Jethwa v Janoowala (Environment & Land Case 9 of 2023)
[2024] KEELC 3884 (KLR) (2 May 2024) (Ruling)

Neutral citation: [2024] KEELC 3884 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 9 OF 2023

LL NAIKUNI, J

MAY 2, 2024

BETWEEN

RAJNIKANT MADHAVJI JETHWA ..... PLAINTIFF

AND

SAJADHUSAIN S. GHULAMHUSAIN JANOOWALA ..... DEFENDANT

RULING

I. Introduction

1. The Honourable Court was moved to make its determination with regard to a Notice of Preliminary Objection dated 11th October, 2023 raised by the Defendant herein. It is instructive to note that earlier on, the Defendant had filed another Preliminary objection dated 17th July, 2023 but withdrew it through a Notice of withdrawal dated 11th October, 2023 and on even date filed this second objection herein.

II. The Objection by the Defendant.

2. The objection dated 11th October, 2023 by the Defendant was based on the following grounds:-

    a. This suit contravenes the provision of Section 6 of the *Civil Procedure Act* Cap 21 Laws of Kenya as the dispute has been adjudicated upon at the Business Premises Rent Tribunal in BPRT (Mombasa) Case No. E259 of 2022 wherein the matters in issue are directly and substantially similar.

    b. This suit is in contravention of Section 2 and section 12 (1) (e) of the *Landlord and Tenant (Shops, Hotels and Catering establishments) Act* (CAP 301) Laws of Kenya.

III. Submissions

3. On 12th October, 2023 while in the presence of all the parties, the Honourable court directed that the said notice of Preliminary objection be disposed off by way of written submissions. Pursuant to that all parties obliged accordingly. Thereafter, the Honourable Court reserved to deliver its ruling on 25th April, 2024 though it was deferred to 2nd May, 2024 thereof.

A. The Written Submissions by the Defendant.

4. Through the Learned Counsel for the Defendant herein, being the Law firm of Messrs. N.A Ali & Company Advocates filed their written submissions dated 11th December, 2023. Mr. Hassan Advocate commenced by stating that the Defendant impugned the competency of the suit filed by the Plaintiff before this Honourable Court ideally for being in contravention of the law. Specifically, that it offended the provision of Section 6 of the *Civil Procedure Act*, Cap. 21 and Sections 2 and 12 (1) (e) of the Land Lord and Tenant (Shops, Hotels and Catering Establishments) Cap. 301 of the Laws of Kenya. (Hereinafter referred to as "The Act").

5. As a way of providing a brief background to the matter, the Learned Counsel informed the Honourable Court that the Defendant was a tenant at the Plaintiff's premises. Prior to the institution of the instant suit, the Defendant filed a complaint under the provision of Section 12 (4) of the Act being BPRT E259 of 2022 where he primarily sought for orders that notices purporting to terminate the Defendant's tenancy relationship were offensive of the Act and therefore illegal and of no legal effect. The Defendant also sought for an order that the Plaintiff be restrained from harassing or threatening the Tenant and from interfering with the Tenant's quiet and peaceful possession of the subject premises. He submitted that the institution of that complaint was admitted by Plaintiff in his Reply to defence dated the 5th June, 2023 on averments made out at Paragraph *5* thereto. The Learned Counsel also relied on the provision of Section 4 of the Act which provides 'inter alia":

> " Notwithstanding the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be terminated, and no term or condition in, or right or service enjoyed by the tenant of, any such tenancy shall be altered, otherwise than in accordance with the following provisions of this Act."

6. According to the Learned Counsel, the said provision held that the controlled tenancy could not be terminated unless done so within the provision of the Act. In the said complaint, the Defendant's grievances was that the Plaintiff was attempting to forcefully have the Defendant evicted without following due process of termination as provided by the said law. He reiterated and being his main contention, being a controlled Tenant and the only way his tenancy could be terminated was through the provisions of the Act.

7. On the contrary to this position, the Plaintiff contended that the Defendant was not a Tenant at the subject premises. The Plaintiff provided specific reasons for arriving at that conclusion. Thus, he argued that he should vacate and hand over possession of the said premises.

8. The Learned Counsel submitted that it was trite law that a Tenant could not be liable to vacate premises without being terminated seeking vacant possession in this suit. It was the termination that gave rise to a cause of action for vacant possession. He averred that the Defendant found himself in a situation whereby there were two proceedings before two different forum on the same subject matter. He argued that should the finding of the Tribunal that the Defendant's complaint was merited and proceeded to grant the orders being sought for, this Honourable Court would find itself in a situation whereby

it would potentially grant orders for vacant possession of the tenancy is a controlled tenancy and could only terminated within the provision of the Act. In that instance, only the Tribunal would have jurisdiction.

9. Hence, on the basis of the said proceedings before the Tribunal, he submitted that this Honourable Court should not proceed with the instant proceedings until that from the Tribunal was concluded. Furthermore, amongst the powers vested in the Tribunal under Section 12 (1) (a) of the Act as follows:

> " to determine whether or not any tenancy is a controlled tenancy."

10. He stressed that under the Act, the Tribunal was vested with jurisdiction to determine whether or not a controlled tenancy exists. Applying the above to this case, given that there were proceedings which existed before the Tribunal, the Tribunal itself has jurisdiction to determine whether a controlled tenancy exists. Hence it had jurisdiction to determine whether it had jurisdiction over the matter or not. If it determined that there existed a controlled tenancy, then as per the provision of Section 2 of the Act, the Tribunal would have jurisdiction to deal with any dispute that arises. If it determined that there existed no controlled tenancy, then it shall not have jurisdiction. It was this Honorable Court that would be seized of jurisdiction.

11. The Learned Counsel opined that the Defendant herein impugn the competence of the suit on the grounds that this Honorable Court lacked jurisdiction to preside over this matter pursuant to Section 2 of the Act. As the dispute emanated from a controlled tenancy between the Plaintiff and the 1st Defendant. In this instant case, the tenancy had not been reduced into writing. The same therefore automatically falls into the said definition. The proper forum for adjudication of the subject matter of the suit is therefore the Business Premises Rent Tribunal. Under CAP 301, it is the Tribunal that has exclusive jurisdiction to adjudicate on issues pertaining to controlled tenancies. This Honorable Court only has appellate jurisdiction and not original jurisdiction, pursuant to Section 15 of the Act.

12. The Learned Counsel averred that looking at the prayers in the suit, it could be seen that the primary prayers are for vacant possession and mesne profits. The powers of the Business Premises Rent Tribunal are provided for in the said Act at Section 12 of CAP 301. Section 12 (1) (e) provides that the Tribunal has powers to:

> " to make orders, upon such terms and conditions as it thinks fit, for the recovery of possession and for the payment of arrears of rent and mesne profits, which orders may be applicable to any person, whether or not he is a tenant, being at any material time in occupation of the premises comprised in a controlled tenancy;"

13. According to the above provision, the Tribunal was vested with powers to make orders for recovery of possession and for payment of mesne profits against either a Tenant or any person in occupation of the premises irrespective of whether that person is a person or not. The Plaintiff's claim as per the Plaint is simply that the Defendant is not a Tenant because the real Tenant who was the Defendant's father passed away. The Plaintiff therefore contended that the Defendant was illegally misrepresenting himself as a Tenant. The Plaintiff was therefore at liberty to raise all its complaints at the Tribunal for determination, as per the said provision. The position that this Honorable Court could not adjudicate on matters which are a preserve of the Business Premises Rent Tribunal is not trite and has been declared as such in many judicial authorities.

14. The Learned Counsel was apprehensive that the determination of this suit may conflict with the decision of the BPRT case. Furthermore, amongst the powers vested in the Tribunal under the provision of Section 12 (1) (a) of the Act. He submitted that the Tribunal was vested with the

jurisdiction to determine whether or not a controlled tenancy exited. Thus, applying the above to this case, given that there was proceedings which existed before the Tribunal, the Tribunal itself had Jurisdiction to determine whether a controlled tenancy existed, hence it had jurisdiction to determine whether it had jurisdiction over the matter or not. If it determined that there existed a controlled tenancy, as per a controlled tenancy existed, then as per the provision of Section 2 of the Act, the Tribunal would have jurisdiction to deal with any dispute that arose. If it determined that there existed no controlled tenancy, then it shall not have jurisdiction. It was this Honourable Court that would be seized of Jurisdiction. The Learned Counsel asserted the Defendant impugned the competence of the suit on the grounds that this Honourable Court lacked jurisdiction to preside over this matter pursuant to the provision of Sections 2 of the Act to the effect that the dispute emanated from a controlled tenancy between the Plaintiff and the 1st Defendant. He argued that the tenancy had not been reduced into writing. Thus, the proper forum for the adjudication of the matter was the Tribunal.

15. The Learned Counsel also submitted on the second limb of the notice of preliminary objection where they submitted that this Court never had jurisdiction when it came to controlled tenancies and relied on the case of:- "Kaka Mohamed – Versus - Mohamed Ali (2018) eKLR the Court faced a similar case in respect of a controlled tenancy, it pronounced itself as follows:-

> "It is generally true that this court has jurisdiction in matters of tenancy. But in matters of controlled tenancy, the first port of call is not this court. Under Section 2(1) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*,(cap 301), a tenancy agreement or arrangement that is not in writing is a controlled tenancy. The tenancy between the parties herein seems to be one such tenancy because no written agreement has been availed. A person with a complaint or grievance relating to or surrounding such tenancy is duty-bound to go to the tribunal set up under the Act. This court is not one such tribunal."PARAGRAPH 16.

16. It was also decided in the case of "Leo Investment Limited t/a Mara Concord Game Lodge – Versus - Samson Ololmaitai & Another [2020] eKLR that:

> "... I find that the Plaintiff/Applicant suit is entirely premised on a tenant landlord relationship between the Applicant and respondent... the operating statute under which this relationship is premised in the Landlord Tenant(shop, Hotels and catering establishment)Act and by extension therefore the provisions of Section 6 of the Act directs the jurisdiction of this court to hear and determine the dispute herein.

17. The Applicant ought to have filed his reference under the provision of Section 6 of the Act before the Business Premises Rent Tribunal. In the case of "Eebtulla Properties Limited (1979) eKLR 96 the court stated that:

> "Under Section 12 of the Landlord Tenant (shops, hotels and catering establishment) Act, the tribunal powers are restricted to its jurisdiction under Section 6. The above being the position obtaining in the instant suit and where the parties have invoked the provisions of Section 6 of the Act I find that this court lacks the requisite jurisdiction to hear and determine the suit herein."

18. It was also determined in "ELC case No. 87 of 2022 - Naresh Kumar Balubhai Adatia – Versus - Samir Thakkar & Another that:-

> "The Plaintiff has submitted that there existed no tenancy relationship between himself and the 1st Defendant... From the reading of Section 12 as read with Section 2 of the

Act, the Plaintiff has a grievance relating to a controlled tenancy, he ought to lodge the same with the Tribunal which has original jurisdiction as the first stop where tenancy is controlled."PARAGRAPH 19.

19. The above establishes that it was the Tribunal and not this Honorable Court that was vested with jurisdiction to preside over the subject matter. In view of the foregoing, the Learned urged that the Court make a finding that the instant suit was incompetent and that the same ought to be struck out for lack of jurisdiction.

B. The Written Submissions by the Plaintiff onto the Notice of Preliminary Objection dated 11th October, 2023.

20. While opposing the objection raised by the Defendant dated 11th October, 2023, the Learned Counsel for the Plaintiff being the Law firm of Messrs. Moses Mwaksha & company filed their written submissions dated 7th February, 2024. Mr. Mwakisha Advocate commenced by stating that these were the submissions filed for the Plaintiff in relation to the Notice of Preliminary Objection dated 11th October, 2023 filed herein. The Learned Counsel provided the Honourable Court with a brief background of the matter by stating that as discernible from the Plaint, the Plaintiff was the Landlord of the suit premises situate on Mombasa/Block XIX/205 whereon one S.G. Janoowalla was for a long time the known tenant. According to the Counsel, the tenancy was hitherto one controlled under the Act. Vide a Landlord's Notice dated 19th January, 2017, the Plaintiff served on the said S. G. Janoowalla a notice seeking to alter the terms of tenancy by increasing the rent payable on the premises. (see page 9 of the Plaintiff's bundle of documents).

21. At this stage, the Learned Counsel pointed out that in line with the law relating to preliminary objections as established by previous decisions such as in the case of "Mukisa Biscuit Manufacturing company Limited – Versus - West End Distributors Limited [1969]EA 696, the preliminary objection was premised on the pleadings and filings put forth by the adverse party (the Plaintiff in this case), and proceeded on the basis that the Plaintiff being by law was bound by his own pleadings and averments. He averred that that, as far as it concerned the Defendant, a settled factual platform on which to base a legal argument in the nature of the preliminary objection on a point of law. So that, while the Defendant could not, for purposes of the preliminary objection, he was at liberty to make reference to the Plaintiff's filings in advancing his objection. Equally, the Plaintiff, in rebutting the objection, could refer to the self-same filings or documents.

22. The Counsel asserted that, the Landlord's notice referred to above elicited a reference as required by the provision of Section 6 of the *Civil Procedure Act* Cap. 21, filed by one S.G. Janoowalla (see page 10 of the Plaintiff's bundle of documents). That reference gave vent to the civil suit:- "BPRT case No. 32 of 2017, S.G.Janoowalla – Versus - Rajnikant Madhavji Jethwa. However, in a strange twist of events, the tenant soon after filed a notice of preliminary objection, attaching thereto the Certificate of death the gist of which was captured in the Judgment of Justice Munyao Sila of 10th February, 2022 (at page 17 of the Plaintiff's bundle, paragraph *4*). It bespoke the death of S.G Janoowalla which as fate would have it occurred on 10th September,1999. The Counsel opined that, it was the fact of death of the tenant which formed the crux of the objection. Of course death being a matter of fact that was being put forth by the tenant, he would have needed to move the court by way of an application to annul or strike out the landlord's notice by annexing the relevant Certificate of death to an affidavit in support of the motion for annulment or striking out.

23. The Learned Counsel contended that no matter, the objection was entertained on the basis of the Certificate of death attached to the notice of preliminary objection, and the notice to strike down by

the Tribunal thereby terminating the proceedings, with an order that the landlord bears the costs of the reference. On appeal to the Environment and Land Court, the Honourable Justice Munyao, on the basis that the fact of death was not contested, upheld the termination of the proceedings but reversed the order awarding costs in favour of what was in effect a phantom litigant. The Counsel referred to the Judgement by stating that in the words of the Learned Judge, at page 17 of the Plaintiff's bundle, paragraph *4* stated that:-

> " I have considered the matter. It will be recalled that in the objection to Janoowalla's notice, it was said that Janoowalla is deceased and therefore the Notice was defective. Indeed, a certificate of death was presented, showing that Janoowalla died on 10th September, 1999. This certificate of death was not challenged by the landlord and I take it that it is a fact that Janoowalla died in 1999. Now, if he died, then he cannot be tenant, because he does not exist, and no notice to terminate tenancy could issue to him. But again, in the same vein, no suit (read reference) could be filed by Janoowalla as he was dead. Any suit purportedly filed by Janoowalla was also defective and null and void...
>
> ..... The suit should also have been struck out with the order that whoever filed it should: pay costs to the landlord, for such person, not being tenant, had no right to file suit before the tribunal pretending to be Janoowalla."

24. And, at paragraph 8 of the said Judgement, of page 18, the Leraned Judge stated that:

> " So, what is to happen to the three cases? The landlord's notice to Janoowalla is certainly null and void, but so too the suit purportedly filed by Janoowalla. I will substitute the order of the tribunal with an order that the landlord's notice is declared null and void, and the suit before the tribunal, that is Mombasa BPRT Case No. 32 of 2017, be struck out. Since the person who filed the case ought not to have filed it in the name of Janoowalla, for in doing so, he was pretending to be Janoowalla, he/she will pay the costs of the suit before the tribunal. That person will also pay the costs of this appeal. We cannot encourage people to file cases in the name of another who is deceased. Since Janoowalla is dead, it is upon the landlord to determine where his remedies lie as against the person/s in occupation of that premises. (Underlining ours)

25. With regard to the present suit and propriety thereof, the Learned Counsel was the view that following the Judgment of this court on appeal, the Landlord was left with no choice but to take steps to find out who had been in occupation of the tenancy since the demise of the known tenant in the year 1999. At the same time, the tenant and who, as could be seen from the copies of receipts appearing at page 26 onwards, continued to pay rent by issuing cheques in various names, such as Mohamed Ali Janoowalla (receipted for G.G. Janoowalla, the known tenant) but without prejudice; was Janoowalla M.S. Gulamhusain (See page 28).

26. The Learned Counsel informed Court that in his quest to get to the bottom of the matter, several letters were written to the advocate on record for the "tenant" on 10th November, 2022 (see pages 20 - 21), in response to which, on 7th November, 2022, the disclosure was made that: "the tenant at the subject premises" was Sajadhusain S. Gulamhusain Janoowalla", and that:- "he has been the one who has been remitting rent and has accordingly been issued with receipts for payment of rent in his name". (Emphasis ours). According to the Learned Counsel, of course, Sajadhusain S. Gulamhusain Janoowalla, also abbreviates to S.G.Janoowalla, the known tenant in respect of whom the Certificate of death was uttered.

27. He stated that the above was the basis of the suit herein, which sought the following prayers:-

a. Vacant possession of the premises on Mombasa/Block XIX/205.

b. Mesne profits at a sum of Kenya Shillings Fifty Five Thousand (Kshs. 55,000/-) per month from 1st April, 2017 until possession was delivered up less a sum of Kenya Shillings Three Thousand Three Hundred and fifty (Kshs. 3,354/-) paid upto November, 2022.

c. Costs and interest.

d. Any other or further relief this Honourable court deems fit and just to grant.

28. The Counsel opined that the rationale for the monetary reliefs sought was explained in the Plaint and witness statement of the Plaintiff. It was his contention that in light of all the foregoing circumstances that the Plaintiff maintained that the Defendant, by attempting to invoke the jurisdiction of the Business Premises Rent Tribunal, was merely indulging in an abuse of the court process. Any rentals paid, in whatever name, had been remitted on behalf of the known tenant and receipted as such.

29. Importantly too, at no time could there be said to have arisen a tenancy by conduct of the parties or operation of law, for it would be seen that once the fact of the demise of S.G. Janoowalla came to the landlord's attention, no rent had been received unconditionally, all receipts being issued on without prejudice basis, while as regards the period September,1999 (death of tenant) and the disclosure of the fact of death at the point of filing the notice of preliminary objection, this court had already determined in the appeal Judgment that the person who filed the reference before the BPRT was impersonating the known S.G Janoowalla. Had the Defendant advanced the case that he was occupying the tenancy and running the business therein as part of the estate of the deceased S.G. Janoowalla, there would be a case of a continuing controlled tenancy. Instead the Defendant's position was that he has become the tenant upon the known tenant's death.

30. The Learned Counsel submitted that it would be within the province of this court to inquire, at a full hearing, on the validity of the claim that casts the Defendant as a trespasser who needed to cede possession for being on the premises without the consent of the landlord. Indeed, there was already a finding by this court, in the appellate Judgment of Sila J, that the person in occupation was, in the circumstances obtaining on appeal, not a tenant, for here was a person who, rather than assert his position as tenant from the outset, had first purported to file a reference masquerading as the deceased tenant.

31. Finally, the Learned Counsel urged the Court in the interest of justice, rather than defer to the Tribunal, the court exercises its jurisdiction.

IV. Analysis & Determination

32. Having carefully perused the notice of preliminary objection dated 11th October, 2023 by the Defendant herein, the written Submissions and the myriad of cited authorities, the relevant provisions of *the Constitution* of Kenya, 2010 and the statures.

33. For the Honourable Court to arrive at an informed, reasonable and Equitable decision there will be need to respond to the following three (3) issues for its determination. These are:-

a. Whether the Preliminary Objection raised by the Defendant through the Notice of Motion dated 11th October, 2023 meets the threshold as founded in law and Precedents.

b. Whether the parties are entitled to from the relief sought.

c. Who will meet the costs of the Objection.

Issue No. a). Whether the Preliminary Objection raised by the Defendant through the Notice of Motion dated 11th October, 2023 meets the threshold as founded in law and Precedents.

34. Under this Sub – heading, the crucial issue here is on the Preliminary objection raised by the Defendant on whether this Court bears the jurisdiction to hear and determine this matter herein. The Defendant has argued that this matter was already pending before the BPRT and hence to tolerate the disputed issues in this Court would tantamount to not only usurping the Jurisdiction of the Court but also being in violation, breach and/or contrary to the Doctrine of "Sub - Judice". In a nutshell, according to the Defendant, this Honourable Court lacked the Jurisdiction to deal on the issues at tis stage.

35. First and foremost, a Preliminary objection has to be determined on a case to case basis. According to the Black Law Dictionary a Preliminary Objection is defined as being:

> " In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary....."

The above legal preposition has been made graphically clear in the now famous case of Mukisa Biscuits Manufacturing Co. Limited (Supra) where Lord Charles Newbold P. held that a proper preliminary objection constitutes a pure points of law. The Learned Judge then held that:-

> " The first matter relates to the 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 demurer 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 in 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 the issue. The improper practice should stop"

36. Furthermore, I wish to cite the case of "Attorney General & Another –Versus- Andrew Mwaura Githinji & another [2016] eKLR:- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-

i. A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.

ii. A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and

iii. The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

37. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. Certainly, the issues raised by the Defendant herein – being the Jurisdiction of the Court and "the Doctrine of Res Sub - Judice" - are by all means, intent and purposes serious and pure issues of law which this court is duty bound to critically venture to be heard and determined prior to them being set down the case for full trial on its own merit. The issues are not fanciful nor remote. For these reasons, therefore, I find that the objection raised by the Defendant were properly filed hereof. It constitutes matters akin to be determined at the preliminary level before embarking on the hearing

of the case on its own merit in conformity to the case of Mukisa Biscuits Manufacturing Co. Limited (Supra). Therefore, I shall proceed to distinctly consider and determine them accordingly.

Issue No. b). Whether the parties are entitled to from the relief sought.

38. Under this Sub – title, the Defendant holds that the Honourable Court lacks the Jurisdiction to entertain the matter taking that there has already been instituted a suit before the BRPT being a controlled tenant under the provision of Sections 4 and 12 of the Act. Furthermore, to proceed on adjudicating on the matter before this Court would tantamount to a violation of the doctrine of Res – Sub – Judice under the provision of Section 6 of the *Civil procedure Act*, Cap. 21. The Honourable Court wishes to commence dealing on the aspect of Jurisdiction of this Court. Indeed a number of Courts hold that jurisdiction is everything and without it, the Court must down its tools as guided in the now famous case of "Owners of Motor Vessel "Lillian S" – Versus Caltex Oil Kenya, Limited (1989) eKLR where the Court held thus:-

> " Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction"

39. The ELC is a creature of *the Constitution* under the provision of Article 162 (2) (b) of *the Constitution* of Kenya, 2010. Without belabouring the point, the ELC Court draws its legal mandate from the provision of Sections 3 and 13 of the ELC Act, No. 19 of 2011. Its from these provisions of the law that clothes this Court with the Jurisdiction to deal and adjudicate on this matter. However, from the surrounding facts and inferences pleaded and adduced by the parties herein and in particular the Judgement by my brother Justice Munyao delivered on 10th February, 2022 and the evidence in form of the Certificate of Death of the tenant which graphically indicates that as fate would have it, he died on 10th September, 1999 and hence there ceased to exist any LandLord – tenant relationship between the Plaintiff and the Defendant. In essence, there was and no suit subsisted before the BPRT pursuant to the provision of Sections 2, 6 and 12 of the Act whatsoever to deny this Court from hearing and entertaining the issues before it. On that front and stand alone point, I discern that the objection raised by the Defendant must fail.

40. With regard to the Doctrine of Sub – Judice, the provision of Section 6 of the *Civil Procedure Act* Cap. 21. The said provision is as follows:

> " No court shall proceed with the trial of any suit or proceeding 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."

The concept of Sub Judice bars a court from trying a matter that is in one way or the other before another Court of competent jurisdiction. If the Courts were to proceed on with the two or duplication of matters and which may end up in conflicting and/or embarrassing or confusing determination. Hence the quickest solution was to stay one proceedings.

41. In the case of "Republic – Versus – Paul Kihara Kariuki, the Attorney General & 2 Others Ex – parte, Law Society of Kenya, (2020) eKLR, Mativo J stated as follows on the concept of Sub Judice:-

> " .....there exists the concept of Sub Judice which in Latin means "under Judgement". It denotes that a matter iis being considered by a Court or Judge. The concept of Sub - Judice that where an issue is pending in a court of law for adjudication between the same parties, any other Court is barred from trying that issue so long as the first suit goes on. In such a situation, order is passed by the subsequent Court to stay the proceedings and such order can be made at any stage".

42. Based on the provisions of Section 6 of the *Civil Procedure Act*, Cap. 21, for there to be a breach or offence of the doctrine of Sub – Judice the following ingredients must be present. These are:

a. There has to be a matter in issue which is also directly and substantially in issue;

b. There has to be a matter previously instituted in competent Court.

c. There has to be an existence of a matter over the same subject matter and parties.

Additionally, for clarity sake, the provision of the provision of Section 2 of the Act defines controlled tenancy is defined under the Act 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
>
> (ii) contains provisions for termination, otherwise than for breach of covenant, within five years from the commencement thereof;"

Undoubtedly, the BPRT is clothed with the legal mandate to deal with all issues of controlled tenancy as donated by the provision of Section 12 (1) of the Act and which the Learned Counsel for the Defendant has articulated with extreme elaboration. However, the major issue for consideration before this Court, is that is there any proper dispute pending before the BPRT, and the answer is in the negative taking that it is more of an issue of facts than pure law as the Defendant wishes to depict. There is no doubt, initially, there may have existed a controlled tenancy relationship between the Land Lord and the tenant herein as dictated by the provision of Section 2 of the Act. However, I reiterate that from the empirical evidential facts being the Certificate of death of the tenant, S.G Janoowala died on 10th September, 1999 and sentiments expressed and stated out in the Judgment of the Learned Judge in ELC Appeal No. 5 of 2020 there could not have existed any controlled tenancy warranting the BPRT to be dealing with the matter. In simple terms, being dead, the Defendant could not have filed BPRT Case No. 32 of 2017. Clearly, and that was the most likely thing to have occurred that it could have been another person using the Defendant's name to occupy the premises. Sir. Arthur Conan Doyle in his captivating novel of Sherlock Holmes stated as follows:

> "Once you eliminate the impossible, whatever remains, no matter how improbable, must be the truth."

43. The individual in this suit must be an individual either impersonating or pretending to use the Defendant's name or even probably has the same name as the defendant which is common in most

cultures. If it is the latter, it is a criminal offence which the Chairman of the tribunal in BPRT E259 of 2023 ought to know under the common law principle of Ex Turpi Causa Non Oritur Actio. Be that as it may, I strongly hold that all these are matter of facts and not law whereby the fairest and reasonable way to tackle them is by conducting a full trial of the matter before this Honourable Court.

44. From the foregoing, therefore, the second limb of whether the facts are certain has not been satisfied and hence the notice of preliminary objection by the Defendant must fail outrightly.

Issue No. c). Who will bear the costs of the objection

45. It is now well established that the issue of costs is the discretion of the Court. Costs mean the award granted to a party at the conclusion of the legal action and proceedings in any litigation. The proviso of Section 27 (1) of the *Civil Procedure Act*, Cap 21 holds that costs follow the events. By events it means the results of the legal action and proceedings.

46. In the instant case, the Preliminary Objection by the Defendant has failed. Pursuant to that, the Plaintiffs are entitled to the costs from the objections thereof.

V. Conclusion & Disposition

47. In the long run, upon conducting indepth analysis of the issues herein, on the Preponderance of probabilities and the balance of convenience, the Honourable Court makes the following specific orders:-

    a. That the Notice of Preliminary objection dated 11th October, 2023 by the Defendant herein be and is hereby dismissed with costs.

    b. That for expediency sake the suit to be fixed for hearing on 2nd October, 2010. There shall be a mention on 11th July, 2024 for conducting of the Pre – Trial conference pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010.

    c. That the costs to be borne by the person representing himself as the Defendant in this suit.

    It is so ordered accordingly.

RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS SIGNED AND DATED AT MOMBASA THIS 2nd DAY OF MAY, 2024.

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HON. JUSTICE L.L. NAIKUNI,

ENVIRONMENT & LAND COURT AT

MOMBASA

Ruling delivered in the presence of:-

a. M/s. Firdaus Mbula, the Court Assistant.

b. Mr. Mwakisha Advocate for the Plaintiff.

c. Mr. Hassan Advocate for the Defendant