Mjad Investment Limited & another v Fujita Corporation Kenya Branch (Environment & Land Case 71 of 2022) [2023] KEELC 16376 (KLR) (7 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16376 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 71 OF 2022

LL NAIKUNI, J

MARCH 7, 2023

BETWEEN

MJAD INVESTMENT LIMITED ..... 1ST PLAINTIFF

SEMIX ENTERPRISES LIMITED ..... 2ND PLAINTIFF

AND

FUJITA CORPORATION KENYA BRANCH ..... DEFENDANT

RULING

I. Introduction

1. This ruling is on a Notice of Preliminary Objection dated July 6, 2022 raised by "Fujita Corporation Kenya Branch", the Defendant herein. The objection is based on the following grounds: -

    a. That the Environment and Land Court has no jurisdiction with respect to this matter as the tenancy between the parties falls within the provisions of the *Landlord and Tenants (Shops, Hotels and Catering Establishment) Act*, Chapter 301 Laws of Kenya ("the Act"). The Instant proceedings are therefore null and void. See the case of "*Kaka Mohamed – Versus - Mohamed Ali* [2018] eKLR".

    b. That it is not in dispute that the Defendant/Respondent has been on the premises for a period of two years without a written lease and thus the Defendant/Respondent is classified as a controlled tenant within the provisions of the Act.

    c. That the above notwithstanding, the draft and unsigned Lease annexed by the Plaintiff/ Applicant was for a term of two years and thus the proper forum to institute the proceedings is the Business Premises Rent Tribunal established under section 11 of the Act.

d. That the Application and suit have been brought in clear disregard of the above statutory provisions and the same are an abuse of the Court process and ought to be dismissed. See order 2 Rule 15(d) of the *Civil Procedure Rules*.

II. Submissions

2. On the July 7, 2022, when this matter came up for directions, the parties agreed to canvass the said preliminary objection by way of written submissions. Pursuant those directions given by the Court, the parties fully complied by the time the court retired to write this ruling.

A. The written submission by the Defendant/Objectors

3. On August 8, 2022, the Counsels for the Defendant/Objectors the Law firm of Messrs Aluvale & Company Advocates filed their Written Submissions dated July 28, 2022. M/s Linda Luvale Advocate stated that the submissions were made in support of the Defendant/Respondent's (hereinafter "the Defendant") Notice of Preliminary Objection dated July 6, 2022 ("the Preliminary Objection").

4. The Learned Counsel submitted that the Defendant's sole issue for determination was whether the Honorable Court has the jurisdiction to hear and determine the Plaintiff/Applicant's (hereinafter "the Plaintiff") suit against the Respondent. In that regard they submitted that it was not in dispute that the parties herein entered into an oral agreement in which the Plaintiff allowed the Defendant to occupy the suit property. This said oral agreement was to precede formalization of a written tenancy agreement. This was confirmed and fortified by the fact that the Plaintiff forwarded a draft lease agreement to the Defendant for its consideration and concurrence. To this end, the Defendant invited this Honourable Court to consider the contents made out under Paragraph 5 of Joseph Mwella's Supporting Affidavit sworn on June 28, 2022 which stated as follows:

> " That, thereafter, in or about the month of August 2020, copies of the draft lease documents were drawn up by the Plaintiffs and exchanged with the Defendant for their input, approval and execution; hereto annexed as a bundle marked "D" are copies of the correspondence between the parties as well as the draft lease document."

5. The Learned Counsel submitted that pursuant to the said oral agreement, the Defendant with the Plaintiff's consent took occupation of the suit property. Subsequently, the parties actively engaged in negotiations and the Defendant communicated its willingness to sign the written lease agreement subject to the Plaintiff's ownership of the suit property being confirmed. Consequently, the allegation that the Defendant was a trespasser holds no basis and indeed, any question regarding the Defendant's tenancy status on the suit property did not arise. This position was held in case of:- "*Mohamed Abdalla A Shikely & 8 Others vs Mohamed Abdalla Salim* [2014] eKLR where the Court held:-

> " Trespass is an authorized or unlawful entry upon land. However, where a landowner gives a person permission either by consent or by a licence, such an entry cannot amount to trespass."

6. The Learned Counsel submitted further in the case of:- "*Kahunga Gathii – Versus - Ruth Njeri Karungo* [2021] eKLR the court held that:

> " As long as there is consent to entry it stops being trespass. The Respondent by operation of the lease had the Appellant's consent to gain ingress into the land."

7. The Learned Counsel submitted that in addition to the above, it was also not in dispute that the Defendant had been on the suit property for a period of two (2) years without a written lease. In view of this, they submitted that the ELC has no jurisdiction with respect to this matter as the tenancy between the parties falls within the provisions of the *Landlord and Tenants (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya* ("the Act"). Section 2(1) of the Act defines a "controlled tenancy" to mean, 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;

8. The Learned Counsel submitted that in view of the above provision, there was no doubt that the tenancy between the Plaintiff and the Defendant was a controlled tenancy for the following reasons that the tenancy between the parties was not reduced into writing and even if the Court was to find that the draft and unsigned lease was applicable, the same was for a period of two years and thus the tenancy squarely fell under the provisions of Section 2(b)(1) of the Act. As the Defendant had satisfied the conditions set out in Section 2 of the Act, the present suit had been irregularly filed before this Honourable Court.

9. In support of this point thereof, they relied on the case of:- "*Al – Riaz International Limited – Versus - Ganjoni Properties Limited* [2015] eKLR where the Court stated that:

> "…….if a tenancy satisfies any of the conditions provided at section 2, the tenancy automatically becomes a controlled one and subject to the provisions of Cap 301 and it does not matter whether the parties had agreed that the provisions of Cap 301 shall not apply to their relationship."

10. It was the Learned Counsel's submission that while there were a plethora of decided caselaw on this subject which they shall not overburden the Honourable Court with, they hasten to nevertheless highlight and relied on the following relevant case law below.

11. The Learned Counsel further relied on the case of "*Kaka Mohamed – Versus - Mohamed Ali* [2018] eKLR, the Court held 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.
>
> ……. I think the position now is clear. And the position is that while this court has general jurisdiction to handle matters relating to tenancy, the first port of call where the tenancy in question is a controlled one is a tribunal set up under The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act cap 301. Such matter can only be entertained by this court on appeal."

12. Additionally, the Learned Counsel cited the case of: "*Ola Energy Kenya Limited – Versus - Rashid Opondo Otieno t/a Kisumu Breakdown Services Limited* [2021] eKLR, the Plaintiff filed suit against the Defendant and alleged that he was a trespasser on the suit property. The Court however found that because the Defendant's tenancy agreement was not reduced into writing, he was a controlled tenant. The Court further held as follows:

> " The Environment and Land Court only acts as an appellate court at Section 15 of the Act to hear appeals from decisions of the tribunal. Hence the Environment and Land Court is not a court of first instance in matters dealing with controlled tenancy but purely as an appellate court. The case before this court is not an appeal but an initial case hence this curt lacks jurisdiction.
>
> Jurisdiction is everything, and where a court or tribunal lacks jurisdiction, it cannot proceed with the matter but down its tools."

13. The Learned Counsel further submitted that in the case of: " *Alice Wanjiru Mwaura T/A Jaliwa Printers and Stationers – Versus Polychem (EA) Limited* [2015] eKLR, the Court deferred the dispute to the Business Premises Rent Tribunal, and the Plaintiff ought to file the necessary reference for relief from the said Tribunal. It held that:-

> " This Court notes that the issues in dispute in this application are the nature of the Plaintiff's occupation of the Defendant's premises, and any rent due or owing by the said parties. In this regard the Court notes that section 2(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act defines a controlled tenancy to includes a tenancy of a shop, hotel or catering establishment that has not been reduced into writing, and therefore the determination of the issue whether the Plaintiff's occupation of the suit premises falls within this category falls within the jurisdiction of the Business Premises Rent Tribunal.
>
> In addition, if the tenancy is found to be a controlled tenancy, the issue of any rent due and owing and recovery of such rent will also fall within the jurisdiction of the Tribunal as stated in Section 12 (1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act."

14. The Learned Counsel averred that in view of the foregoing, the Application and suit had been brought in clear disregard of the law. The Business Premises Tribunal was the proper forum to determine the issues raised in relation to occupation of the suit property and the rent owing, if any. As such, the Application and suit were an abuse of the Court process and ought to be dismissed with costs and in accordance with the provision of Order 2 Rule 15 (d) of the *Civil Procedure Rules, 2010*.

15. The Learned Counsel urged the Court to find that the suit filed by the Plaintiff against the Defendant be struck out in its entirety.

B. The Plaintiff's Submissions

a. On August 12, 2022, the Learned Counsels for the Plaintiff the Law firm of Messrs Oloo & Chatur Advocates for the filed their written submissions dated August 11, 2022. Mr Busieka advocate stated that the vide the Plaint dated June 28, 2022, the Plaintiffs herein and who at all material times to the suit herein were the undisputed registered owners of the suit properties herein, to wit, LR No 5273/VI/MN and LR No 5274/VI/MN, filed the instant case seeking the following orders against the Defendant, in summary:-

a). An order of permanent injunction to issue barring the Defendant from entering trespassing, encroaching onto, alienating or in any other way dealing with the properties aforesaid.

b). An order of mandatory injunction to issue directing the Defendant to remove all equipment illegally brought onto and/or constructed on the suit properties aforesaid.

c). An order for mense profits calculated at Kshs 584,000/- (Kenya Shillings Five Hundred Eighty-Four Thousand) per month from January 2020 until the handing over of vacant possession of the occupied portion of the suit property.

d). An order for General damages.

e). An order for costs of the suit and interest thereof.

f). Any other or further relief at the Court's instance.

16. The Learned Counsel submitted that the Plaint was filled alongside an application dated June 28, 2022 brought under a Certificate of urgency and supported by an affidavit detailing the factual background of the dispute herein; and it was instructive to note that the Defendant had neither filed a Defence herein nor a Replying Affidavit to the application aforesaid, and thus, the only facts disclosed and uncontroverted were those set out by the Plaintiffs in their pleadings, and which could be summarized as follows; that

a. The Plaintiffs were the undisputed registered owners of the suit properties herein as evidenced by copies of the titles thereto filed at page 5 – 8 of the Plaintiffs' List of Documents lodged in court on June 30, 2022 (hereinafter "the list").

b. In or about the month of January 2020, the Defendant encroached onto a portion of the suit property and began using the same as "lay down area" for equipment and works related to a road construction project they are currently undertaking in the area.

c. On becoming aware of the aforesaid trespass, the Plaintiffs and the Defendant engaged in negotiations to allow the latter to regularize their occupation thereon on a portion measuring 1.6 Ha for a lease period of two (2) years commencing on the March 1, 2020 on a monthly rent of a sum of Kenya Shillings Five Eighty Four Thousand (Kshs 584,000/-) including two months rent security deposit; copies of the emails exchanged between the parties to that effect were captured at page 9 – 11 of the list.

d. Thereafter, a draft lease was drawn up and circulated between the parties (see pages 12 – 30 of the list) but the Defendant refused to endorse the same, prompting the Plaintiffs to write a letter dated the November 20, 2022 to the Defendant asking them to comply or leave the suit property; the letter is found at page 31 of the list.

e. Vide their response dated December 4, 2020 (see page 33 – 34 of the list), the Defendant purported that they could not finalise the transaction ostensibly as the suit property did not belong to the Plaintiffs, allegedly the same, having since been acquired by the Government.

f. In rejoinder thereto, the Plaintiffs responded to the letter vide their letters dated the December 7, 2020 and January 31, 2020 clarifying their true ownership credentials and demanding that the Defendant either proceeds to execute the lease failure to which they should vacate the suit premises; copies of the aforesaid letters are captured at pages 35 – 47 of the list.

g. Despite the concise clarification given, the Defendant, again by letter dated the March 4, 2022 made it clear to the Plaintiffs that they still disputed the Plaintiffs true ownership of the suit

properties and were thus not in a position to execute the lease documents; the letter was at pages 48 and 49 of the list.

h. It was therefore crystal clear that, the instant suit was preferred by the Plaintiffs against the Defendant, who was indisputably occupying and using the suit property and who was actively denying the Plaintiffs entitlement to the suit land, on the one hand, yet on the other hand, and in the same breath, was now purporting to be a tenant by seeking refuge in legal technicalities that were not backed up by the disclosed facts of the dispute.

i. They reiterated that, the Defendant ought not to be allowed to take this Honourable Court for a ride by misrepresenting obvious facts and relying on inapplicable law solely with a view of delaying the hearing and determination of the suit herein on merits while she continued to occupy and use the suit property.

17. The Learned Counsel submitted that contrary to the Defendant's assertions and submissions lodged before this Court, this Honourable Court was clothed with the requisite jurisdiction to hear and determine this suit on the basis of the fact that, the disclosed dispute touched on the occupation, use and title to the suit property. The Preliminary Objection herein did not in any way meet the threshold set out under the law as the same constitutes of matters that need the interrogation of the court by calling evidence as they were not pure points of law for termination.

18. The Learned Counsel relied on the famous Court of Appela case of:- "*Owners of the Motor Vessel "Lillian S" -Versus - Caltex Oil (Kenya) Limited* (1989) eKLR at page 8, of the decision, jurisdiction was everything and it was reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter was then obliged to decide the issue right away on the material before it. It is their humble submissions that, on the material before it, to wit, the plaint, list of documents, witness statements, supporting affidavits filed herein along side the motion for interlocutory reliefs, there can be no doubt that this court is properly seized of the jurisdiction to hear and determine the dispute subject matter herein as it invariably touches on the occupation, use and title of the suit property in question.

19. On the issue of the jurisdiction of the ELC to hear and determine the subject dispute, the Learned Counsel submitted that the jurisdiction of this Honourable Court is donated by dint of the provision of Articles 162(2)(b) and 165(5)(b) of the *Constitution of Kenya 2010*, Section 13(2)(d) of the *ELC Act* as well as Section 150 of the *Land Act*. Article 162(2)(b) of the *Constitution of Kenya 2010* stipulates that parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the Environment and use and occupation of, and title to, land , while on the other hand, Article 165(5)(b) thereof fortifies the power of the ELC Court aforesaid by providing that the High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the Courts contemplated in Article 162(2).

20. The Learned Counsel submitted that Section 13(1) and (2)(d) of the *ELC Act* stipulates that, the Court shall have original and Appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of the Act or any other written law relating to environment and land, including private land such as is the subject matter of the case herein. Under Section 150 of the *Land Act 2012*, it is provided that the ELC established in the *ELC Act* is vested with exclusive jurisdiction to hear and determine disputes, actions and proceedings concerning land under the Act.

21. The Learned Counsel submitted that in a blatant attempt to distort facts pleaded by the Plaintiffs in this court, the Defendant is now alluding to a non- existent tenancy relationship between the parties in a desperate attempt to oust the Honourable Court's jurisdictions to hear and determine this case,

and they humbly submitted that, the position ought not to be countenanced by the Court by dint of the following reasons:

i. At no material time to this suit have the Plaintiffs unconditionally recognized the Defendant as a lawful tenant on the suit property; if anything, from the documents provided, the Plaintiffs have always maintained that the Defendant is a trespasser who either has to regularize her occupation and use of the subject portion of the suit land, or failure of which they must vacate the land forthwith.

ii. As the documents provided by the Plaintiffs evince, the Defendant has refused to sign the tenancy documents drawn to regularize her position on the subject land, and has now taken the position that the Plaintiffs are not the lawful owners of the suit property with whom they are capable of entering into a valid and binding agreement, whether to lease or otherwise.

iii. Now that the instant suit has been lodged, the Defendant, and quite paradoxically, is claiming tenancy rights from the Plaintiffs, and whose title they are disputing; and they submitted that these contrasting and contradictory positions adopted by the Defendant are an abuse of the due process of court and should invite the court's sanction.

iv. From the evidence and material before court, what is disclosed is not a tenancy dispute in the circumstances, but a pure case regarding the uninvited, illegal use and occupation of the suit property by the Defendant to the detriment of the Plaintiff and which dispute falls squarely by within the ambit of the ELC as duly constituted and mandated under the applicable laws herein above stated.

22. On the issue of whether the Preliminary Objection as drawn an d contemplated meets the threshold set down under the law, the Learned Counsel submitted that commenting on the nature of a preliminary objection, the Court in the case of "*George Owino Mulanya & 4 Others – Versus - Charles Achieng Odonga & Another* (2017) eKLR (and citing with the approval the decision in the case of:- "*Mukisa Biscuit Manufacturing Co Limited – Versus - West End Distributors Ltd* (1969) EA 696) at paragraph 4 of page 2 thereof observed that;

> " A preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained, that should dispose of the matter. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law."

23. The court further stated that:

> " Thus a preliminary objection may only be raised on a "pure question of law." To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.
>
> In law, a question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law.[10] Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts.
>
> In law, a question of fact, also known as a point of fact, is a question that must be answered by reference to facts and evidence as well as inferences arising from those facts. Such a question is distinct from a question of law, which must be answered by applying relevant

legal principles. The answer to a question of fact (a "finding of fact") usually depends on particular circumstances or factual situations."

24. The Learned Counsel submitted that in a nutshell and as per the decision in the now famous case of "*Mukisa Biscuit* case (*Supra*), not only must it be raised on a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct, but it cannot be pleased if any fact has to be ascertained or what is sought is the exercise of Judicial discretion. In the instance, the preliminary objection raised is premised on the unascertained and unproved allegations of the existence of a tenancy agreement between the parties. That a cursory glance at the pleadings lodged inn Court will reveal that, the dispute between the parties is not based on any tenancy relationship but has been caused by the alleged illegal occupation and use of the suit property by the Defendant, and who has refused to enter into a tenancy/lease agreement by dint of the unproved fact that the Plaintiffs are not the true owners of the suit property.

25. The Learned Counsel submitted that in the circumstances, the issue as to whether there exists a valid tenancy relationship between the parties has not been ascertained, that the same has not been unequivocally revealed in the pleadings lodged in court so far as for it to be determined as an non-contested issue by the parties and thus, the subject of the existence or non- existence of the alleged tenancy relationship is up in the air requiring proof by evidence and in the premises, the issue cannot form the basis of a preliminary objection as set out under the law.

26. The Learned Counsel concluded by stating that they are constrained to revisit the wise counsel proffered by the Venerable Sir Charles Newbold P in the *Mukisa* Case (supra) where he opined that;

> "The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issues, and this improper practice should stop."

27. The Learned Counsel submitted that this Honourable Court ought not to be drawn into the exercise of confusing the issues that are manifestly clear for determination as disclosed in the pleadings lodged herein and proceed to find that, the notice of preliminary objection is devoid of any merit and that it is a proper candidate for dismissal with an order for attendant costs.

III. Analysis and Determination

28. I have considered the Notice of Preliminary Objection by the Defendant and the rival submissions, the cited authorities and the relevant provisions of the *Constitution of Kenya, 2010* and the Statutes thereof.

29. In order to reach informed, Just, fair and reasonable decision, the Honorable Court has framed three (3) issues for its determination. These are:-

    a. Whether the objection raised by the Defendant/Objector herein meets the threshold laid - down in law and precedents.

    b. Whether this Honorable Court has the jurisdiction to deal with the suit in question, as a preliminary objection.

    c. Who will meet the Costs of the objection raised.

30. 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....."

31. The above legal preposition has been made graphically clear in the now famous case of *Mukisa Biscuits Manufacturing Co Ltd –VS- West End Distributors Ltd* [1969] EA 696. 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"

32. 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*:-

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.

33. 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 that the Defendant contends that the Environment and Land Court has no jurisdiction with respect to this matter as the tenancy between the parties falls within the provisions of the *Landlord and Tenants (Shops, Hotels and Catering Establishments) Act*, CAP 301 Laws of Kenya. The instant proceedings are therefore null and void and referred the Court to the case of *Kaka Mohamed vs Mohamed Ali* [2018] eKLR.

34. Now turning to the issue of jurisdiction of the Environment and Land Court to hear and determine issue concerning land, the Defendant has raised a preliminary objection that it has been on the premises in dispute for a period of two years without a written lease and thus the tenancy between the Plaintiffs and the Defendant is a controlled tenancy pursuant to the provisions of the section 2 of the *Landlord and tenant (Shops, Hotels and catering Establishment Act*) Cap 301 Laws of Kenya and therefore this court lacks statutory Jurisdiction to entertain the dispute as the dispute is within the jurisdiction of the Business Premises Rent Tribunal.

35. I have perused the plaint, supporting affidavit, replying affidavit on record and do find that there is an allegation of a relationship of tenant/Landlord between the plaintiff and the Defendant though the same is not reduced in writing. The Plaintiffs failed to address themselves to this. They instead went far and wide to invoke other statutes that do not specifically deal with Landlord/Tenant relationship and only addressed the issue of encroachment which affirms the claim by the Defendant that this was a controlled tenancy. The Plaintiff was wrong. The issue of jurisdiction was all about controlled tenancy.

36. Such disputes are within the consent of the *Landlord and tenant (shops, Hotels catering establishment Act* Cap 301 Laws of Kenya. Section 2 of Cap 301 provides:

> " 2. (1) For the purposes of this Act, except where the context otherwise requires –"controlled tenancy" means a tenancy of a shop, hotel or catering establishment which has not been reduced into writing; or which has been reduced into writing and which is for a period not exceeding five years; or contains provision for termination, otherwise than for breach of covenant, within five years from theMcommencement thereof; or(iii) relates to premises of a class specified under subsection (2) of this section: Provided that no tenancy to which the Government, the Community or a local authority is a party, whether as landlord or as tenant, shall be a controlled tenancy; ....."shop" means premises occupied wholly or mainly for the purposes of a retail or wholesale trade or business or for the purpose of rendering services for money or money's worth; "tenancy" means a tenancy created by a lease or under-lease, by an agreement for a lease or under-lease, by a tenancy agreement or by operation of law, and includes a sub-tenancy but does not include any relationship between a mortgagor and mortgagee as such; "tenancy notice" means a notice given under subsection (2) or subsection (3) of section 4 of this Act; "tenant" in relation to a tenancy means the person for the time being entitled to the tenancy whether or not he is in occupation of the holding, and includes sub-tenant;"

37. The Plaintiffs admit that this lease agreement between themselves and the Defendant was not reduced into writing hence under the above provisions it is clear that it was a controlled tenancy.

38. The Defendant's argument being hat being a controlled tenant by virtue of section 2 of the *Landlord and Tenant (shops, hotels & catering establishments) Act* cap 301 the appropriate form for determination of the question of eviction of a controlled tenant is the business premises rent tribunal established by section 11 of the said act. The powers of the tribunal are spelt out in section 12 which at section 12 (e) includes to make order, upon such terms and conditions as it thinks fit, for the recovery of possession. The process of terminating a controlled tenancy is also enumerated under the provision of Sections 4, 6 & 7 of the Act of which the Plaintiffs has not complied with.

39. 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.

40. It was the wrong approach taken up by the Plaintiffs to come to this court first. They should have gone to the tribunal. In the case of "*Joseph Njuguna Mwaura & Others – Versus - Republic*: CA Cr Appeal No 5 of 2008, Nairobi (Yes, the matter is instructive even it is a criminal one) the Learned Judges expressed themselves as follows:

> "In our understanding, Courts have no jurisdiction in matters over which other arms of government have been vested with jurisdiction to act".

41. Further, in the Case of: "*Alice Mweru Ngai – versus - Kenya Power & Lighting Co Limited*: ELC Case No 287 of 2014, Kerugoya [2015] eKLR the court observed thus:

> "...it would be an un-warranted intrusion into the jurisdiction of another organ if this court were to purport to handle this dispute ..." "proper procedures provided for in the hierarchy of dispute resolution are to be followed and that the organs mandated to arbitrate over such dispute be respected and allowed to perform their statutory responsibilities. That is why those procedures were formulated and such organs established".

42. It is my own view that, the position now is clear. And the position is that while this court has general jurisdiction to handle matters relating to tenancy, the first port of call where the tenancy in question is a controlled one is a tribunal set up under The *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* cap 301.

43. The Environment and Land Court only acts as an appellate court at section 15 of the Act to hear appeals from decisions of the tribunal. Hence the Environment and Land Court is not a court of first instance in matters dealing with controlled tenancy but purely as an appellate court. The case before this Court is not an appeal but an initial case hence this court lacks jurisdiction.

44. As it is now well established, Jurisdiction is everything, and where a court or tribunal lacks jurisdiction, it cannot proceed with the matter but down its tools. See the celebrated case of *Motor Vessel MV Lillians* (supra) at page 10;

> "The purpose of sub- judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter-------When two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to "Jurisdiction must be acquired before judgment. It is for this reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on evidence before the court. It is immaterial whether the evidence is scanty or limited...the moment the court determines that it has no jurisdiction it has to down its tools and proceed no further."

45. On the same breath, the supreme court rendered itself in the case of "*Samuel Kamau Macharia & Ano – Versus - KCB and 2 Others* Supreme Court Civil Application no 2 of 2011 that a court's jurisdiction flows from either the *constitution* or legislation or both. In this case, the tenancy in question being a controlled one, the appropriate forum to ventilate any dispute ought to be the Business Premises Rent Tribunal and not this court.

46. Accordingly is it the humble submission of the Defendant that the Court finds that it lacks statutory jurisdiction to hear this case and proceed to strike out the suit with costs to the Defendant. A submission the Plaintiffs did not contend but only went ahead to affirm the position of the same by submitting that the Defendant has encroached and was to enter into a lease agreement with them but had not put it into writing.

Issue c) Who bears the Costs of the Objection

47. The issue of Costs is at the discretion of the Costs. Costs mean any award that is granted to a party at the conclusion of a legal action, proceedings and/or process of any litigation. The proviso of the Section 27 (1) holds that costs follow the event. By event herein it means the results of the said legal action, proceedings and/or process.

48. In the Instant case the objection succeeds and therefore the Defendant is entitled to the Costs.

VI. Conclusion & Disposition

49. In the long run, after conducting an indepth analysis of the framed issues, I agree entirely with the reasoning in the above decisions and caselaw cited by the Defendant which are in all fours with the instant case. As such I find that this matter is not ripe for this Court. I hold that the suit or parties can only come to this Court on appeal from the decision of the Business Premises Rent Tribunal but not before. It is premature. Specifically, I find and hold as follows:-

    a. That the Notice of Preliminary Objection dated July 6, 2022, by the Defendant be and is hereby allowed as it is meritorious.

    b. That an order be and

    c. Is hereby made to have the suit instituted before this Court by the Plaintiff be struck out with costs to the Defendant.

    d. That costs to be borne by the Defendant herein

    It Is So Ordered Acordingly.

RULING DELIVERED, SIGNED AND DATED AT MOMBASA THIS 7TH DAY OF MARCH, 2023.

HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIROMNENT AND LAND COURT AT

MOMBASA

In the presence of:

a. M/s. Yumna, Court Assistant.

b. Mr. Busieka Advocate for the Plaintiff.

c. M/s. Linda Luvale Advocate for the Defendant