



Telkom Kenya Limited v Roka Trading Company Limited & 5 others (Environment and Land Case Civil Suit E65 of 2022) [2023] KEELC 19960 (KLR) (21 September 2023) (Ruling)

Neutral citation: [2023] KEELC 19960 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND CASE CIVIL SUIT E65 OF 2022
LA OMOLLO, J
SEPTEMBER 21, 2023**

BETWEEN

TELKOM KENYA LIMITED PLAINTIFF

AND

ROKA TRADING COMPANY LIMITED 1ST RESPONDENT

JOAN WANJIKU KAMAU 2ND RESPONDENT

CHARLES KAHUGI NJOROGE 3RD RESPONDENT

JANET WANJIKU NJOROGE 4TH RESPONDENT

RACHEL EVONNE MUTHONI NJOROGE 5TH RESPONDENT

NJOROGE KAHUGI 6TH RESPONDENT

RULING

Introduction

1. This ruling is in respect of the Defendants' Notice of Preliminary Objection dated 16th January 2023. The preliminary objection is on the following grounds;
 - a. This Court has no jurisdiction in this matter.
 - b. This suit is bad in law, fatally incompetent, unsustainable, and null and void ab initio.
 - c. The entire suit is bad in law for joinder of the 2nd to 6th Defendants, they being merely Shareholders of the 1st Defendant company.
 - d. This entire suit is in breach of the law on the separate and distinct legal identities and personalities of a Company and its shareholders, as set out in the age-old legal principle in Salomon-vs Salomon (1897) AC 78.



- e. The entire suit is bad in law for want of the mandatory authority and/or resolution which is a legal pre-requisite for the filing of suit by the Plaintiff.
 - f. There is no triable cause of action disclosed against the 2nd to 6th Defendants.
2. The preliminary objection was raised after the defendants were served with the application dated 16/11/2022 and plaint. In the application, the Plaintiff seeks the following orders:
- a. That this Honourable Court be pleased to certify this Application as urgent and for the same to be considered ex parte in the first instance.
 - b. That this Honourable Court be pleased to issue an interim injunction restraining the Respondents by themselves, servants, agents and/or employees or whomsoever acting on their behalf from removing, interfering, destroying or in any other way dealing with goods in, or entering into, taking possession of, vandalizing, demolishing, destroying or in any way interfering with the property known as Nakuru/Municipality/Block 5/19 together with the development thereon pending the hearing of this Application inter partes.
 - c. That this Honourable Court be pleased to issue an interim injunction restraining the Respondents by themselves, servants, agents and/or employees or whomsoever acting on their behalf from removing, interfering, destroying or in any other way dealing with goods in, or entering into, taking possession of, vandalizing, demolishing, destroying, or in any other way interfering with the property known as Nakuru/Municipality/Block 5/19 together with the development thereon upon the hearing and determination of this Application.
 - d. That this Honourable Court be pleased to issue an interim injunction restraining the Respondents by themselves, servants, agents and/or employees or whomsoever acting on their behalf from removing, interfering, destroying or in any other way dealing with goods in or entering into, taking possession of, vandalizing, demolishing, destroying or in any way interfering with the property known as Nakuru/Municipality/Block 5/19 together with the development thereon pending the hearing and determination of the suit.
 - e. That this Honourable Court be pleased to issue an order directing the Officer Commanding Station (OCS), Nakuru Police Station and/or officers acting under his or her orders and/ or directions to enforce the orders of the Honorable Court.
 - f. That the costs of this Application be provided for.
3. In the plaint dated 10th November, 2022. The Plaintiff seeks the following prayers;
- a. A permanent injunctive order restraining the Defendants by themselves, servants, agents and/or employees or whomsoever is acting on their behalf from removing, interfering, destroying or in any other way dealing with goods in, or entering into, taking possession of, vandalizing, demolishing, destroying or in any way interfering with the property known as Nakuru/Municipality/Block 5/19 together with the development.
 - b. An order of specific performance compelling the Defendants to pay the outstanding rent arrears in the sum of Kshs 39,401,462.26 relation to Property known as Nakuru/Municipality/Block 5/19 and interest thereon from the date of the suit.
 - c. An order directing the Defendants to remedy damage caused as a result of vandalism to Property known as Nakuru/Municipality/Block 5/19 and interest thereon from the date of the suit.



- d. General damages for breach of contract.
- e. Costs of this suit.
- f. Interest on a) to d) above from the date of filing suit until payment in full; and
- g. Any other relief that this Honourable Court may deem fit and just to grant in the circumstances.

Factual Background.

4. On 18th November, 2022 this court gave directions that the application dated 16th November, 2022 would be heard on 17th January, 2023.
5. On 17th January, 2023 when the application came for hearing, counsel for the Plaintiff /Applicant intimated to the court that he has been served with a Notice of Preliminary Objection.
6. The Court gave directions that the Preliminary Objection shall be canvassed by way of written submissions.
7. After numerous mentions, on 22nd March, 2023, the counsel for the Defendants confirmed filing of further submissions and the matter was scheduled for ruling.

Plaintiff's Response To The Preliminary Objection.

8. The Plaintiff/Applicant filed a Supplementary affidavit dated 19th January, 2023 sworn by Thinwa Kagai in response to the Defendant's/Respondent's Notice of Preliminary objection dated 16th January, 2023.
9. The Deponent states that he is the head of facilities in the Applicant company, is well seized of the matters deponed to and duly authorized to swear the affidavit.
10. He states that the Respondent seeks to determine the factual merits of the Applicant's case before the start of the trial which matters fall to be determined at the hearing and therefore ought not to be allowed.
11. On the question of jurisdiction of the court, the Applicant states that the Respondents have not in their Notice of Preliminary Objection specified the reason for their objection as to the Court's jurisdiction.
12. The Applicant states that by a lease agreement dated 4th December, 2017 ("Lease"), the Applicant leased the 1st Respondent 14,993 square feet on the ground, 1st, 2nd and 3rd floors in a development on the property known as Nakuru/Municipality/Block 5/19 ("Property") for a term of 10 years commencing on 1st December 2017.
13. The Applicant states that the said lease contained clauses defining the relationship between the Applicant and the 1st Respondent in relation to the Property and also clauses relating to payment of rent and alterations to the property.
14. The Applicant states that in default of the terms of the Lease, the Respondents have failed to pay rent to an amount of over Kshs 39,401,462.26 and have committed waste on the said property contrary to express conditions of the Lease and the law.
15. The Applicant also states that as a result of the violations by the Respondent, there arose a dispute subsequent to which the Applicant filed the instant Application and suit before this Honorable court.



16. The Applicant further states that the said dispute relates to use and occupation of land as contemplated under Article 162 (2) (b) of *the Constitution* of Kenya and section 13 of the *Environment and Land Court Act*, and that no other dispute resolution body has jurisdiction of this matter other than this Honourable Court.
17. The Applicant states that the Respondents' allegation that this Court is bereft of jurisdiction to hear and determine the instant Application and the Suit filed therewith is erroneous and ought to be disregarded by this Honourable Court.
18. On the issue of joinder of parties, the Applicant states that the Application and suit cannot be defeated by a mere allegation of non-joinder or mis-joinder of parties.
19. The Applicant further states that the effect of non-joinder or mis-joinder of parties on the validity of a suit is provided by Order 1 Rule 9 of the *Civil Procedure Rules*, 2010, which makes it patently clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit.
20. The Applicant states that it is evident that the Respondents' objection on the ground of joinder is calculated to waste this Honourable Court's precious time and ought not be entertained.
21. On the issue of authority to file suit; the Applicant states that where a corporation institutes court proceeding, there must be an authorization by the corporation for instituting such proceedings.
22. The Applicant states that he is aware pursuant to the said requirement, the Applicant authorized institution of the instant suit and the said authorization was filed and subsequently served on the Respondents. The Applicant has attached a copy of the authorization as annexure TK-1.
23. The Applicant states that the settled jurisprudence is that such authorization may be filed at any time before the suit is fixed for hearing as there is no requirement in law that the same be filed at the same time as the suit.
24. The Applicant states that the Respondents' allegation that the Applicant's suit ought to be dismissed for want of authorization is incompetent on all fronts for being misleading and lacking a basis in law.
25. The Applicant further states that the Respondents' Notice of Preliminary Objection is a mere dilatory tactic calculated to delay hearing and determination of the Applicant's Application and suit in order to buy the Respondents' time to continue causing loss to the Applicant.
26. The Applicant states that the Notice of Preliminary objection fails to move this Honourable Court to striking or dismissing the Applicant's Application and suit, and the same ought to be dismissed.

Defendant's Submissions.

27. The Defendants submit that a Controlled tenancy under Section 2 (1) of the *Landlord and Tenant Shops Hotels and Catering Establishments Act* Cap 30 defines a controlled tenancy to mean a tenancy of a shop, hotel or catering establishment 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
28. The Defendants submit that the Plaintiff's claim is based on the Lease agreement dated 4th December, 2017 and that the Plaintiff claims that it entered into a lease agreement with the Defendants, for



lease of 14,993 square feet of the 1st, 2nd, and 3rd floors of the developed property known as Nakuru/ Municipality/Block 5/9 for a period, commencing on 1st December, 2017.

29. They also submit that from the Plaintiff's pleadings, it is evident that the tenancy was terminated in October, 2022; 4 years and 10 months after the parties entered it.

30. The Defendants submit that the lease agreement had clear provisions for termination of the tenancy, "otherwise than for breach of covenant", at part 7.1.3.5. it provided that;

"...the tenant has any distress or execution levied on its goods;

The landlord may re-enter the Premises (or any part of them in the name of the whole) at any time (and even if any previous right of re-entry has been waived) the Term will absolutely cease but without prejudice to any right or remedies which may have accrued to the landlord against the tenant in respect of any breach of covenant or other term of this lease (including the breach in respect of which the re-entry is made)"

31. The Defendants submit that in the motion filed by the Plaintiff on 16th November, 2022 at paragraph (d) (under the grounds of the Notice of Motion) and in the Supporting Affidavit sworn by Thinwa Kagai on 16th November, 2022 at paragraph 8, it is deposed that;

"...subsequently, the Applicant commenced the process of levying distress for rent with instruction to the Auctioneer who proclaimed and attached the 1st Respondent's goods in October 2022..."

32. The Defendants submit that in light of the fact that the tenancy between the parties herein contained provisions for its termination, otherwise than for breach of Covenant and that the tenancy between the parties was terminated before lapse of five years, they submit that tenancy herein was controlled tenancy.

33. The Defendants submit that controlled tenancies are governed by the *Landlord and Tenant Shops Hotels and Catering Establishments Act* Cap 301. The Defendants rely on the case of *Al-Riaz International Limited Vs Ganjoni Properties Ltd* [2015] Eklr.

34. The Defendants submit that the *Landlord and Tenant Shops Hotel and Catering Establishments Act* Cap 301 has clear provisions in matters pertaining to Controlled tenancies, provisions and rules that the Plaintiff opted not to invoke and instead opted to move this Honourable Court (which is not clothed with the requisite Jurisdiction to deal with controlled tenancies). The Defendants rely on the Court of Appeal case of Speaker of the *National Assembly Vs Karume* (2008) 1 KLR 425.

35. The Defendants also relies on the case of *Samuel Kamau Macharia & Another Vs KCB & 2 Others* Supreme Court Civil Application No 2 of 2011, to submit that the Supreme Court stated that jurisdiction flows from either *the Constitution* or legislation or both.

36. It is the Defendants' submission that the tenancy in question being a controlled one, the appropriate forum to ventilate any dispute is the Business Premises Rent Tribunal and not this Honourable Court. It is their submission that this court can only act as the appellate court at Section 15 of the Act, to hear appeals from decisions of the tribunal.

37. The Defendants submit that the Environment and Land Court is not a court of first instance in matters dealing with controlled tenancy but purely as an appellate court and the case before this court is not an appeal but an initial case hence this court lacks jurisdiction.



38. The Defendants submit that jurisdiction is everything and where a court or tribunal lacks jurisdiction, it cannot proceed with the matter but down its tools. The Defendants rely on the case of *Motor vessel M.V. Lillians vs Caltex Oil (Kenya) Limited* (1989) LLR 1653
39. The Defendants urged this Honourable Court to arrive at the finding that it lacks the requisite jurisdiction to hear this matter and proceed to dismiss it with costs to the Defendants.
40. The Defendants further submit that a corporate entity is a distinct and separate legal person from its Directors/Shareholders, that the 1st Defendant is a duly incorporated limited liability Company, that the Plaintiff does not contest this fact as can be read from paragraph 2 of the plaint.
41. The Defendants further submit that in the said Plaint, the Plaintiff states that it entered into the foregoing Lease agreement with the 1st Defendant herein, being Roka trading Company limited and from the Lease agreement and the Plaint it is also very clear that the 2nd to the 6th Defendants herein were not part of the lease agreement and indeed the Plaintiff has not disclosed any cause of action against the 2nd- 6th Defendants.
42. The Defendants also submit that the 2nd to 6th Defendants herein have been sued by the Plaintiff, by virtue of merely being the Shareholders of the 1st Defendant, Roka trading Company Limited. The Defendants submit that this is in breach of the long-standing principle of Law established in the, locus Classicus, *Salomon Vs Salomon* [1897] AC 78
43. The Defendants rely on the case of *Victor Mabachi & Another Vs Nurtun Bates Ltd*, Civil Appeal NO 247 OF 2005 [2013] eKLR and submit that this entire suit is in breach of the Law on the separate and distinct legal identities and personalities of a company and its shareholders.
44. The Defendants submit that the entire suit is bad in law for want of mandatory authority and/or resolution as the Plaintiff filed this suit without the mandatory authority and or resolutions authorizing institution of this suit, as mandatorily required in Law. The Defendants rely on the cases of *Fubeco China Fushun Vs Naiposha Company Limited & 11 others* [2014] eKLR where the court cited with approval the decision of *Bugerere Coffee Growers Ltd Vs Sebaduka & Another* [1970] E.A 147. They also rely on the case of *Golden Mile Park Management Limited v Dreyan Investment Limited* [2021] Eklr.
45. The Defendants submit that in the Plaintiff's Supplementary Affidavit dated 19th January, 2023 in response to the Preliminary objection, the Plaintiff annexed an "Authority to swear Affidavit" which purported to authorize "Nelson M. Mogaka of the Company to swear the Verifying Affidavit to be filed herein and to do all that appertains to the prosecution of our claim herein"
46. The Defendants submit that the Plaintiff's verifying affidavit dated 16th November, 2022 is sworn by Thinwa Kagai. The Plaintiff's Supporting Affidavit dated 16th November, 2022 in support of its pending application herein is also sworn by Thinwa Kagai. The Plaintiff's Supplementary Affidavit dated 19th January, 2023 in response to the Preliminary objection is also sworn by Thinwa Kagai. It is the Defendant's submission that in all the said Affidavits, Thinwa Kagai purports to have authority to sign the Affidavits on behalf of the Plaintiff.
47. The Defendants submit that Thinwa Kagai clearly lacks the authority and does not have the locus standi to sign any affidavits or prosecute this suit in any way on behalf of the Plaintiff if the authority annexed in the Plaintiff's Supplementary Affidavit dated 19th January, 2023 is anything to go by.
48. The Defendants submit that the threshold of a preliminary objection is set out in the Mukisa Biscuits case and it is their submission that the Defendants have met the legal threshold set out in the *Mukisa*



Biscuit Manufacturing Co Ltd v West End Distributors [1969] E.A 696 as it is purely based on matters of law and on the court record.

49. The Defendants pray that this Honourable Court allows their Preliminary Objection dated 16th January, 2023 and proceed to dismiss the Plaintiff's Notice of Motion dated 16th November, 2022 and the entire suit with costs to the Defendants.

Plaintiff's/applicant's Submissions.

50. The Plaintiff filed submissions dated 3rd March 2023 and identifies the following issues for determination;
- a. Whether this Court has jurisdiction to hear and determine the Application and Suit.
 - b. Whether the Notice of Preliminary Objection meets the threshold set in the leading case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors* (1969) EA 696
 - c. Whether lack of mandatory Authority and/or Resolution is detrimental to the suit.
51. On whether this Court has jurisdiction to hear and determine the Application and suit, the Plaintiff submits that the legal basis for controlled tenancy is set out in section 2 (1) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* ("the Act") which reads as follows:
- "controlled tenancy" means a tenancy of a shop, hotel or catering establishment-
- a. which has not been reduced into writing; or
 - b. 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 a landlord or as a tenant shall be a controlled tenancy."
52. The Plaintiff submits that pursuant to the Act, the lease in the present case does not establish a controlled tenancy for the following reasons;
- i. Clause 7.1 of the Lease is a termination clause for breach of contract
 - ii. The Lease does not contain any provision for termination within five (5) years of its commencement
 - iii. The Lease is for a term of ten (10) years.
 - iv. The Applicant is a state corporation wholly owned by the Government of Kenya.
53. The Plaintiff submits that contrary to the Respondent's allegation, they contend that Clause 7.1 of the Lease (Re-entry) is a termination clause for breach of covenant which entitles the Applicant to terminate the Lease on occurrence of any of the events of breach stated thereunder. A breach of contract occurs when there is failure by a party to meet their obligations outlined in the contract,



whatever those obligations may be. In the instant case, it includes any distress or execution levied on the 1st Respondent's goods.

54. The Plaintiff submits that contrary to the Act, the Lease does not contain any provision for termination within five (5) years. Section 2 (1) (b) (ii) of the Act is time based and not event based. Thus, the section is solely applicable when the Lease contains a clause that permits its termination within five years of its commencement. It is the Plaintiff's submission that in the present lease, the occurrence listed under clause 7.1.3.5 is not constrained by a five-year duration. Consequently, in the absence of the event described in clause 7.1.3.5, the Applicant lacked the authority to terminate the Lease. The Plaintiff relies on the case of Cotton Roots Fashions Ltd v Veeral Shah & another [2021] Eklr
55. The Plaintiff submits that with regard to the term of the Lease, the lease between the Applicant and the 1st Respondent was for a term of ten (10) years commencing on 1st December 2017. In particular, the third schedule to the Lease agreement between the Applicant and the Respondent expressly stipulates the term of the Lease as follows;

“The Term Ten (10) years from and including the 1st day of December 2017.”
56. The Plaintiff submits that the Lease is for a duration of ten (10) years, commencing on 1st December 2017. The duration specified in the Lease is more than five (5) years and therefore falls outside the definition of a controlled tenancy under the Act. The Plaintiff refers to the case of Sunil Vinayk v Santokh Singh Mool Singh & 2 others [2017] Eklr
57. The Plaintiff further submits that the Applicant is a state corporation within the meaning of the State Corporation Act and goes on to define the meaning of a state corporation based on Section 2 of the State Corporation Act.
58. The Plaintiff submits that the Lease entered into by the Applicant, a state corporation wholly owned by the government, is a tenancy in which the government is a party and therefore falls outside the definition of a controlled tenancy under the Act.
59. The Plaintiff submits that this Honourable Court has jurisdiction and that this court is the proper forum to adjudicate on the subject matter herein, which is not a controlled tenancy.
60. The Plaintiff humbly prays that this court dismisses the Respondents Preliminary objection on the issue of tenancy.
61. On whether the Notice of Preliminary Objection meets the conditions in Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors (1969) EA 696, the Plaintiff submits that the Court in the case established the principle of law that dismissal or striking out of a suit on a Notice of Preliminary Objection can only succeed where the objection raises a single point of law which is capable of disposing of the suit. The Plaintiff submits that the court set out the meaning and nature of preliminary objection which a party seeking to have a suit struck out or dismissed at the preliminary stage must demonstrate as follows:
 - i. A preliminary objection must raise a pure point of law.
 - ii. A preliminary objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
 - iv. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue.



62. The Plaintiff submits that the Respondents' allegation that the suit is in breach of the law on distinct legal identities and personalities of a company and its shareholders is incapable of disposing of the suit, as it can only be determined at the hearing of the main suit based on the substance contained in the pleadings.
63. The Plaintiff also submits that the allegation that the 2nd to 6th Respondents have been wrongly joined in this suit does not meet the test for disposing of the suit. The Plaintiff submits that this is in accordance with Order 1 Rule 9 of the Civil Procedure Rules, 2010, which clearly states that misjoinder or non-joinder of parties cannot be a ground for defeating a suit. The Plaintiff relies on the case of Maureen Onsongo v EOH Limited an EOH/Copy Cat Limited Company [2021] Eklr
64. The Plaintiff submits that the Respondents' objection fails to meet the meaning and nature of preliminary objection laid out and goes on to cite the decisions in; Pamela Ogalo Oguta National Bank of Kenya [2021] Eklr, Oraro.V. Mbaja 2005 Eklr, Samuel Waweru v Geoffrey Muboro Mwangi [2014] Eklr.
65. The Plaintiff submits Respondents' preliminary objection fails as it raises factual issues which can only be dealt with during the hearing of the main suit and not at the interlocutory stage. According to it, this breaks the most important rule that preliminary objection must be on pure points of law.
66. On the question whether the lack of mandatory authority and/ or resolution is detrimental to the suit, the Plaintiff submits that where a corporation institutes court proceeding, the corporation must give an express authorization for the said proceedings. The Plaintiff submits that in line with this requirement, the Applicant authorized filing the suit which authorization has been filed before this Honourable Court.
67. The Plaintiff further submits that even if that Authorization was to be found defective, that alone cannot be detrimental to the instant suit. It is the Plaintiff's submission that the settled jurisprudence is that such Authorization need not be filed at the commencement of the suit and the authorization may be filed at any time before the suit is fixed for hearing. The Plaintiff cites the following decisions to buttress this position; Leo Investments Ltd v Trident Insurance Company Ltd (2014) Eklr, Raymark Limited v John Lokorio [2021] eKLR the court cited with approval the case of Republic v Registrar General & 13 Others (2005) eKLR.
68. The Plaintiff submits that contrary to the Respondent's allegations, the said authorization was filed and even if the authorization was found to be defective, the same can be filed at any time before hearing of the suit.
69. The Plaintiff/Applicant concludes its submissions by giving a summary on why the preliminary objection must fail and it is as follows:
 - i. This Honourable Court has both subject matter and pecuniary jurisdiction to hear and determine the instant suit.
 - ii. The Respondents' Notice of Preliminary Objection does not meet the conditions in Mukisa Biscuit Manufacturing Co Ltd v West End Distributors (1969) EA 696
 - iii. Order 1 Rule 9 of the Civil Procedure Rules, 2010 makes it patently clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit contrary to the Respondents allegations.
 - iv. There is no requirement that an authorization to institute suit be filed at the same time as the suit. Its absence is, therefore, not fatal to the suit.



- v. The Respondents' preliminary objection does not disclose any ground to justify dismissal or striking out of the Applicant's suit.
70. The Plaintiff prays that the Respondents' Notice of Preliminary Objection be dismissed with costs to the Applicant.

Defendant's Further Submissions.

71. The Defendants filed further submissions dated 20th March, 2023 in response to the Plaintiff's submissions dated 3rd March, 2023 and reiterates the Defendants' earlier submissions dated 21st February, 2023.
72. The Defendants further submit that the tenancy contained an exit/break-drop clause and indeed the Plaintiff does not dispute that the tenancy agreement contained a termination/ break or drop clause.
73. The Defendants submit that the Plaintiff advances the argument that the lease was for a period of 10 years and that it did not contain any provision for termination within five (5) years of its commencement, as such the tenancy could not be controlled tenancy.
74. The Defendants in response submit that the termination clause in the tenancy agreement herein was a blanket provision. In that it gave room for termination of the tenancy, at any time within the ten-year term of the tenancy.
75. The Defendants further submit that in effect, and as worded, the termination clause did not exclude termination of the tenancy within the first five years of the term. It was in fact permissive of termination within five years from the commencement of tenancy, and indeed this is what happened herein as the tenancy was terminated before lapse of five years. The Defendants submit that the termination clause was exactly within the meaning of controlled tenancy under Section 2 (1) (b) (ii) of the *Landlord and Tenant Shops Hotels and Catering Establishments Act* Cap 301.
76. The Defendants rely on the Court of Appeal decision in *Khalif Jele Mohamed & another v Republic & another* [2019] Eklr at paragraph 23, 24, 25 and 27 and submit that the tenancy herein was for a period of 10 years and had a blanket termination/break provision which did not specify that the termination provision could only be invoked after expiration of the first five years after commencement and not earlier. The Defendants submit that in line with the blanket termination provision, the tenancy herein was terminated, 4 years and 10 months after the parties entered it.
77. The Defendants submit that according to the decision in *Khalif Jele Mohamed (Supra)* and Section 2 (1) (b) (ii) of the *Landlord and Tenant Shops Hotels and Catering Establishments Act* Cap 301 the inclusion of the termination provision in the tenancy agreement herein, ipso facto, rendered the tenancy to be controlled tenancy and therefore subject to the jurisdiction of the tribunal.
78. The Defendants also submit that the Plaintiff is not a Government with the meaning and interpretation of *CAP 310*. The Defendants submit that the Plaintiff argues that, it is a "...state corporation wholly owned by the Government and therefore falls outside the definition of a controlled tenancy under the Act..."
79. The Defendants rely on the case of *Power General Contractors Limited v Pharmacy and Poisons Board* [2021] Eklr where the Business Premises Rent Tribunal while considering the issue of its jurisdiction on the matter, proceeded to interrogate whether Pharmacy and Poisons Board, a creature of section 3 of the *Pharmacy and poisons act* is Government within the meaning and interpretation of section 2 of the *Landlord and Tenant (shops, Hotels and catering Establishments) Act*, Cap 301 Laws of Kenya.



80. The Defendants submit that at paragraph 1 of the Plaintiff's plaint dated 16th November, 2022, the Plaintiff described itself as; "...a limited liability Company incorporated under the [Companies Act](#) Laws of Kenya...".
81. The Defendants further submit that in its submissions, the Plaintiff argues that it is a state corporation according to Section 2 of the State Corporation Act and as such the tenancy herein cannot be controlled tenancy. The Defendants quote section 2 of the State Corporation Act and submit that the Plaintiff herein is not a State Corporation.
82. The Defendants also submit that in line with the Pharmacy and Poisons Board case, the Plaintiff is not Government as contemplated in section 2 of the [Landlord and Tenant \(shops, Hotels and Catering establishments\) Act](#), Cap 301 Laws of Kenya as read with section 3 of the [interpretation and General Provisions Act](#). It is the Defendant's submission that the Plaintiff is clearly capable of entering into independent contracts with private entities without the necessity of Attorney General being a party to such contracts.
83. The Defendants reiterate their earlier submissions on a separate corporate personality as per the famous case of *Salomon & Co Ltd V Salomon* [1897] A.C 22 H.L that directors are generally not personally liable on contracts purporting to bind their company.
84. The Defendants submit that it is not in dispute that the tenancy agreement herein was between the Plaintiff and the 1st Defendant and the Plaintiff's action of suing the 2nd to the 6th Defendants, merely for being shareholders of the 1st Defendant, is bad in Law. The Defendants submit this is a question of law contrary to the Plaintiff's assertion and rely on the case of *Kolaba Enterprise Ltd Vs Shamsudin Hussein Varvani & Anor* (2014) eKLR.
85. The Defendants submit that their preliminary objection is purely based on matters of law and among them the question of jurisdiction. The Defendants opine that the question of jurisdiction is a pure point of law and not a mere procedural technicality as it goes to the heart of the matter. It is also their submission that it is now well settled that jurisdiction can neither be implied nor conferred by agreement of parties, by judicial craft or legal sophistry, it must be expressly provided for in [the Constitution](#) or in the statute. The Defendant's rely on the cases of [Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Ltd & 2 others](#) [2012] Eklr and *Mukisa Biscuit Manufacturers Ltd vs Westend Distributors Ltd*, (1969) E.A 69
86. The Defendants urge the Honourable court to allow their Preliminary Objection dated 16th January, 2023 as prayed.

Analysis And Determination.

87. After considering the Defendant's/Respondent's preliminary objection, the responses thereto and the rival submissions filed herein, the only issue that arises for determination is whether the preliminary objection dated 16th January, 2023 has merit.
88. In *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd*. (1969) EA 696. Law J.A. and Newbold (both with whom Duffus V-P agreed), respectively at 700 and 701, held as follows on what constitutes a competent preliminary objection: Law, JA.:

“So far as I am aware, a Preliminary Objection consists of a pure 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 on the jurisdiction of



the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Newbold, P.:

“ 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 increases costs and, on occasion, confuse the issues. This improper practice should stop.”

89. The Court of Appeal in the case of *Nitin Properties Ltd v. Singh Kalsi & another* [1995] eKLR further held as follows:

“ A Preliminary Objection 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.”

90. The Supreme Court in the case of *Hassan Ali Joho & another -Vs- Suleiman Said Shabal & 2 Others* SCK Petition No. 10 of 2013 [2014] eKLR held thus:

“ 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”

91. As things remain, it is not clear whether the tenancy in question is controlled on not, whether the tenancy provided for termination otherwise than for breach of contract, whether the tenancy was for 5 years, less or 10 years, what the legal status of the plaintiff is and whether by virtue of this status they are exempted from proceedings before the Business Premises Rent Tribunal. From the submissions filed, both parties understand these issues differently and each party disputes the position advanced and held by the other.

92. There is no doubt that these issues in dispute and factual in nature and would necessitate interpretation, interrogation and adducing evidence in support of the rival positions.

93. In *Oraro -Vs- Mbaja* (2005) 1KLR 141, it was held that: -

“ Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.

94. The Defendant has raised other grounds in its preliminary objection which include; this suit is bad in law, fatally incompetent, unsustainable, and null and void ab initio, the entire suit is bad in law for joinder of the 2nd to 6th Defendants, they being merely Shareholders of the 1st Defendant company, this entire suit is in breach of the law on the separate and distinct legal identities and personalities of a Company and its shareholders, as set out in the age-old legal principle in *Salomon-vs Salomon* (1897) AC 78 and that there is no triable cause of action disclosed against the 2nd to 6th Defendants. My view is that the question of mis-joinder of the 2-6th Defendants ought to be considered as a defence and not as a preliminary objection. Needless to say, the legal position is that a suit shall not be defeated for mis-joinder or non-joinder.



95. The defendants’ position is that the entire suit is bad in law for want of the mandatory authority and/or resolution which is a legal pre-requisite for the filing of suit by the Plaintiff. The learned Judge in Raymark Limited v John Lokorio [2021] eKLR cited with approval the decision in Leo Investments Ltd v Trident Insurance Company Ltd (2014) eKLR and stated thus;

“Odunga J held that failure to file a resolution authorizing filing of the suit does not invalidate the suit as the defect can be rectified by filing the resolution before the suit was heard. To hold otherwise would be to elevate procedural technicalities to a point where they would be an impediment to the administration of justice. Article 159 (2) (d) of the constitution which section 19(1) of the Environment and Land Court Act, 2011 echoes, enjoins the court to administer justice expeditiously and without undue regard to technicalities of procedure. In the present matter the Plaintiff on 28th September 2021 filed the resolution of the Plaintiff under seal authorizing the filing of the suit and appointing the Law firm of Ashitiva Advocates LL. P to represent them. Though the Resolution was filed after the preliminary objection had been taken, it had the effect of rectifying any defects in the suit for want of a resolution authorizing its filing. Various courts have held such a resolution can be filed at any time before the hearing of the case...”

96. The resolution by the Plaintiff though filed after the preliminary objection was taken is properly on record as it has been filed before the suit is set down for hearing.

Disposition.

97. The preliminary objection dated 16th January, 2023 raises factual issues which require proof by way of evidence.

98. Consequently, I find that the Preliminary Objection dated 16th January 2023 lacks merit and is hereby dismissed with costs.

99. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 21ST DAY OF SEPTEMBER, 2023.

L. A. OMOLLO

JUDGE.

In the presence of:

Mr. Mbaya for the Plaintiff.

Mr. Deenambo for the Defendants.

Court Assistant: Ms. Monica Wanjohi.

