



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**  
**ELC CONSTITUTIONAL PETITION NO. 7 OF 2015**

**IN THE MATTER OF THE DECISION OF THE BUSINESS PREMISES RENT TRIBUNAL  
MADE ON THE 20<sup>TH</sup> NOVEMBER 2014, BUSINESS PREMISES RENT TRIBUNAL,  
TRIBUNAL CASE NO. 200 OF 2014 – NYERI**

**AND**

**IN THE MATTER OF ARTICLES 2, 10, 19, 20, 22, 23, 40, 47, 64, 159, 165 OF THE  
CONSTITUTION AND SECTIONS 6, 9, & 12 OF THE LANDLORD AND TENANT (SHOPS,  
HOTELS AND CATERING ESTABLISHMENT ACT, CAP 301 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE REGISTERED LAND ACT, CAP 300 (REPEALED)**

**AND**

**IN THE MATTER OF THE LAND REGISTRATION ACT 2012**

**AND**

**IN THE MATTER OF THE LAW REFORMS ACT CAP 26 LAWS OF KENYA**

**BETWEEN**

**KENYA PLANTERS CO-OPERATIVE UNION LIMITED.....PETITIONER**

**AND**

**KENYA CO-OPERATIVE COFFEE MILLERS LIMITED.....1<sup>ST</sup> RESPONDENT**

**BUSINESS PREMISES RENT TRIBUNAL.....2<sup>ND</sup> RESPONDENT**

**RULING**

The Petitioner and the 1st respondent herein are parties in **NYERI BUSINESS PREMISES RENT TRIBUNAL CASE NO. 200 OF 2014** which is before the 2nd respondent and which involves a license agreement between them over storage facilities, assets and access on land parcel No. KIINE/SAGANA/388/77. In the course of that litigation, an issue arose as to whether the 2nd respondent had the requisite jurisdiction to determine that dispute. That issue which was raised by way of a Preliminary Objection by the petitioner was heard by the 2nd respondent which, in a ruling on 20th

November 2014, ruled that it was seized with the necessary jurisdiction.

Aggrieved by that ruling, the petitioner filed at the **ENVIRONMENT AND LAND COURT KERUGOYA CIVIL APPEAL NO. 60 OF 2014** (the appeal) on 16th December 2014. That appeal is still pending and is based on, inter alia, the following grounds:-

1. *The Chairman of the Business Premises Tribunal variously and generally misdirected himself in ignoring, disregarding and failing to put into consideration the evidence, pleadings, submissions and the materials placed before him by the appellant and proceeded to deliver a ruling without jurisdiction.*
2. *The Tribunal misconstrued and misapplied the principle governing the raising and determination of Preliminary Objections and the effect of such objection on proceedings pending before the Tribunal.*
3. *The Tribunal erred in law and in fact in holding that:-*
  - a. *The Preliminary Objection does not raise issues of pure law.*
  - b. *The issues raised in the Preliminary Objection cannot be exhaustively dealt with without taking evidence from the parties.*
  - c. *The Preliminary Objection raises issues of mixed law and facts.*
4. *The Tribunal erred and misdirected itself, and violated the appellant's right to a fair hearing in failing to make a finding that the suit premises were not a shop, a hotel or a catering establishment as envisaged by the Landlord and Tenants (Shops, Hotels and Catering Establishment) Act when there was before the Tribunal un-contested facts to the effect that the premises are designed for the purposes of milling and warehousing coffee.*
5. *The Tribunal mis-directed itself and erred in failing to find that it lacked the jurisdiction to determine matters relating to licenses and where there was no proved landlord and tenant relationship etc.*

The appellant therefore sought orders that the ruling of the Tribunal given on 20th November 2014 be set aside and the appellant's Preliminary Objection be allowed. The appellant also prayed for costs of the appeal and in the Tribunal with interest.

That appeal is still pending.

Meanwhile, on 22nd September 2015, the petitioner filed this Constitutional Petition in which it sought the following remedies:-

- a. *A declaration do issue to the effect that the 2nd respondent Tribunal has no jurisdiction to hear and determine disputes between a licensor and licensee.*
- b. *An order of certiorari to remove to this Honourable Court for the purposes of being quashed, the 2nd respondent's entire decision delivered on 20th November 2014 with respect to the dismissal of the petitioner's Preliminary Objection and finding that there existed a Landlord – Tenant relationship between the parties.*
- c. *An order of prohibition be issued prohibiting and/or barring the 2nd respondent Tribunal from hearing and determining the 1st respondent's reference filed on 20th September 2014, Business Premises Rent Tribunal Case No. 200 of 2014 – Nyeri and/or conducting any further proceedings over the same subject matter.*

- d. ***A mandatory injunction be issued restraining the 1st respondent, its agents and/or servants from interfering, trespassing, entering and/or dealing in any other manner whatsoever with the petitioner's milling facilities at Sagana situated on parcel No. L.R KIINE/SAGANA/388/77.***
- e. ***The costs of this petition be borne by the 1st and 2nd respondents herein.***

The petition is supported by the affidavit of **JOSEPH KIOKO** the petitioner's Managing Director and cites, among others, a violation of the following Constitutional provisions:-

**Article 40** – that the ruling by the 2nd respondent dated 20th November 2014 dismissing the Petitioner's Preliminary Objection is prejudicial and violates the petitioner's right to own property as the 1st respondent is currently enjoying quiet un-interrupted possession and occupation of the petitioner's property the milling facilities at Sagana situated on land parcel No. L.R KIINE/SAGANA/388/77.

**Article 47** – that the 2nd respondent's move and/or action of slating the reference filed by the 1st respondent for hearing despite the fact that it does not have jurisdiction to hear and determine disputes between a licensor and licensee is a gross infringement of the petitioner's right to a fair administrative action.

**Article 50** – That the petitioner's right to a fair hearing has been violated as the 2nd respondent Tribunal acted ultra vires and contrary to the mandatory provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act as its jurisdiction is only limited to disputes between Landlords and Tenants.

Simultaneously with the filing of that petition, the petitioner filed a Notice of Motion citing **Articles 22 and 23 of the Constitution (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013** and **Sections 3A of the Civil Procedure Act** seeking the following orders as a matter of urgency:-

1. ***Spent.***
2. ***Spent.***
3. ***That upon hearing inter-partes, a mandatory injunction be issued restraining the 1st respondent, its agents and/or servants from interfering, trespassing, entering and /or dealing in any other manner whatsoever with milling facilities or L.R No. KIINE/SAGANA/388/77 situated at Sagana and restraining the 2nd respondent from hearing and determining the reference filed on 20th September 2014 and/or conducting proceedings in any other manner whatsoever in Business Premises Rent Tribunal Case No. 200 of 2014 – Nyeri pending the hearing and determination of the petition herein.***
4. ***That this Honourable Court do give directions on the hearing of the petition.***
5. ***That the costs of this application be borne by the respondents in any event.***

That application which is the subject of this ruling is also supported by the affidavit of **JOSEPH KIOKO** reiterating the contents of his earlier affidavit and based on the grounds set out therein which basically are that:-

1. ***On 12th September 2013 the petitioner herein entered into a license agreement with the interested party for the use of its storage facilities, assets and access located at Sagana on L.R No. KIINE/SAGANA/388/77 for a period of 12 months.***
2. ***That there was therefore no landlord and tenant relationship in existence between the petitioner and the 1st respondent.***

3. *That the decision/ruling of the 2nd respondent Tribunal delivered on 20th November 2014 dismissing the petitioner's Preliminary Objection was flawed, un-lawful, irregular and null and void as the 2nd respondent Tribunal acted ultra-vires and contrary to the mandatory provisions of Section 12 of the Landlord Tenant (Shops, Hotels, Catering Establishment Act) Chapter 301 Laws of Kenya which outline the jurisdiction of the Tribunal to hear and determine disputes between Landlords and Tenants.*
4. *That the petitioner's right to own property stands violated as the 1st respondent is currently in quiet possession, enjoyment and occupation of the suit premises despite the expiry of the license.*
5. *That without the intervention of this Honourable Court, the petitioner stands to suffer irreparable loss.*
6. *That it is in the interest of justice that the orders sought are granted.*

The first respondent through its General Manager **SIMON KANIARU GAKINYA** filed a replying affidavit in response to the Notice of Motion in which he deponed inter alia, that the ruling by the Tribunal was in the negative as it dismissed the Preliminary Objection and is therefore incapable of being stayed and the issues raised herein are at sub-judice and before the Business Premises Tribunal is Case No. 200 of 2014 – Nyeri and this Court cannot therefore issue an injunction. That this petition is misconceived, in-competent, bad in law, frivolous, vexatious and an abuse of the process of the Court. That the applicant has not come to Court with clean hands and none of its rights under **Articles 41, 47 and 50 of the Constitution** have been violated and further, the applicant has not told this Court about the pending appeal being **KERUGOYA ENVIRONMENT AND LAND COURT APPEAL NO. 60 OF 2014** and this application should therefore be dismissed with costs.

The second respondent filed no response.

Submissions have been filed both by the firm of Njuguna, Kahari and Kiai Advocates for the petitioner and that of Wahome Gikonyo & Company Advocates for the first respondent.

I have considered the application, the rival affidavits and annexures and the submissions by counsel.

From the petitioner's submissions, its case is that as it is the bona fide owner of land parcel No. L.R KIINE/SAGANA/388/77 for which it gave the first respondent a license to use as a milling facility, it is now entitled to the orders sought since the license expired and yet the first respondent continues to enjoy quiet possession, occupation and enjoyment of that facility. Relevant case law has been cited in support of the submission that the petitioner is entitled to the injunctive reliefs and stay orders sought.

On its part, the thrust of the first respondent's submissions are that the petitioner has not satisfied the Court that the order of mandatory injunction is deserving and further that the petitioner has not come to Court with clean hands as it has not disclosed that there is pending an appeal at this Court over the ruling of the Business Premises Rent Tribunal on the Preliminary Objection.

In considering this application, I take note of three un-contested facts i.e.:-

1. *That the petitioner and the first respondent were parties in Business Premises Rent Tribunal Case No. 200 of 2014 at Nyeri where a Preliminary Objection on the Tribunal's jurisdiction to handle the dispute involving them was raised by the petitioner but dismissed in a ruling dated 20th November 2014.*
2. *That following that ruling, the petitioner filed an appeal at this Court being Appeal No. 60 of 2014,*
3. *That that appeal is still pending.*

In my view, this application, and indeed the petition itself, can both be determined at this early stage on

the basis of whether or not they in fact amount to an abuse of this Court's process and therefore liable for striking out. **Rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 (The Mutunga Rules)** provides as follows:-

***“Nothing in these rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court”*** emphasis added.

Such orders as are mentioned above include striking out a Constitutional Petition that amounts to an abuse of the Court process. As to what constitutes an abuse of the Court process is a matter to be determined by the circumstances of each case as there is no all-encompassing definition of the concept ***“abuse of process”*** – **BENOSI VS WILEY 1973 C.A 721**. For instance, filing of a fresh Notice of Motion where there is pending in Court another un-determined Notice of Motion has been held to be an abuse of the Court process – **MARGARET MIGWI VS BARCLAYS BANK OF KENYA LTD 2016 e K.L.R (C.A CIVIL APPEAL NO. 68 OF 2015 NYERI)**.

As already indicated above, this petition has been filed while there is pending at this same Court Civil Appeal No. 60 of 2014 arising from the ruling of the Business Premises Rent Tribunal's ruling dated 20th November 2014. In that appeal, as already stated, the petitioner challenges, inter alia, the Tribunal's jurisdiction in dismissing the Preliminary Objection, and that the Tribunal violated its right to a fair hearing. Those are substantially the same issues raised herein and amount to an abuse of the Court process. As was held in the case of **CHOKOLINGO VS ATTORNEY GENERAL TRINIDAD AND TOBAGO (1981) V.L.R 108** and also in **MAHARAJ VS ATTORNEY GENERAL OF TRINIDAD AND TOBAGO (No. 2) (1979) A.C 385**, a collateral attack of a judgment through an appeal and later through a Constitutional reference would be subversive of the rule of law. It is my view that the petitioner's conduct in filing this Constitutional Petition during the pendency of an appeal at this very Court raising the same issues is clearly an abuse of the process of this Court and which, pursuant to **Rule 3(8) of the Mutunga Rules**, this Court is obliged to strike out because there is need to have good order in litigation. Only then can judicial time and other resources be expended judiciously and not extravagantly or at the whims of litigants. As was held in **THE KING VS THE GENERAL COMMISSIONER FOR THE PURPOSE OF INCOME TAX ACTS FOR THE DISTRICT OF KENSINGTON EX-PARTE PRINCES EDMOND DE POLIGNAL (1917) K.B 486 at page 495**, there is inherent jurisdiction of every Court to prevent an abuse of its process and it is therefore its duty to intervene and stop such proceedings that amount to an abuse of the Court process.

It is also clear that the **Landlord and Tenants (Shops, Hotels and Catering Establishments Act) Chapter 301 Laws of Kenya** which is the law that governs the dispute between the petitioner and the 1st respondent that was being handled by the 2nd respondent has a clear provision and procedure to be followed by a party who is aggrieved by any order issued by such Tribunal. **Section 15(1)** of the said Act provides as follows:-

***“Any party to a reference aggrieved by any determination or order of a Tribunal made therein may, within thirty days after the date of such determination or order, appeal to the Environment and Land Court:***

It is pursuant to that provision that the petitioner filed the appeal at this Court and which it ought to pursue rather than filing this petition. The law is that where procedures have been set out for addressing grievances, such procedures ought to be followed. In **THE SPEAKER OF THE NATIONAL ASSEMBLY VS JAMES NJENGA KARUME C.A CIVIL APPEAL NO. 92 OF 1992 (NBI)**, the Court of Appeal stated as follows:-

***“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed”***

See also **KONES VS REPUBLIC and ANOTHER EX-PARTE KIMANI WA NYOIKE and OTHERS**

**(2008) 3 K.L.R. E.P 29.**

It is my view therefore that the petitioner having filed this appeal at this Court against the ruling of the 2nd respondent dated 20th November 2014, it should pursue that appeal as provided for under the **Landlord and Tenants (Shops, Hotels and Catering Establishment Act) Chapter 301 Laws of Kenya**, which is the proper procedure to address its grievances rather than file this petition.

Finally, it is obvious to this Court that this petition is sub-judice. That principle is defined in **Section 6 of the Civil Procedure Act** as follows:-

**“No Court shall proceed with the trial of any suit or proceeding on in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed”** emphasis added

The term ‘sub-judice’ is defined in **BLACK’S LAW DICTIONARY 9<sup>TH</sup> EDITION** as:

**“Before the Court or Judge for determination”**

A matter which is still pending in Court un-decided or still under consideration is therefore sub-judice and that is precisely the position with regard to **KERUGOYA ENVIRONMENT AND LAND COURT CIVIL APPEAL NO. 60 OF 2014**. I hold the view that a Constitutional Petition is amenable to the sub-judice rule just like any other civil proceeding and that explains the insertion of the words **“or proceeding”** in **Section 6 of the Civil Procedure Act**. I am therefore satisfied that this Constitutional Petition is sub-judice in view of the pendency of the appeal at this Court in which substantially the same issues have been raised.

While this Court affirms the petitioner’s right to approach it to enforce a Constitutional right, it must also be made clear that this Court has a duty to ensure that its process is not abused. This petition is clearly an abuse of the process of this Court and the law enjoins me to make appropriate orders to bring such process to an end.

Ultimately therefore and upon considering all the issues raised herein, I am satisfied that this Petition and the Notice of Motion accompanying it amounts to an abuse of the process of this Court and must therefore be struck out which I hereby do.

The petitioner shall meet the 1st respondent’s costs. It is so ordered.

**B.N. OLAO**

**JUDGE**

**22<sup>ND</sup> APRIL, 2016**

Ruling dated, delivered and signed in open Court this 22<sup>nd</sup> day of April 2016

Mr. Njuguna for Petitioner present

Mr. Gikonyo for 1<sup>st</sup> Respondent present.

**B.N. OLAO**

**JUDGE**

22<sup>ND</sup> APRIL, 2016