



REPUBLIC OF KENYA



Barrack v Anyach (Civil Case E005 of 2024) [2025] KEHC 12043 (KLR) (12 June 2025) (Ruling)

Neutral citation: [2025] KEHC 12043 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY**

CIVIL CASE E005 OF 2024

OA SEWE, J

JUNE 12, 2025

BETWEEN

EUNICE AWUOR BARRACK PLAINTIFF

AND

DANCUN ANYACH DEFENDANT

RULING

1. This suit was filed on the 17th November 2024 by the plaintiff, Eunice Awuor Barrack. She prayed for general damages as well as an order reinstating her as a tenant of the defendant, Dancun Anyach, and to compel the defendant to release her business items unlawfully confiscated by the defendant. The plaintiff explained that sometime in the month of August 2021, she entered into a tenancy agreement with the defendant at a monthly consideration of Kshs. 12,000/= . She added that she paid the monthly rents as agreed until the month of May and June 2023 when, due to a robbery that occurred in the demised premises, she was unable to pay rent for the two months.
2. The plaintiff's cause of action was that, on the 5th June 2023, the defendant, without any lawful justification, invaded the demised premises and damaged shelves before taking away assorted business items and personal property, all worth about Kshs. 700,000/=; and that the defendant was threatening to dispose of the property by way of auction, thereby prompting the filing of Homa Bay Chief Magistrate's Civil Case No. E092 of 2023. She averred that the orders made in that suit formed the genesis of the instant suit.
3. Upon being served with the Complaint and Summons to Enter Appearance, the defendant filed a Notice of Preliminary Objection dated 8th December 2024, contending that:
 - a. The Court lacks jurisdiction to hear and determine this suit.
 - b. The suit offends the provisions of Sections 2, 6, 12 and 15 of the [Landlord and Tenant \(shops, Hotels and Catering Establishments\) Act](#), Cap 301 of the Laws of Kenya and the [Landlord](#)



and Tenant (Shops, Hotels and Catering Establishments) (Tribunal) (Forms and Procedure) Regulations, 1966.

4. Directions were thereafter given on 18th March 2025 that the Preliminary Objection be canvassed by way of written submissions. and although the defendant complied and filed written submissions dated 31st March 2025, the plaintiff did not. The defendant submitted that the facts as they were before the lower court have not changed; and therefore the dispute falls within the jurisdiction of the Business Premises Rent Tribunal, established under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. The defendant relied on Owners of Motor Vessel Lillian "S" v Caltex Oil (Kenya) Limited [1989] eKLR and Samuel Kamau Macharia v Kenya Commercial Bank & 2 others, Civil Appl. No. 2 of 2011 among other authorities to underscore the argument that a court of law can only exercise jurisdiction as conferred by the Constitution or statute.
5. The defendant further relied on Section 15 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act for the submission that any appeals from the Tribunal can only be filed before the Environment and Land Court as opposed to the High Court. He therefore urged the Court to uphold the Preliminary Objection and dismiss this suit with costs for want of jurisdiction.
6. In her oral submissions made on 18th April 2025, the plaintiff reiterated that this is a dispute between a tenant and landlord in respect of a shop at Rodi Kopany. She pointed out that the matter was before the lower court where a ruling was made on 31st October 2024 to the effect that the lower court lacked the jurisdiction to entertain it. The parties were accordingly referred to the High Court because the landlord/tenant relationship was no longer there. The plaintiff expressed the conviction that the matter is before the correct forum.
7. In the case of Mukisa Biscuits Manufacturers Ltd v West End Distributors Ltd [1969] EA 696, it was well-stated that a preliminary objection consists of:

“...a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection 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.

...

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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 is the exercise of judicial discretion.”

8. Therefore, although the plaintiff filed a Replying Affidavit herein, sworn by her on 10th January 2025 to which he annexed a copy of the Judgment of the lower court, it is impermissible for the Court to place reliance on such evidence for purposes of determining a preliminary objection. This point was made by Hon. Ojwang, J. (as he then was) as follows in Oraro v Mbaja [2005] 1 KLR 141, Hon. Ojwang, J. (as he then was) made the point that:

“...The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual



aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed...Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."

9. The purposes of a preliminary objection was explicated by the Supreme Court in *Independent Electoral & Boundaries Commission v Cheperenger & 2 others* (Civil Application 36 of 2014) [2015] KESC 2 (KLR) (15 December 2015) (Ruling), as follows:

“...The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits...”

10. In the premises, the instant Preliminary Objection, to the extent that it is based on jurisdiction, was validly taken. Therefore, the issue for determination is whether the Court has the requisite jurisdiction to hear and determine this suit.

11. It is now trite law that jurisdiction is everything and without it, a court must down its tools. In *The Owners of Motor vessel Lillian ‘S’ v Caltex Kenya Limited* [1989] KLR 1 the Court held:

“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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

12. Moreover, in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, the Supreme Court pointed out that:

“(68) A Court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant)*, Constitutional Application Number 2 of 2011. Where the *Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the *Constitution*. Where the *Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the



legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law...”

13. The jurisdiction of the High Court is provided for in Article 165(3) of the Constitution thus:

- (3) Subject to clause (5), the High Court shall have—
- a. unlimited original jurisdiction in criminal and civil matters;
 - b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - c. jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - d. jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - i. the question whether any law is inconsistent with or in contravention of this Constitution;
 - ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - iv. a question relating to conflict of laws under Article 191; and
 - e. any other jurisdiction, original or appellate, conferred on it by legislation.

14. In the same vein, Article 165(5)(b) of the Constitution states in peremptory terms that:

(5) The High Court shall not have jurisdiction in respect of matters: -

...

b) Falling within the jurisdiction of the courts contemplated in Article 162(2).

15. Moreover, Section 13 of the Environment and Land Court Act, 2011, an Act of Parliament enacted pursuant to Article 162(2) of the Constitution, states as follows with reference to the jurisdiction of the Environment and Land Court:

1. 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 this Act or any other law applicable in Kenya relating to environment and land.
2. In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes-
 - a. relating to environmental planning and protection, climate issues, land use, planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources.
 - b. relating to compulsory acquisition of land;



- c. relating to land administration and management;
- d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interest in land; and
- e. any other dispute relating to environment and land.

16. The suit is in connection with a tenancy and the parties are in agreement that the demised premises comprise a shop. Therefore, the suit ought to have been filed before either the Business Premises Rent Tribunal or the Environment and Land Court. This is because Section 15 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* provides that:

“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.

(2) In hearing appeals under subsection (1) of this section the Court shall have all the powers conferred on a Tribunal by or under this Act, in addition to any other powers conferred on it by or under any written law.

...

(4) The procedure in and relating to appeals in civil matters from subordinate courts to the Environment and Land Court shall govern appeals under this Act:

Provided that the decision of the Environment and Land Court on any appeal under this Act shall be final and shall not be subject to further appeal.”

17. It is therefore immaterial that the lower court ordered that the suit be filed before the High Court; for jurisdiction cannot be conferred by judicial craft. In *Republic v Chief Land Registrar & another* [2019] eKLR Hon. Mativo, J. held that:

“ 14. The jurisdiction of the Environment and Land Court is limited to the disputes contemplated under Article 162(2)(b) of the *Constitution* and Section 13 of the *Environment and Land Court Act*. In this regard, my view is that the intention of the *Constitution* is that if an issue arises touching on land in respect of its use, possession, control, title, compulsory acquisition or any other dispute touching on land, then this Court has no jurisdiction. My strong view is that this suit ought to have been transferred to the proper court the moment the *Constitution* of Kenya 2010 divested this court the jurisdiction to hear the case. Buttressed by the provisions of the *Constitution* and section 13 of the *Environment and Land Court Act*, I am clear in my mind that this court cannot properly entertain the application before me.

15. It is beyond argument that a High Court may not determine matters falling squarely under the jurisdiction of the Employment and Labour Relations Court and the Land and Environment Court, whether it is a substantive hearing or an application such as the instant application.

...



17. Where the Constitution and legislation expressly confers jurisdiction to a court as in the present case, invoking this courts vast jurisdiction is inappropriate. The jurisdictional boundaries of the High Court are clearly spelt out under the Constitution...”
18. Similarly, in Delmonte Kenya Limited v County Government of Murang'a & Another [2019] eKLR a multiple bench of the High Court held that:
- “89. In the end we find and hold that the dominant issue in the petition is the right to renewal of leases over the suit land. We further find that the issue is intrinsically connected to the use and title to land. The dispute thus falls squarely within the purview of the ELC under Article 162(2) of the Constitution as read with Section 13 of the ELC Act...”
19. Having found that the suit was filed in a court without jurisdiction to entertain it, it cannot be transferred to the Environment and Land Court. The Supreme Court of Kenya restated the position in Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) [2019] eKLR, thus:
- “(153) ...the purposive reading and interpretation of Article 162 together with Article 165(5) of the Constitution leaves no doubt that the original and appellate jurisdiction over disputes related to Employment and Labour relations was transferred from the High Court to the Employment and Labour Relations Court. Prima facie, that meant that, any dispute subject to any other statutory or constitutional limitations emanating from the disputes contemplated under Article 162(2) *supra*, must be determined by the Employment and Labour Relations Court. This is what may have informed the consent by parties through respective counsel to transfer the matter from the High Court to the Employment and Labour Relations Court.
- (154) However, as it was well elucidated in the case of *Kagenyi v Musirambo & Another* (1968) EALR 43, an order for transfer of a suit from one court to another cannot be made unless the suit has been brought, in the first instance, to a court which has jurisdiction to try it. It is therefore irrelevant as parties cannot consent to confer jurisdiction to a Court/tribunal where it is not provided by law.”
20. Likewise, in Phoenix of EA Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR, the Court of Appeal held:
- “Decided cases on this issue are legion and we cannot cite all of them...The Court succinctly settled this point in the following words:-
- “When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being *Kagenyi v. Musirambo* (1968) EA 43. The same would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the court’s pecuniary jurisdiction.



We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing."

20. It is clear from the foregoing that the claim by the respondent was filed before a court devoid of jurisdiction. The suit was a nullity ab initio and was not transferable to another court; jurisdiction cannot be conferred by consent and ultimately, all orders emanating from that suit are null and void. Civil Appeal No. 6 of 2018 *Phoenix East Africa Assurance Co.ltd v. S.m. Thiga T/a Newspaper Services* is therefore a nullity as it was based on a nullity." (also see *Boniface Waweru Mbiyu v Mary Njeri & Tai Yun Hwang*, Misc. Application No. 639 of 2005 [2005] eKLR)
21. In view of the above, the Preliminary Objection dated 8th December 2024 is hereby upheld with the result that this suit is hereby struck out for want of jurisdiction. Each party to bear their own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT HOMA BAY THIS 12TH DAY OF JUNE 2025

SIGNED BY: HON. LADY JUSTICE OLGA A. SEWE

HOMABAY HIGH COURT

