



REPUBLIC OF KENYA



**Severin Sea Lodge (EA) Limited v Baracuda Kenya Limited (Miscellaneous Application E003 of 2023) [2024] KEELC 7211 (KLR) (16 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7211 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
MISCELLANEOUS APPLICATION E003 OF 2023**

**LL NAIKUNI, J  
OCTOBER 16, 2024**

**BETWEEN**

**SEVERIN SEA LODGE (EA) LIMITED ..... LANDLORD**

**AND**

**BARACUDA KENYA LIMITED ..... TENANT**

**RULING**

**I. Introduction**

1. This ruling is in respect to two motions whereby the Honourable Court was moved by parties for its determination. The first one is a Notice of Preliminary objection dated 18<sup>th</sup> September, 2023 raised by the by Baracuda Kenya Limited, the Tenant/Respondent herein. Whilst the second one is the Notice of Motion application dated 24<sup>th</sup> October, 2024 by Severin Sea Lodge (E.A.) Limited, the Landlord/Applicant herein brought under the provision of Sections 1A, 1B, 3A and 79 G of the *Civil Procedure Act* Cap. 21 Laws of Kenya and Order 51 Rule 1 of the Civil Procedure Rules, 2010.
2. Upon service of the aforesaid motion, the Landlord/Applicant raised the Notice of Preliminary objection while the Tenant/Respondent responded to the Notice of Motion application through filing of a Replying Affidavit dated 6<sup>th</sup> December, 2023. The Honourable Court shall be dealing with these pleadings in depth on their own merit at a later stage of this ruling hereof.

**II. The issues from the Notice of Preliminary Objection by the Tenant/Respondent**

3. The Tenant/Respondent raised a preliminary objection at the hearing of this matter on the basis that the entire proceedings were defective. Essentially, the main ground of the objection was that the application was in contravention of the provision of Section 15 (1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Cap. 301.



### III. The Notice of Motion application dated 24<sup>th</sup> October, 2023 by the Landlord/Applicant

4. The Landlord/Respondent sought for the following orders:
  - a. Spent.
  - b. That upon hearing of the said Application, this Honourable Court be pleased to grant leave to the Landlord/Applicant to file an appeal out of time against the Ruling dated 5<sup>th</sup> June 2023 delivered by the Vice Chairman of the Business Premises Rent Tribunal
  - c. That costs for this Application be in this Cause.
5. The Application was premised on the grounds, testimonial facts and averments made out under the 30 Paragraphed Supporting Affidavit of Tuva Mwachunga. He averred that:-
  - a. On 19<sup>th</sup> January 2023, the Tenant/Respondent filed a reference claiming that it had been operating its business at the Landlord/Applicant's Premises situated at Severin Sea Lodge, Ground Floor Room No.180 to Room 184 erected on L.R No. I/MN/883 and the Landlord/Applicant had threatened to forcefully evict it from the subject premises. Subsequently, the Tenant/Respondent sought orders restraining the Landlord/Applicant from unlawfully terminating the alleged tenancy and from evicting the Tenant/Respondent from the premises.
  - b. The Landlord/Applicant raised a Notice of Preliminary Objection dated 21<sup>st</sup> February 2023 in response to the said reference challenging the Jurisdiction of the Tribunal to hear and entertain the dispute on grounds that the relationship between the Landlord/ Applicant and the Tenant/ Respondent is that of a Licensor/Licensee pursuant to the License to Use Agreement dated 20<sup>th</sup> September 2021.
  - c. The Landlord/Applicant grounded the Preliminary Objection dated 21<sup>st</sup> February 2023 under the provision of Section 12(4) of the Landlord and Tenant {Shops, Hotels and Catering Establishments} Act, Cap. 301 on grounds that the Tenant/Respondent entered into a License Agreement dated 20<sup>th</sup> September 2021 with the Landlord/Applicant therefore outside the scope of the Tribunal.
  - d. On 5<sup>th</sup> June 2023 the Tribunal found that the Preliminary Objection lacked merit and proceeded to dismiss it noting that the License between the Parties was for a defined period of One {1} Year and after its expiry proceeded to erroneously state that, the Parties entered into a Periodic Tenancy.
  - e. The day the Ruling was delivered, the Honourable Tribunal only pronounced itself as to its final finding and never read the entire Ruling and it informed them that a copy would be availed to the Parties in the course of the week, but that was not the case.
  - f. Desirous to appeal against the Ruling dated 5<sup>th</sup> June 2023 by the Vice-Chairman of the Honourable Tribunal, the Landlord/Applicant, followed up with the Tribunal for issuance of a copy of the Ruling dated 5<sup>th</sup> June 2023 from the date it was delivered but without any success.
  - g. As a result, the Landlord/Applicant through their agents wrote to the Honourable Tribunal for a copy of the Ruling on 3<sup>rd</sup> July 2023 to enable it to prepare a conclusive Memorandum of Appeal and the Tribunal responded on 6<sup>th</sup> July 2023 that the Ruling would be ready within 21 days from the said date.



- h. After 21 days, on 27<sup>th</sup> July 2023 the Landlord/Applicant through their agents wrote to the Honourable Tribunal again referring to the email dated 6<sup>th</sup> July 2023 requesting for a Copy of the Ruling in order to prepare the Memorandum of Appeal and the Tribunal responded that the file was in court on the said date, directing the Landlord/Applicant through their agents to follow up with an email in the afternoon.
- i. On 16<sup>th</sup> August 2023, the Tribunal directed the Landlord/Applicant through their agents to pay for a copy of the Ruling as per the Invoice generated on our e-filing portal, the Landlord/Applicant through their agents proceeded to make payments as directed, generated a receipt and shared it with the Tribunal on the same day.
- j. On 25<sup>th</sup> August 2023, having not received any response from the Tribunal, the Landlord/Applicant through their agents proceeded to write a reminder by an email dated 25<sup>th</sup> August 2023 making reference to the email correspondence of 16<sup>th</sup> August 2023; the Invoice and the E-receipt demonstrating payment with the aim of obtaining a copy of the Ruling but the said email did not elicit any response from the Tribunal.
- k. Through sheer persistence, on 1<sup>st</sup> September 2023, Landlord/Applicant through their agents wrote to the Tribunal once more urgently requesting for a copy of the Ruling dated 5<sup>th</sup> June 2023 to enable the Landlord/Applicant prepare a conclusive Memorandum of Appeal and the Tribunal responded by requesting the Landlord/Applicant through their agents to collect the same in their offices.
- l. On the same date, 1<sup>st</sup> September 2023, the Landlord/Applicant through their agents wrote to the Tribunal seeking clarification whether the copy of the Ruling was available at Mombasa Business Premises Rent Tribunal Registry for collection but Tribunal failed to clarify the directions.
- m. Nonetheless despite the above circumstance, the Landlord/Applicant through their agents visited the Mombasa Business Premises Rent Tribunal Registry to collect a copy of the Ruling only to be informed that the file is in Nairobi and it was not available in the Mombasa office.
- n. Finally, on 7<sup>th</sup> September 2023 the copy of Ruling was made available by the Tribunal through the E-filing portal and via email but the said Ruling issued to the Landlord/Applicant is an incomplete copy further delaying the filing of the Appeal by restricting the Landlord/Applicant from referring to the Tribunal's reasons for dismissing the Preliminary Objection dated 21<sup>st</sup> February 2023.
- o. The intended appeal was arguable with a high chance of success as the Landlord/Applicant argues that the relationship between the Landlord/Applicant and the Tenant/Respondent is not the subject of a periodic tenancy based on the fact that the relationship between the parties is of a Licensor and a Licensee; subject to the License to Use Agreement dated 20<sup>th</sup> September 2021; for a period of one (1) year commencing 1<sup>st</sup> October 2021 and ending on 30<sup>th</sup> September 2022, granting the Tenant/Respondent authority to use the Premises situated at Severin Sea Lodge, Ground Floor Room No.180 to Room 184 erected on L.R No. I/MN/883 for the duration of the Agreement only.
- p. Prior to the expiry of the License to Use Agreement dated 20<sup>th</sup> September 2021, the Landlord/Applicant notified the Tenant/Respondent vide a Letter dated 14<sup>th</sup> September 2022 of the expiry date and further notifying the Tenant/Respondent that the License to Use Agreement shall not be renewed after expiration, expressing clear intentions to terminate the relationship



and take overpossession of the Premises situated at Severin Sea Lodge, Ground Floor Room No.180 to Room 184 erected on L.R No.1/MN/883.

- q. On the date of expiration of the Agreement the Tenant/Respondent did not vacate the premises instead, on 13<sup>th</sup> October 2022 the Tenant/Respondent requested in writing to be given an opportunity to vacate by the end of January 2023 and Landlord/Applicant in allowing the request did not convert the License to a Periodic Tenancy as held by the Tribunal rather, the Landlord/Applicant exercised good faith to pave way for the surrender of the Premises situated at Severin Sea Lodge, Ground Floor Room No.180 to Room 184 erected on L.R No. I/MN/883 and further did not accept any rent save for the month of October 2022.
- r. The Tribunal erred in fact and in law by failing to consider that the continued occupation by the Tenant/Respondent after the lapse of License to Use Agreement dated 20<sup>th</sup> September 2021 beyond January 2023 is pursuant to the ex-parte Orders obtained by the Licensee dated 31<sup>st</sup> January 2023 and issued by the Tribunal on 26<sup>th</sup> January 2023.
- s. The Tribunal erred in fact and in law by failing to recognize that from November 2022 the Tenant/Respondent has not paid any Licensee fee to the Licensor nor as the Landlord/Applicant demanded any payment of the License fee; the License to Use Agreement dated 20<sup>th</sup> September 2021 has expired and the Tenant/Respondent continues to forcefully occupy the Premises situated at Severin Sea Lodge, Ground Floor Room No.180 to Room 184 erected on L.R No. I/MN/883 all the more reason why the Landlord/Applicant makes this Application before the Honourable Court to allow the appeal to be filed and to seek Orders to evict the Tenant/Respondent from the Premises situated at Severin Sea Lodge, Ground Floor Room No.180 to Room 184 erected on L.R No. I/MN/883.
- t. The substance of the intended appeal argues that the Landlord/Applicant and the Tenant/Respondent entered into a License Agreement dated 21<sup>st</sup> September 2021, therefore outside the jurisdiction of the Tribunal.
- u. The Tribunal misdirected itself by finding that it had jurisdiction to hear and determine a dispute between a Licensor and a Licensee pursuant to the License to Use Agreement dated 20<sup>th</sup> September 2021 and holding that the relationship between the Licensor and the Licensee had converted into a Periodic Tenancy despite the fact that the relationship was not governed by the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Cap. 301.
- v. The Tribunal erred in fact and in law by disregarding Judicial Precedence established in the case of:- “Agnes Wambui Maina t/a Agnes Pharmaceuticals - Versus - Ola Energy (K) Limited 92022) eKLR” and “Lucy Wanjiku Kinyanjui -Versus - Wilson Nguyo (2022) eKLR”, where in both cases the Tribunal relied on the case of Nairobi HCC No.3424 of 1982, “BP Nairobi Service Station Limited – Versus - BP Kenya Limited”, where Justice Muthoga found that on the basis of the evidence it was clear that the document duly executed by the parties is binding, and by the documentary evidence parties intended to create a license therefore relationship of the plaintiff and the defendant is one of Licensor and Licensee and not of Landlord and Tenant and is accordingly not governed by the Landlord and Tenant (Shops, Hotels & Catering Establishment) Act(Cap 301).
- w. The Tribunal misdirected itself by finding that the Appellant’s Preliminary Objection dated 21<sup>st</sup> February 2023 lacked merit without considering that the Licensor and the Licensee entered



into a valid License to Use Agreement dated 20<sup>th</sup> September 2021, therefore the Tribunal had no jurisdiction to hear and entertain the dispute between the parties.

- x. Further to the above, the delay in filing the Appeal was occasioned by the Honourable Tribunal's failure to issue a copy of the written Ruling in time so as to inform the reasons for dismissing the Preliminary Objection dated 21<sup>st</sup> February 2023 and prepare a conclusive Memorandum of Appeal.
- y. The Landlord/Applicant was keen to prosecute the intended Appeal and has brought this instant Application without unreasonable delay.
- z. This Honourable Court should exercise its discretion judicially by admitting the appeal out of time and upholding the provisions of Section 79G of the *Civil Procedure Act*.
- aa. The prosecution of the instant Application will be rendered a mere academic exercise in the event this Honourable Court does not certify this matter as urgent and does not issue leave to appeal out of time.
- ab. The present Application was not in any way intended to cause and delay and/or abuse the process of the Honourable Court.
- ac. The Tenant/Respondent would not be prejudiced should the instant Application be allowed.
- ad. In the interest of justice and fairness that the prayers sought in the instant Notice of Motion be granted as prayed.

#### **IV. The Response to the Notice of Motion application dated 24<sup>th</sup> October, 2023**

- 6. While opposing the application, the Respondent through its Director, UWE MEIXNER, responded through a 15<sup>th</sup> Paragraphed Replying Affidavit sworn on 6<sup>th</sup> December, 2023 where he averred that:
  - a. Application was bad in law and fatally defective.
  - b. In response to paragraph 2 of the supporting affidavit, he averred that he indeed lodged at the Business Premises Rent Tribunal a complaint under Section 12 of the *Landlord and Tenant (Shops, hotels and catering establishments) Act* (CAP 301) seeking in the main for orders that the Applicant be restrained from unlawfully terminating the Applicant's tenancy outside the provisions of the Act and from illegally and forcefully evicting the Tenant from the subject premises. Annexed hereto was a copy of the complaint which was hereby marked as "A."
  - c. In response to Paragraphs 3, 4, 5 and 6 of the supporting affidavit, he averred that the Applicant raised a Preliminary Objection against the said Complaint, which Objection was duly dismissed by the Tribunal through a ruling rendered on the 5<sup>th</sup> June 2023 and thereafter directions for the hearing of the complaint were issued.
  - d. In response to Paragraphs 7 and 8 of the supporting affidavit, he averred that the Applicant sought for a copy of the ruling on the 3<sup>rd</sup> July 2023, which was just short of a month from when the said ruling was rendered.
  - e. There was therefore an inordinate delay on the part of the Applicant.
  - f. In response to Paragraphs 9 and 15 of the supporting affidavit, he averred that the Tribunal not providing its ruling within the timelines that the Applicant was allowed to lodge its appeal.



- g. He averred that the Applicant prepared its draft Memorandum of Appeal of July 2023 and marked as “SS2.” Annexed hereto was a copy of the Supporting Affidavit and the draft Memorandum of Appeal which are both marked as “B.”
- h. The said Memorandum of Appeal was prepared in the absence of the Tribunal's ruling and proceedings.
- i. The lack of the ruling and proceedings therefore could not be deemed to be a cogent reason for failing to file the Appeal timeously.
- j. In response to paragraphs 16 to 24 of the supporting affidavit, he averred that given that the determination by the Tribunal was on a preliminary objection, the Applicant was attempting to argue on issues of disputed facts as a basis of justifying the preliminary objection raised before the Tribunal, hence on an ex-facie basis, the Applicant lacks an arguable appeal.
- k. In response to Paragraphs 25 to 30 of the supporting affidavit, he averred that other than the said inordinate delay in seeking for the ruling, the Applicant further filed this instant Application on the 24<sup>th</sup> October 2023, which was more than four months after the delivery of the ruling, hence there was an inordinate delay on the part of the Applicant.
- l. In the foregoing, the subject Application lacks in merit and the same ought to be dismissed with costs.

## **V. Submissions**

- 7. On 20<sup>th</sup> May, 2024 while all the parties were present in Court, they were directed to have the Notice of Preliminary Objection dated 18<sup>th</sup> September, 2023 and Notice of Motion application dated 24<sup>th</sup> October, 2023 be disposed of by way of written submissions and all the parties complied. Pursuant to that, the Honourable Court would only access the submissions by the Tenant/Applicant. Hence, it proceeded to reserve a ruling date for 25<sup>th</sup> July, 2024. However, due to unforeseen circumstance it was actually delivered on 16<sup>th</sup> October, 2024 accordingly.

### **A. The Written Submissions by the Applicant on the Notice of Preliminary objection dated 18<sup>th</sup> September, 2023**

- 8. The Applicant through the Law firm of Messrs. Anne Wamithi and Company Advocates filed their written submissions dated 23<sup>rd</sup> April, 2023. M/s. Wamithi Advocate submitted that the Applicant had before this Honourable Court for its determination of two applications:-Application dated 24<sup>th</sup> October 2023 seeking leave to appeal out of time against the ruling delivered by the Vice Chairman of the Business Premises Rent Tribunal on 5<sup>th</sup> June 2023 Application dated 26<sup>th</sup> July 2023 seeking stay of execution of the ruling of the Chairman of the Business Premises Rent Tribunal No E012 of 2022 delivered on 5<sup>th</sup> June 2022
- 9. The Respondent was yet to respond to the two Application. Instead, the Respondent opted to raise an objection through filing of a notice of preliminary objection dated 18<sup>th</sup> September 2023 on the ground that the entire proceedings were defective and that the Applicant's Application was in contravention of the provision of Section 15(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments Cap 301. The Respondent's Preliminary Objection never disclosed which of the Applicant's Application.



10. On the law, the Learned Counsel relied on Section 15(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishment Act Cap 301 which provides:-

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:

Provided that the Environment and Land Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.

11. The Learned Counsel further went on to state that they acknowledged the fact that there was delay in filing an Appeal. She averred that the delay which was attributed to the Tribunal's Registry. This was purely an administrative issue. They had since filed an application before this honorable Court to grant leave to enable the Applicant to Appeal out of time the same had not been determined for reasons that there was a pending Preliminary Objection. They beseeched this Honourable Court to exercise its discretion to ensure that justice was served to the Applicant in spite there being procedural technicality, which had been cured, the Applicant had already filed a Record of Appeal and was awaiting this Court's directions for the same to be admitted.
12. On the brief history, the Learned Counsel stated that the Applicant had filed a Reference against the Respondent before the Business Premises Rent Tribunal on the 19<sup>th</sup> January 2023 seeking orders to restrain the Respondent from unlawfully terminating the tenancy and from evicting the Applicant from the suit premises. The Respondent filed a preliminary objection dated 21<sup>st</sup> February 2023 on grounds that the Tenant /Respondent entered into a license agreement with the Landlord therefore the tribunal lacked the jurisdiction. The Applicant's Advocate followed up with the tribunal in order to obtain proceedings that were crucial in filing of an appeal. The proceedings were not availed within the statutory stipulated period to enable the Applicant to lodge an appeal within 30 days.
13. Only part of the ruling was availed by the Tribunal on 7<sup>th</sup> September 2023 despite the fact that the Applicant had followed from the 5<sup>th</sup> June 2023 when the ruling was delivered. The Applicant had prior to that written on numerous occasions wrote to the Tribunal and on the 3<sup>rd</sup> July 2023 the Tribunal responded on the 6<sup>th</sup> July 2023 that the ruling would be ready within 21 days. After the lapse of 21 days, the Applicant's Advocate wrote to the Tribunal on 27<sup>th</sup> July 2023 referencing to the earlier communication to the Tribunal on 6<sup>th</sup> July 2023. That it is only on the 16<sup>th</sup> August 2023 that the Tribunal through its agent directed the Applicant to pay for the ruling through an invoice generated. By 25<sup>th</sup> August 2023 the Tribunal through its agent had not forwarded the ruling and the proceedings.
14. The Applicant wrote to the Tribunal again on the 1<sup>st</sup> September the ruling was availed on 7<sup>th</sup> September 2023 and the ruling did not have all the pages. The Applicant wrote several letters and reminders to the tribunal which were annexed (as 2,3b,4a,7a 8a) to the supporting Affidavit sworn by Tuva Mwachunga in support of the Applicant's Application dated 24<sup>th</sup> October 2023 seeking for leave to file an appeal out of time. The period for delay in filing had been explained and the same was attributed to the Tribunal's delay in availing the certified proceedings and the complete certified copy of the ruling.
15. The Applicant's Advocates were during the period of follow up informed that the file could not be traced and was finally traced in Nairobi. The Tribunal staff thereafter refused to release the file for typing and issuance of the certified copies of the proceedings on the basis that the file had a date and once a date was issued the Registry could not move the file to the typing office/pool. It was on the appeal to the Registrar of Tribunals by the Applicant's Advocate that certified copies of the incomplete



and certified ruling and certified proceedings were directed to be issued to the Applicant's Advocates, the certified ruling and certified proceedings were prepared by the Tribunal registry and released to the Applicant's Advocate on 20<sup>th</sup> February 2024.

16. On the issues for determination, the Learned Counsel relied submitted that the Applicant had since prepared the record of appeal which it is seeking to have the Court admit as the record of appeal in this matter or grants leave for the Applicant to file in the interest of justice.
17. On whether the Respondent's Notice of preliminary objection was merited, the Learned Counsel submitted that a Preliminary objection ought to be on points of law and not on points of facts. Once a Court was invited to make a determination on the issue of facts then it ceased to be a preliminary objection. None of the issues raised were on points of law. The issues herein were on the facts that transpired within the proceedings of the Tribunal after the delivery of the ruling.
18. The Learned Counsel relied on the case of "Mukisa Biscuit Manufacturing Co. Limited – Versus - West End Distributors Limited [1969) EA 696" as cited in "Martha Akinyi Migwambo – Versus - Susan Ongoro Ogenda [2022] eKLR" where the held that

“ 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.”

19. The Learned Counsel submitted that the Applicant had extensively demonstrated and explained the reasons for filing the appeal late which was due to the delay in obtaining proceedings from the Tribunal. Further the Applicant was diligent enough to follow up with the Tribunal through written letters on record in the Applicant's Application dated 24<sup>th</sup> October 2023 together with its supporting Affidavit. The period of delay had been explained, and the Applicant ought not to be blamed for the delay given that the proceedings are prepared by the Tribunal which released the certified proceedings and certified complete ruling after the lapse of the 30 days period of filing an appeal.
20. The delay was occasioned from administrative issues that could be confirmed from the affidavit evidence in the Applicant's supporting Affidavit to the Application dated 24<sup>th</sup> October 2023 and with the Tribunal.
21. To buttress on this point, the Learned Counsel relied on the case of "Njoroge – Versus - Kimani (Civil Application Nai E049 of 2022) [2022] KECA 1188(KLR) (28 October 2022)(Ruling)", where the Court held that:

“ I have evaluated the reason offered for the delay. I find and hold that the delay in obtaining certified proceedings and judgment cannot be faulted on the applicant. I find and hold that the delay is excusable and that it has been satisfactorily explained. I also find that the application meets the tests for the court to exercise its discretion in the applicant's favour. Accordingly, I allow the applicant's application dated February 22, 2022 and order that the intended appeal be filed and served within 30 days from the date of this ruling.”

22. The Learned Counsel contended that the law cited in the Preliminary Objection the provision of Section 15(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishment Act Cap 301) Stipulates that any party to a reference aggrieved by the decision of a Tribunal can Appeal to the Environment and Land Court within 30 days. They had demonstrated before this Honourable



Court that due to the unavailability of the certified ruling and certified proceeding the Applicant was inadvertently unable to meet the stipulated timelines. The Applicant had since moved this Honourable Court to grant leave to file an Appeal out of time. On the Second part Section 15(1) of the Landlords and Tenants Act provides that the Court can extend time if sufficient reasons had been given for the delay.

23. The Learned Counsel averred that the Applicant had demonstrated the explanation for delay and that the preliminary objection ought to be on points of law. None of the issues raised are on points of law. The issues herein are on the facts that transpired within the proceedings of the Tribunal after the delivery of the ruling.
24. The Learned Counsel relied on “Mukisa Biscuit case (Supra)” and further submitted that the Preliminary objection having not disclosed the points of law as required is unmerited and ought to be dismissed.
25. In conclusion they prayed that this Honourable Court dismiss the Respondent's Preliminary Objection with costs to the Applicant and that the Court grants orders in accordance with Applicant's Application dated 24<sup>th</sup> October 2023.

## **VI. Analysis & Determination.**

26. I have carefully read and considered the pleadings herein by the Plaintiff/Applicant, the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
27. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has framed two (2) issues for its determination. These are:-
  - a. Whether the notice of preliminary objection dated 18<sup>th</sup> September 2023 on ground that the entire proceedings are defective and that the Applicant's Application is in contravention of Section 15 (1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments Cap 301.
  - b. Whether the Notice of Motion application dated 24<sup>th</sup> October 2023 seeking leave to appeal out of time against the ruling delivered by the Vice Chairman of the Business Premises Rent Tribunal on 5<sup>th</sup> June 2023 is merited
  - c. Who will bear the Costs of Notice of Motion application dated 26<sup>th</sup> July, 2023, the Notice of Preliminary objection dated 18<sup>th</sup> October, 2023 and the Notice of Motion dated 24<sup>th</sup> October, 2023.

ISSUE No. a). Whether the notice of preliminary objection dated 18<sup>th</sup> September 2023 on ground that the entire proceedings are defective and that the Applicant's Application is in contravention of Section 15 (1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments Cap 301

28. Under this sub – heading, the Honourable Court will examine the meaning, nature and scope of the legal validity of the Preliminary objection and whether it conforms to the required threshold. 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.....”



29. The above legal proposition has been made graphically clear in the now famous case of “Mukisa Biscuits Manufacturing Co Ltd (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”

30. I have further relied on the decision 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:-

- a. A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
- b. 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
- c. The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute

31. 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. From the most of them of the issues and facts of contention in this objection are to be adduced during a full trial. For instance in this case the Respondent contends that the entire proceedings are defective and that the Applicant’s Application is in contravention of Section 15(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments Cap 301. Therefore the Preliminary objection meets the threshold laid - down in law and precedents.

32. On Whether the entire proceedings are defective and that the Applicant’s Application is in contravention of Section 15(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments Cap 301. The provision of Section 15(1) provides:-

“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: Provided that the Environment and Land Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.”

33. The provision of Section 15 above, expressly provides for the forum which appeals from the Business Premises Rent Tribunal lie. It provides that the court with the requisite jurisdiction in this instance is the Environment and Land Court and not the High Court. I am persuaded by the decision of the Supreme Court in in the case of “Republic – Versus - Karisa Chengo & 2 others (Supreme Court



petition No 5 of 2015) 2017 eKLR”, where the Supreme Court pronounced itself as follows with respect to demarcated jurisdiction of the High Court and the Environment and Land Court:-

“Flowing from the above, it is obvious to us that status and jurisdiction are different concepts. Status denotes hierarchy while jurisdiction covers the sphere of the court’s operation. Courts can therefore be of the same status, but exercise different jurisdictions. That is why this court has reaffirmed its position that the jurisdiction of courts is derived from the Constitution or legislation.....

In addition to the above, we note that pursuant to article 162(3) of the Constitution, Parliament enacted the Environment and Land Court Act and the Employment and Labour Relations Act and respectively outlined the separate jurisdictions of the ELC and ELRC as stated above. From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of courts, with sui generis jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal’s decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous courts and exercise different and distinct jurisdictions. As article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.”

34. The Environment and Land Court is therefore equipped to entertain the appeal within 30 days of the intended decision. In the instant case being appealed against was delivered on 5<sup>th</sup> June, 2023 and only part of the ruling was availed by the Tribunal on 7<sup>th</sup> September 2023 despite the fact that the Applicant had followed from the 5<sup>th</sup> June 2023 when the ruling was delivered. The Applicant had prior to that written on numerous occasions wrote to the Tribunal and on the 3<sup>rd</sup> July 2023 the Tribunal responded on the 6<sup>th</sup> July 2023 that the ruling would be ready within 21 days. After the lapse of 21 days, the Applicant’s Advocate wrote to the Tribunal on 27<sup>th</sup> July 2023 referencing to the earlier communication to the Tribunal on 6<sup>th</sup> July 2023. That it is only on the 16<sup>th</sup> August 2023 that the Tribunal through its agent directed the Applicant to pay for the ruling through an invoice generated. By 25<sup>th</sup> August 2023 the Tribunal through its agent had not forwarded the ruling and the proceedings.
35. Further to the provision of Section 15(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Cap 301, stipulates that provided that the Environment and Land Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit. This Court cannot be partisan to defeating the right to a party to appeal on technicalities that were as a result of the Tribunal registry; For these reasons, therefore, the Honourable Court finds the Notice of Preliminary objection unmerited and hereby overruled.

**ISSUE No. b). Whether the Notice of Motion application dated 24<sup>th</sup> October 2023 seeking leave to appeal out of time against the ruling delivered by the Vice Chairman of the Business Premises Rent Tribunal on 5<sup>th</sup> June 2023 is merited.**

36. Under this sub heading, the Honourable Court will decipher to deal on powers of enlargement of time on filing an appeal by the Court. The provision of Section 79G of the Civil Procedure Act, Cap. provides that appeals originating from the subordinate court should be filed within thirty (30) days from the date of the decree or order appealed against. The provision of Section 95 of the said Act gives the court discretion to extend the time as it deems fit even if the time originally fixed has expired.



37. The provision of Section 79G of the *Civil Procedure Act*, cap. 21 provides as follows:-

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

38. While the provision of Section 95 of the *Civil Procedure Act*, Cap. 21 provides thus: -

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

39. The principles to be considered in exercising the court’s discretion on whether or not to enlarge time to file appeal were set out in the case of “Leo Sila Mutiso – Versus - Rose Hellen Wangeri Mwangi Civil Appeal 255/ 1997”, the court, in considering the exercise of discretion to extend time, held as follows: -

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court takes into account in deciding whether to grant an extension of time are first, the length of the delay. Secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”

40. These principles were also reiterated in the case of:- “First American Bank of Kenya Ltd – Versus - Gulab P. Shah & Others HCC 2255/2000 [2002] IEA 65” as follows: -

- 1) The explanation if any, for the delay;
- 2) The merits of the contemplated action, whether the appeal is arguable;
- 3) Whether or not the respondent can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the applicant.

41. I will therefore proceed to address each of the limbs outlined in the above mentioned cases and establish whether the Applicant has satisfactorily met each of the said principles. The length of the delay and the explanation if any. The present application was filed on the 24<sup>th</sup> October, 2023 after the tribunal delivered its ruling on the Notice of Preliminary objection on 5<sup>th</sup> June, 2023. The Applicant has given an explanation for the 21 days delay since the delivery on 5<sup>th</sup> June, 2023.

42. The Applicant contends that the delay was caused by the Honourable Tribunal only pronounced itself as to its final finding and did not read the entire Ruling and it informed them that a copy would be availed to the Parties in the course of the week, but that was not the case. Desirous to appeal against the Ruling dated 5<sup>th</sup> June 2023 of the Vice-Chairman of the Honourable Tribunal, the Landlord/Applicant, followed up with the Tribunal for issuance of a copy of the Ruling dated 5<sup>th</sup> June 2023 from the date it was delivered but was not successful. As a result, the Landlord/Applicant through their agents wrote to the Honourable Tribunal for a copy of the Ruling on 3<sup>rd</sup> July 2023 to enable it to prepare a conclusive Memorandum of Appeal and the Tribunal responded on 6<sup>th</sup> July 2023 that



- the Ruling would be ready within 21 days from the said date. After 21 days, on 27<sup>th</sup> July 2023 the Landlord/Applicant through their agents wrote to the Honourable Tribunal again referring to the email dated 6<sup>th</sup> July 2023 requesting for a Copy of the Ruling in order to prepare the Memorandum of Appeal and the Tribunal responded that the file was in court on the said date, directing the Landlord/Applicant through their agents to follow up with an email in the afternoon. On 16<sup>th</sup> August 2023, the Tribunal directed the Landlord/Applicant through their agents to pay for a copy of the Ruling as per the Invoice generated on our e-filing portal, the Landlord/Applicant through their agents proceeded to make payments as directed, generated a receipt and shared it with the Tribunal on the same day.
43. The Applicant further contended that on 25<sup>th</sup> August 2023, having not received any response from the Tribunal, the Landlord/Applicant through their agents proceeded to write a reminder by an email dated 25<sup>th</sup> August 2023 making reference to the email correspondence of 16<sup>th</sup> August 2023; the Invoice and the E-receipt demonstrating payment with the aim of obtaining a copy of the Ruling but the said email did not elicit any response from the Tribunal. Through sheer persistence, on 1<sup>st</sup> September 2023, Landlord/Applicant through their agents wrote to the Tribunal once more urgently requesting for a copy of the Ruling dated 5<sup>th</sup> June 2023 to enable the Landlord/Applicant prepare a conclusive Memorandum of Appeal and the Tribunal responded by requesting the Landlord/Applicant through their agents to collect the same in their offices. On the same date, 1<sup>st</sup> September 2023, the Landlord/Applicant through their agents wrote to the Tribunal seeking clarification whether the copy of the Ruling was available at Mombasa Business Premises Rent Tribunal Registry for collection but Tribunal failed to clarify the directions. Finally, on 7<sup>th</sup> September 2023 the copy of Ruling was made available by the Tribunal through the E-filing portal and via email but the said Ruling issued to the Landlord/Applicant is an incomplete copy further delaying the filing of the Appeal by restricting the Landlord/Applicant from referring to the Tribunal's reasons for dismissing the Preliminary Objection dated 21<sup>st</sup> February 2023.
44. In response to the same, the Respondent averred that he indeed lodged at the Business Premises Rent Tribunal a complaint under Section 12 of the *Landlord and Tenant (Shops, hotels and catering establishments) Act*, Cap. 301 seeking in the main for orders that the Applicant be restrained from unlawfully terminating the Applicant's tenancy outside the provisions of the Act and from illegally and forcefully evicting the Tenant from the subject premises. Annexed hereto is a copy of the complaint which is hereby marked as "A."
45. The Applicant sought for a copy of the ruling on the 3<sup>rd</sup> July 2023, which is just short of a month from when the said ruling was rendered. There was therefore an inordinate delay on the part of the Applicant. In response to Paragraphs 9 and 15 of the supporting affidavit, he averred that the Tribunal not providing its ruling within the timelines that the Applicant was allowed to lodge its appeal. He averred that the Applicant prepared its draft memorandum of Appeal of July 2023 and marked as "SS2." Annexed hereto is a copy of the Supporting Affidavit and the draft memorandum of Appeal which are both marked as "B." The said Memorandum of Appeal was prepared in the absence of the Tribunal's ruling and proceedings. The lack of the ruling and proceedings therefore cannot be deemed to be a cogent reason for failing to file the Appeal timeously.
46. Even though there is no maximum or minimum period of delay set by the law, anyone seeking this relief must satisfactorily explain the cause of the delay. See the case of:- "Andrew Kiplagat Chemaringo – Versus - Paul Kipkorir Kibet [2018] eKLR".
47. From the delivery of the ruling to the filling of the application seeking to stay the execution of the decision pending the appeal was 21 days; and from the ruling being appeal against to filling of this application which was filed on 24<sup>th</sup> October, 2023 for leave to file appeal out of time should be about



4 months' delay. This in my view does not amount to inordinate delay. Furthermore, the explanation given by the Applicant is sufficient and I therefore find that the Application was filed without undue delay.

**ISSUE No. c). Who will bear the Costs of the Notice of Preliminary objection dated 18<sup>th</sup> October, 2023 and the Notice of Motion dated 24<sup>th</sup> October, 2023.**

48. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh – Versus - Tarchalan Singh” eKLR (2014) and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, eKLR (2014).
49. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.
50. In this case, this Honourable Court has reserved its discretion in not awarding costs.

**VII. Conclusion & Disposition**

51. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, this court arrives at the following decision and makes orders below:-
- a. That the Notice of preliminary objection dated 18<sup>th</sup> October, 2023 be and is hereby found to lack merit and hereby overruled.
  - b. That the Notice of Motion application dated 24<sup>th</sup> October, 2023 is found to have merit is hereby allowed in its entirety
  - c. That this Honourable Court do and hereby issues an order granting leave to the Landlord/ Applicant to file an appeal out of time against the Ruling dated 5<sup>th</sup> June 2023 delivered by the Vice Chairman of the Business Premises Rent Tribunal.
  - d. That for expediency sake, the Applicant granted 30 days leave to have compiled, filed and served the Record of Appeal.
  - e. That the matter to be fixed for mention on 3<sup>rd</sup> December, 2024 for purposes of admission of the Appeal; taking directions on the disposal of the Appeal under the provision of Sections 79B & G of the *Civil Procedure Act*, Cap. 21 and Order 42 Rules 11, 13 and 16 of , 2010 of Civil Procedure Rules, 2010.
  - f. That there shall be no orders as to costs.

IT IS SO ORDERED ACCORDINGLY.

**RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 16<sup>TH</sup> DAY OF OCTOBER 2024.**

.....

**HON. MR. JUSTICE L. L. NAIKUNI,**



## **ENVIRONMENT AND LAND COURT AT MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. Mr. Hassan Advocate for the Tenant/Respondent.
- c. Mr. Isika Advocate holding brief for M/s. Wamithi Advocate for the LandLord/ Applicant.

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