



Ali Badi & 2 others v Realtors & another; Realtors (Interested Party) (Environment & Land Petition E005 of 2022) [2022] KEELC 4852 (KLR) (20 September 2022) (Ruling)

Neutral citation: [2022] KEELC 4852 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E005 OF 2022
EK WABWOTO, J
SEPTEMBER 20, 2022**

BETWEEN

**BADI ALI 1ST PETITIONER
PAUL ONDITI 2ND PETITIONER
JANE MUKUNDI 3RD PETITIONER**

AND

PREVIEW REALTORS INTERESTED PARTY

AND

LOCAL AUTHORITIES PROVIDENT FUND BOARD RESPONDENT

AND

PREVIEW REALTORS INTERESTED PARTY

RULING

1. The application is premised on the preliminary objection dated March 21, 2022. The preliminary objection is raised on the grounds that:
 - i. The suit lacks jurisdiction to entertain to entertain rental amounts disputes between landlord and tenant as a court of first instance.
 - ii. The applicants herein have failed to abide by the doctrine of exhaustion as laid out in the [Rent Restriction Act](#) of which the court cannot entertain the instant proceedings.
2. Section 2(1) of the [Rent Restriction Act](#) states that:



This act shall apply to all dwelling-houses, other than: -

- a. expected dwelling-houses;
- b. dwelling-house let on service tenancies;
- c. dwelling-houses which have a standard rent exceeding two thousand five hundred shillings per month, furnished or unfurnished.

3. The facts of this case are outlined in the petition filed on February 23, 2022 involving Mariakani Estate. The petitioner sought:

- a. A declaration issued that the respondents action of increasing rent threefold contravenes the Constitution and is likely to convene or infringe upon the petitioners fundamental rights and freedoms guaranteed in articles 2(1), 2, 3(1), 10(1), 10(2), 22, 23(a), 27(1) and (2), 28, 47 and 48;
- b. A declaration that the respondents conducts and actions complained of in the petition are oppressive, unfair, unreasonable, irrational, illegal and an abuse of power;
- c. An order of prohibition directed to the respondents prohibiting it and its agents and/or employees and assigns from interfering with the petitioner's quiet and peaceful enjoyment of the suit property i.e Mariakani Estate pending hearing and determination of this petition;
- d. An order of injunction restraining the respondent, its agents, assigns and employees from evicting the petitioners and/or otherwise interfering with the quiet and peaceful enjoyment of all that parcel of land constituting several flats;
- e. Costs of the petition.
- f. Any other relief this honourable court may deem fit and just to grant in the interest of justice.

4. The respondent submitted that the initial rent as per the rate card is Ksh 600 and would therefore fall within the jurisdiction of the tribunal. In addition, the matter would be *sub judice* by virtue of an existing matter before the Rent Restriction Tribunal under Case No E654 of 2021. The interested party in support of the respondent's position submitted that the petition would be incompetent based on the doctrine of exhaustion.

5. In the submissions dated May 18, 2022, the petitioners submitted that the court cannot purport to determine the matter on facts which need to be ascertained.

6. Having perused the written submissions, it is evident that the issues for determination before this court are;

- I. Whether the threshold to raise a preliminary objection has been met?
- II. Whether the preliminary objection is merited?

7. It is trite law that a preliminary objection must be raised on a point of law as reiterated in the case of *Mukisa Biscuits Manufacturing Co Ltd V West-End Distributors Limited (1969) EA 696*. Having



raised the objection on a specific provision of the law, the preliminary objection would be alive and within the jurisdiction of this court.

8. The preliminary objection is raised on two limbs, first the question of jurisdiction and secondly on the doctrine of exhaustion.
9. The jurisdiction of this court would be guided by the pecuniary limit set out in the act of Ksh 2,500. I equally take note that under section 8(2), this court (read Environment and Land Court) is outlined as an appellate court. I am guided by the sentiments of Justice Munyao Sila in *James Kirugi v Chairman, Rent Restriction Tribunal & another [2020] eKLR*, where he outlined the interpretation of rent:

' Now, I need to make clear that 'standard rent' as used in the act is not the actual amount of money. Thus when we say 'standard rent' of KShs 2,500/= it does not mean that this literally the sum of KShs 2,500/=. It will be noted that 'standard rent' has to be deduced or calculated. The ex parte applicant can only succeed in this application if he can tell this court what the 'standard rent' for the premises is. As I have explained above, rent can be the sum of KShs 15,000/= in the actual sense, but that does not mean that the 'standard rent' is KShs 15,000/=. The two are not always the same. The ex parte applicant has not presented before this court any material to demonstrate what the standard rent is. From what I can see, the ex parte applicant had filed a preliminary objection contesting the jurisdiction of the court, but he never appeared to argue it. He therefore never demonstrated to the tribunal that the standard rent is beyond the jurisdiction of the tribunal. It is the same thing here. Though the ex parte applicant is loud in his argument that the tribunal had no jurisdiction, he has not told me what the standard rent is, so that I can find that the subject matter was beyond the jurisdiction of the tribunal. If the ex parte applicant had thought that the standard rent went beyond the jurisdiction of the court, he ought to have raised it with the tribunal, so that the tribunal can proceed to make an assessment of what the standard rent is, and then see whether that standard rent is beyond the jurisdiction of the court. He never pursued this avenue'

10. For this reason, this court need not interpret the rent limit in its strictest sense and therefore the tribunal should conduct an assessment to determine standard rent and accordingly dispose of the suit at hand.
11. Moreover, with jurisdiction lying at the tribunal, the petitioner would be in violation to the doctrine of exhaustion and constitutional avoidance. In line with the determination of the Supreme Court of Kenya in *Communications Commission of Kenya and 5 Others Vs Royal Medical Services & 5 Others* the court held that the principle of constitutional avoidance entails that a court will not determine a constitutional issue when a matter may properly be determined by another existing forum. Similarly, in *Eric Kiprotich Soi & another v Director General Nairobi Metropolitan Services [2022] eKLR* Justice MD Mwangi held that:

' The doctrine of constitutional avoidance interrogates whether there are other ways that a dispute may be resolved outside a constitutional petition.'

12. In conclusion, it is the finding of this court this matter would be exhaustively handled within the rightful forum of the tribunal. For this reason, I find the preliminary objection merited and the petition is hereby struck out with no orders as to costs.
13. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2022



EK WABWOTO

JUDGE

In the presence of: -

N/A for the Petitioners.

Ms Kaegi for the Respondent.

N/A for the Interested Party.

Court Assistant; Caroline Nafuna.

EK WABWOTO

JUDGE

