The tenant applicant filed an undated Grounds of Opposition to oppose the said Notice of Preliminary Objection in which he sets out the following grounds; -
 - i. That the Notice of Preliminary Objection did not meet the threshold of the elements set out under Section 7 of the *Civil Procedure Act*, which sets out the maxims for a suit to be brought under it.



- ii. That the case beforehand is with respect to illegal eviction by the respondent whereas the case being cited, that is, ELC Appeal No. E008 of 2022 was subject of rent review which is not an issue in the current suit.
- iii. That parties are not litigating under the same title. On the case the respondent is pegging its Notice of Preliminary Objection, the applicant/tenant was not a party to the suit neither did he participate at any stage of the trial process.
- iv. That the issue in the instant suit has never been heard and determined in any court of competent jurisdiction.
- v. That the tenant approached this court vide a statement of claim and not a plaint as contended by the respondent and in any event of any typographical errors in the body of the statement of claim, Article 159 (2)(d) of the constitution cures the same.

3. At a court hearing on 11th March, 2024, the court directed that the Notice of Preliminary Objection be disposed of by way of written submissions. Both parties complied with the tenant/applicant filing his submissions dated 24th April, 2024 and the respondent/landlord filing his' dated 8th May, 2024.

4. The landlord/respondents in his submissions states that he wishes to abandon all the grounds listed in the Notice of Preliminary Objection except point number 3 which states that the tenant has filed a reference under Section 6 of cap 301 which reference is not supported by a landlord's notice to terminate tenancy or alter terms of tenancy and that the tenant has filed a plaint which is a strange document before this court.

5. The landlord/respondent also states in his submissions that the landlord has not issued any tenancy notices to the tenant herein under Section 4 of Cap 301 to warrant the applicant/tenant to approach this court under Section 6 of the Act.

6. In addition, the respondent states that the applicant's complaint ought to have been brought under Section 12 (4) in Form C as provided for by Rule 5 of Cap 301 Regulations and that consequently there is no appropriate pleadings to anchor the application before the tribunal and as such it ought to fail.

7. The tenant/applicant on the other hand in his submissions states that he filed a statement of claim dated 15th December 2023 in relation to continued harassment by the respondent/landlord and verbal threats of eviction from the suit premises despite the tenant/applicant meeting all his tenancy obligations.

8. The tenant/applicant adds that the landlord's illegal behavior led him to institute the instant claim pursuant to Section 6 and filed the reference in Form B in conformity with Rule 5 of the Landlord and Tenant (shops, Hotels and Catering Establishments) Regulations.

9. The tenant/applicant in his submissions also states that the statement of claim 'typo' can be cured by Article 159 (2) (d) as this court has discretion to excuse minor deviations from strict non-compliance with the provisions of the tribunal as the same does not in any way affect the suit in general and does not offend Section 7 of the Civil Procedure Act.



B. Analysis and Determination

10. The test of what constitutes a Preliminary objection was settled in the locus classicus case of *Mukisa Biscuits Manufacturing Ltd -vs- West End Distributors* (1969) EA 696 wherein it was stated as follows:

“----a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case, Sir Charles Newbold, P. stated:

“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 preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

11. In the instant case, we have perused the documents filed in this matter and we find that there is indeed no notice of termination of tenancy nor notice to alter terms of tenancy issued by the landlord to warrant the filing of a reference under Section 6 of Cap 301 Laws of Kenya.

12. The landlord/respondent and the applicant have both relied on Section 6(1) of Cap 301 Laws of Kenya which states thus;

6. Reference to Tribunal

(1) A receiving party who wishes to oppose a tenancy notice, and who has notified the requesting party under *section 4(5)* of this Act that he does not agree to comply with the tenancy notice, may, before the date upon which such notice is to take effect, refer the matter to a Tribunal, whereupon such notice shall be of no effect until, and subject to, the determination of the reference by the Tribunal:

Provided that a Tribunal may, for sufficient reason and on such conditions as it may think fit, permit such a reference notwithstanding that the receiving party has not complied with any of the requirements of this section.”

13. This tribunal wishes to rely on the case of Lee Owen Madara t/a First Sunshine Limited v Jacqueline Sagino James & 3 others [2022] eKLR where the tribunal held as follows; -

“18. It is important to note that the Landlord and Tenant (Shops, Hotels and Catering Establishments) (Tribunal) forms and procedure) Regulations, were promulgated in the year 1966. They therefore predate the Constitution of Kenya, 2010 which under Article 159 (2) (d) requires that justice be administered without undue regard to procedural technicalities.



19. What amounts to procedural technicality was considered in the case of *James Muriithi Ngotho & 4 Others – vs- Judicial Service Commission* (2012) eKLR at page 5-6/7 where Justice C.W. Githua observed as follows: -

“We all know what is normally regarded as procedural technicalities could be in the nature of procedural lapses that do not go to the root of the matter under consideration. They would for example include lapses like using the wrong mode of moving the court for certain reliefs/orders e.g. filing of a notice of motion to seek leave to commence judicial review proceedings instead of a chamber summons prescribed under order 53 Rule 1, Civil Procedure Rules or citing the wrong provisions of the law while the substance of the application shows clearly that the law cited is not applicable to the subject of the litigation among many others.

I am fortified in this finding by the definition of the words ‘procedure’ and ‘technicality’ since it is from a combination of these two words that the phrase procedural technicality must have been coined from. The procedure is defined in the black’s Law Dictionary, 9th Edition page 13/23 as “a specific method or course of action”. The judicial rule or manner for carrying a Civil Law Suit or Criminal prosecution also termed rules of procedure”.

20. I have looked at the decision in the case of *James Muriithi Ngotho* (supra) and noted that the superior court was dealing with provisions of Order 40(1) of the Civil Procedure Rules which requires that there be a suit as a basis for an injunction. In the said case, the applicants had not filed a plaint as required under Section 2 of the Civil Procedure Act, Cap. 21 Laws of Kenya. All the other cases cited dealt with applications under order 40 of the Civil Procedure Rules.

21. In the case of *Bachelors Bakery Ltd – vs- Westlands Securities Ltd* (1982) eKLR, the court of appeal at page 3-4/6 had the following to state about Cap. 301, Laws of Kenya:-

“The Act is a legislation of a special nature enacted solely for the protection of tenants. It allows the parties a chance of occupation of premises under a controlled or uncontrolled tenancy. In the first case within the ambit, and in the second case, outside the ambit of the Act. In the instances to which the provisions of the Act are declared to apply, it overrides any other written law which is in conflict with its provisions”.

22. I find and hold that Section 12(4) of Cap. 301, Laws of Kenya does not require the filing of a suit as a basis of an application for injunction. Although the applicant herein has not filed a complaint in the manner stipulated by Regulations of the Tribunal’s Regulations, I am satisfied that the notice of motion clearly sets out his complaint and this Tribunal has jurisdiction to investigate and reach a verdict.



14. Based on the foregoing decision we find the tenant's fear of eviction which was precipitated by alleged verbal threats and the landlord's proclamation of attachment by way of distress for rent is well founded and ought to be heard on merit.
15. The tribunal shall order that the Notice of Preliminary Objection dated 11th March 2024 be dismissed as further investigation is required to achieve justice in this matter.

C. Orders

16. In view of the foregoing, the following orders command to us; -
 - a. The Notice of preliminary Objection dated 11th March, 2024 is hereby dismissed.
 - b. The respondent shall file and serve their response to the application dated 15th December, 2023 within 14 days hereof and the parties shall then comply with order 11 of the Civil Procedure Rules within 14 days thereafter.
 - c. Mention on 17th July, 2024 to confirm compliance and fix a hearing date.
 - d. Costs of the application shall abide the outcome of the hearing

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 14th DAY of JUNE 2024.

HON. JOYCE AKINYI OSODO - (PANEL CHAIRPERSON)

HON GAKUHI CHEGE - (MEMBER)

BUSINESS PREMISES RENT TRIBUNAL

In the presence of:

Ms. Kamanja holding brief for Mr. Abdulahi for applicant/tenant

No appearance for Respondent

