



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**CIVIL CASE NO. 478 OF 2012**

**MOLO GROUP SERVICES SAVINGS AND  
CREDIT CO-OPERATIVE LIMITED.....PLAINTIFF**

**VERSUS**

**SAMUEL CHEGE KURIA.....1<sup>ST</sup> DEFENDANT**

**TIMOTHY CHEGE.....2<sup>ND</sup> DEFENDANT**

**SAID SALAM ALIAS SHAHID NUSHEEN MOHAMED.....3<sup>RD</sup> DEFENDANT**

**RULING**

The suit was instituted by the plaintiff against the defendants seeking an order of permanent injunction restraining the defendants from evicting the plaintiff or interfering with the plaintiff's quiet possession and enjoyment of the suit premises. The cause of action according to the plaintiff arises from a tenancy relationship between the plaintiff and the 3<sup>rd</sup> defendant in which the defendant leased to the plaintiff a booking office on plot No. 209/138/4 along River Road for a period of five years which lease was set to expire on 20<sup>th</sup> June 2012. After the said expiry the 3<sup>rd</sup> defendant purported to have terminated the said tenancy and realisation of the same the plaintiff sought leave of the Business Premises Tribunal to file a reference out of time which leave was granted. In the meantime the 3<sup>rd</sup> defendant entered a similar agreement with the 1<sup>st</sup> and 2<sup>nd</sup> defendants despite the fact that the plaintiff is still in occupation of the suit premises which action according to the plaintiff threatened the plaintiff's quiet occupation of the suit premises.

Together with the suit the plaintiff filed a Notice of Motion dated 27<sup>th</sup> September 2012 seeking the following orders:

1. **That this application be certified as urgent and service be dispensed with in the first instance.**
2. **That an order of injunction do issue restraining the Defendants either by themselves,**

**servants and/or agents, from evicting interfering and/or dispossessing the plaintiff from all that piece or parcel of land known as Plot Number LR 209/134/04 along River Road also known as General Exhibition Centre sale 2000 situate in Nairobi or in any other manner whatsoever interfering with the Plaintiff's quiet possession and peaceful occupation of the said portion of the suit premises including the parking area pending the hearing and determination of this application.**

**3. That an order of injunction do issue restraining the Defendants either by themselves, servants and/or agents, from evicting, interfering and/or dispossessing the Plaintiff from all that piece or parcel of land known as Plot Number LR 209/134/04 along River Road also known as General Exhibition Centre Sale 2000 situate in Nairobi or in any other manner whatsoever interfering with the Plaintiffs quiet possession and peaceful occupation of the said portion of the suit premises including the parking area pending the hearing and determination of this suit.**

**4. That the cost of this application be provided for.**

The said application is based on the fact that resulting from the tenancy relationship between the plaintiff and the 3<sup>rd</sup> defendant the plaintiff has heavily invested in the business with a fleet of vehicles hence stand to suffer heavily. On the expiry of the tenancy between the plaintiff and the 3<sup>rd</sup> defendant the defendant went ahead and entered into an agreement with the 1<sup>st</sup> and 3<sup>rd</sup> defendants and hence the plaintiff risks being evicted from the suit premises yet he has filed a reference before the Business Premises which reference is still pending. In the plaintiff's view the said reference operates as a stay and thus the outcome of the said proceedings ought to be awaited.

Confronted with this application the defendants filed a Notice of preliminary objection dated 24<sup>th</sup> October 2012 in which they raised the following issues:

- 1. This Honourable Court has no jurisdiction to hear this suit since the plaintiff is a Co-operative Society and the first and second defendants are its members.**
- 2. There is an established Co-operatives Tribunal which adjudicates Disputes between members of co-operative societies.**
- 3. The current suit is an abuse of the court process.**
- 4. The suit is frivolous, scandalous and if allowed will occasion a travesty of justice.**

The same day they filed an application by way of Notice of Motion seeking the dismissal of the suit herein on the ground that it is an abuse of the process of the Court. According to them the dispute herein ought to be adjudicated at the Co-operative Tribunal since the dispute is between the members of a co-operative society since the 1<sup>st</sup> and 2<sup>nd</sup> defendants are members of the plaintiff. The defendant also filed an affidavit in which it was sworn that the plaintiff never passed any resolution authorising the filing of the present suit.

On 7<sup>th</sup> November 2012 the suit against the 1<sup>st</sup> and 2<sup>nd</sup> defendants was withdrawn. Accordingly the only suit pending is between the plaintiff and the 3<sup>rd</sup> defendant. The defendants however filed another notice of preliminary objection on 27<sup>th</sup> November 2012 raising the following issues:

- 1. The plaintiff is not and has never been a tenant of the defendant and this renders the suit a nullity.**
- 2. Without a Landlord – tenant relationship the suit is null and void.**
- 3. The suit and the application by the plaintiff are legally irredeemably defective.**
- 4. The suit has been filed without the necessary resolution of members or the board and therefore without the knowledge of members of the plaintiff.**
- 5. The suit is barred by section 9b0 of the Civil Procedure Act as other matters are pending at the BPRT.**

In that decision I relied on **Oraro vs. Mbaja [2005] 1 KLR 141** in which **Ojwang, J** (as he then was) expressed himself 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 the contract giving rise to the suit to refer the dispute to arbitration. The first matter relates to increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 facts pleaded by the opposite side are correct. It cannot be raised if any fact is 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 issues and this improper practice should stop... The principle is abundantly clear. A “preliminary objection” correctly understood, is now well defined 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, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence. If the applicant’s instant matter required the affidavit to give it validity before the Court, then it could not be allowed to stand as a preliminary objection clearly out of order and, apart from amounting to a breach of established procedure, it had the unfortunate effect of provoking filing of the respondent’s very detailed “affidavit in reply to an affidavit in support of preliminary objection”, which replying affidavit was expressed to be “under protest”... The applicant’s “notice of preliminary objection to representation” cannot pass muster as a procedurally designed preliminary objection. It is accompanied by affidavit evidence, which means its evidentiary foundations are not agreed and stand to be tested. Secondly, the essential claims in the said preliminary objections are matters of great controversy, as their factual foundations are the subject of dispute”.**

In my view the issues such as whether there exists a landlord-tenant relationship and whether the suit has been filed without the necessary resolution of members or the Board and therefore without the knowledge of the members of the plaintiff are not matters which can strictly speaking be the subject of preliminary objection especially where the said issues are contested as they are in this application and the suit. On the issue of the defect in the application the Court has not been addressed on the same hence no determination can be made thereon. On the relevancy of section 6 of the Civil Procedure Act, it is necessary to show that the parties in both suits are the same and that the subject matters are the same. In this suit, the applicant seeks orders of injunction. In **Narshidas & Company Limited vs. Nyali Air Conditioning and Refrigeration Services Limited Civil Appeal No. 205 of 1995** the Court of the Appeal expressed itself as follows:

**“What does a controlled tenant confronted with a threat of forcible eviction do? He cannot go to the Business Premises Rent Tribunal established under the Act as that Tribunal has no jurisdiction to issue an injunction as was held by that court in the case of Republic vs. Nairobi Business Premises Rent Tribunal & Others, Ex Parte Karasha [1979] KLR 147 and also in the case of Re: Hebtulla Properties Limited [1979] KLR 96.”**

Accordingly I am not satisfied that this suit is barred by section 6 of the Civil Procedure Act.

It follows that the notice of preliminary objection filed on 27<sup>th</sup> November 2012 fails and is dismissed.

With respect to the preliminary objections dated 24<sup>th</sup> October 2012 the withdrawal of the suit against the 1<sup>st</sup> and 2<sup>nd</sup> defendants had the effect of removing the wind from their sails and the same cannot similarly be sustained.

Although on 27<sup>th</sup> November 2012 leave was granted to the 3<sup>rd</sup> defendant to file and serve a replying affidavit none was in fact filed. Despite that fact **Mr. Njoroge** learned counsel for the 3<sup>rd</sup> defendant was permitted to submit. Apart from raising the issues which were raised in the notice of preliminary objection which issues I have dealt with learned counsel submitted that since the orders sought herein have already been granted by the Tribunal there is no need to grant the same. As it is doubtful whether the Tribunal has jurisdiction to grant an injunction on the basis of the said Court of Appeal decision, the plaintiff cannot be faulted for seeking the remedy from this court.

Therefore in order to preserve the subject of the dispute herein the order that commends itself to me is that an injunction be and is hereby granted restraining the 3<sup>rd</sup> defendant by himself, servants and/or agents from evicting, interfering and/or dispossessing the Plaintiff from the suit premises situate on LR No. 209/134/04 along River Road known as Exhibition Centre Sale 2000 pending the hearing and determination of the reference pending before the Business Premises Tribunal or until further orders of this Court on condition that the plaintiff files a sufficient undertaking in damages within 7 days from the date hereof and continues paying rents on due dates. The costs of this application shall be in the course.

Those are the orders of the court.

**Dated at Nairobi this 30<sup>th</sup> day of January 2013**

**G V ODUNGA**

**JUDGE**

Delivered in the presence of:

Mr. Karigi for Wachira for the Plaintiff/Applicant

Mr. P. K. Njoroge for the 3<sup>rd</sup> Defendant/Respondent