



**Fuks v Cotswold Estate Limited (Environment and Land Case  
E078 of 2024) [2025] KEELC 5840 (KLR) (16 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 5840 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT AND LAND CASE E078 OF 2024**

**LL NAIKUNI, J  
JUNE 16, 2025**

**BETWEEN**

**JURGEN FUKS ..... PLAINTIFF**

**AND**

**COTSWOLD ESTATE LIMITED ..... DEFENDANT**

**RULING**

**I. Introduction**

1. The Honourable Court was called upon to make a determination onto the Notice of Motion application dated 3<sup>rd</sup> December, 2024 by Jurgen Fuks, the Plaintiff/Applicant herein. It was brought under the provisions of Order 40 Rules 1, 2, 3 and 4 of the Civil Procedure Rules, 2010, Sections 1A,1B, and 3A of the *Civil Procedure Act*, Cap. 21, the Inherent Jurisdiction of the Court and all other enabling provisions of the law. Additionally, the Court was also called upon to determine the Notice of Preliminary objection dated 3<sup>rd</sup> February, 2025 raised by Cotswold Estate Limited, the Defendant herein.
2. Upon service of the Notice of Motion application, the Defendant responded through a Replying Affidavit sworn on 10<sup>th</sup> March, 2025 while the Plaintiff filed a further affidavit sworn on 19<sup>th</sup> March, 2025 and another further affidavit sworn on the same day in response to the Replying Affidavit and the Notice of Preliminary Objection.

**II. The Plaintiff/Applicant's case**

3. The Applicant sought for the following orders: -
  - a. Spent.
  - b. Spent.



- c. That pending the hearing and determination of the suit, an order of injunction be granted restraining the Defendant by themselves, their servants, employees and/or agents from evicting the Plaintiff from the two acres being a portion of all that parcel of land known as Kwale/Diani/63 and interfering with the Plaintiff's quiet and peaceful occupation of the property and operation of business enterprise known as Shakatak Discotheque.
  - d. That the costs of this application be provided for.
4. The application by the Applicant was premised on the grounds, facts and testimony on the face of the application and the averments made under the 20 Paragraphed Supporting affidavit of JURGEN FUKS, the Plaintiff herein. The Deponent averred that:
- a. He was the sole proprietor of a business enterprise known as Shakatak Discotheque situated on parcel of land known as Kwale/Diani/63. Annexed and marked as "JF - 1" was a copy of the Certificate of Registration of the business enterprise.
  - b. The Defendant was the registered leasehold proprietor of the said parcel of land known as Kwale/Diani/63 with effect from 1<sup>st</sup> August, 1945 until August, 2023 when the lease expired by effluxion of time. Annexed and marked as "JF - 2" was a copy of a letter from Ministry of Lands indicating that the lease was expired.
  - c. On the said property the Defendant operated a hotel business known as Diani Sea Lodge on the larger part leaving part thereof in his possession and occupation in the circumstances explained herein under.
  - d. While the Defendant was still the registered leasehold proprietor of the suit property, he entered into an oral agreement with them, through one Mr. Gerhard Mathiessen who was a director of the Defendant, who sub-leased a portion of the said property measuring approximately 2.0 acres in size at a consideration of a monthly rent of a sum of Kenya Shillings Sixty Thousand (Kshs. 60,000/-).
  - e. It was on the said approximately 2.0 acres that he resided and operated his said business known as Shakatak Discotheque.
  - f. Sometimes in January 2006, the Deponent and Defendant represented by their director, Mr. Gerhard Mathiessen, entered into a gentleman's agreement that the deponent increased the monthly consideration from a sum of Kenya Shillings Sixty Thousand (Kshs. 60,000/-) to sum of Kenya Shillings Eighty Thousand (Kshs. 80,000/-) which he dutifully paid. Annexed and marked as "JF - 3" was a copy of payment receipts showing proof of payment.
  - g. By a mutual understanding, the increment was for the purposes of paying and/or compensating the Defendant so that when it came to their time to renew their lease with the Government of Kenya, they would cede their right to the approximately 2.0 acres in his possession and occupation and they would support of his bid to have the said portion of approximately 2.0 acre registered in his name as a direct lessee of the Government of Kenya.
  - h. Based on the assurance and/or representation by the Defendant and on the strength of the increased monthly consideration which he had religiously paid, he made substantial investment on the approximately 2.0 acres with the expectation that the same would ultimately be registered in his name as a lessee of the Government of Kenya.



- i. As shown in paragraph 14 herein below, the leasehold between the Defendant and the Government of Kenya expired by effluxion of time on August, 2003 and the same had not been renewed.
- j. In the circumstances ownership of the said parcel of land known as Kwale/Diani/63 reverted to the government and was available for allocation to any individual who successfully applied for the same or part thereof and met the requirements of the government for the purposes of registration.
- k. On or about 9<sup>th</sup> March, 2006, he submitted an application to the Ministry of Lands (now the Ministry of Lands, Housing & Urban Development) seeking allocation of the said approximately 2.0 acres of the property under the former Government Lands Act. Annexed and marked “JF – 4” was a copy of a letter to the Ministry of Lands submitting the application.
- l. When he failed to receive any response, he filed an application seeking information regarding the status of parcel no. Kwale/Diani/63. This application – “HC Misc. Application No. 13 of 2018, Jurgen Fuks – Versus - Attorney General and Land Registrar Kwale”, was marked as settled after the Defendant presented documents in court indicating that the property had reverted to the Government of Kenya. Annexed in the Affidavit were copies of the said documents mark the same as annexure as “JF - 5”.
- m. Despite the property having reverted to the government, the Defendant herein had served him with a notice of termination of lease dated 17<sup>th</sup> October, 2024 of Plot known as Kwale/Diani/63 purporting to evict the Plaintiff. Annexed and marked as “JF - 6” was a copy of notice of termination dated 17<sup>th</sup> October, 2024.
- n. Vide a letter dated 24<sup>th</sup> October, 2024, he informed the Defendant herein that he would not comply with the said notice as the Defendant had no locus standi to issue the same since its lease had expired. Annexed and marked as “JK – 7” was a copy of the letter dated 24<sup>th</sup> October, 2024.
- o. The deponent had not given up on his bid and endeavors to be registered as the lease of the Government of Kenya in respect of the approximately 2.0 acres that were in his possession and occupation and he was still following up with the relevant authorities.
- p. If the Defendant was not restrained from evicting him and/or in any manner interfering with his quiet possession and enjoyment of the part of Plot No. Kwale/Diani/63 to which he was making a claim, the Defendant made the threat in their notice for termination good he would lose his residence together with his means of livelihood and he would be rendered destitute occasioning him irreparable loss and damages.
- q. On the other hand the Defendant who had not been in occupation and/ or actual possession of the approximately 2.0 acres which he was making a claim to would not be prejudiced by the orders sought and in any case any damages that they may suffer should it turn out that the orders ought not to have issued can be compensated by a monetary award of damages.
- r. On the other hand, the Defendant who had not been in occupation and or actual possession of the approximately 2.0 acres which the Deponent was making a claim to will not be prejudiced by the orders sought and in any case any damages that they may suffer should it turn out that the orders ought not to have issued can be compensated by a monetary award of damages.



- s. Considering that there was no landlord – tenant relationship between the Deponent and the Defendant, the Deponent verily believed that it was in the interest of justice that this Honourable Court grant the orders sought.

### **III. Response to the Notice of Motion application dated 3<sup>rd</sup> December, 2024**

5. The Defendant responded to the Application through a 17 paragraphed replying affidavit sworn on 10<sup>th</sup> March, 2025 by HARALD KAMPA, one of the Directors of the Defendant where he averred that:-
- a. The Plaintiff had been a tenant of the Landlord for over 20 years in premises known as Shakatak Disco developed by the Defendant on its plot No. Kwale/ Diani Beach Block /63. He filed Mombasa ELC Petition No. 17 of 2019 which was subsequently transferred to the Environment & Land Court, Kwale, as Petition No. 4 of 2021 demanding to be allocated 2 acres to be excised from that plot. Shakatak Discotheque is within the 2 acres the Plaintiff claimed in that Petition. The Petition was found to have no merit and was dismissed with costs. A copy of that Judgment was in annexed to the Plaintiff's Supporting Affidavit sworn on 3<sup>rd</sup> December, 2024. The Plaintiff had not paid their costs in that Petition.
  - b. The Plaintiff, falsely believing that he was entitled to the ownership of the property refused to pay rent. He also used force by way of hired goons in preventing the Defendant from constructing a perimeter wall around the property.
  - c. The Defendant instructed an auctioneer to levy distress but we did not recover anything. The Plaintiff had filed Mombasa Chief Magistrate Misc. Cause No. E947 of 2021 to prevent distress for rent and he had admitted that he was in arrears of rent totaling to a sum of Kenya Shillings One Million Two Hundred Thousand (Kshs.1,200,000.00/) from March 2020. The Plaintiff had not paid any rent since but he refused to vacate the property.
  - d. The Plaintiff filed Mombasa Chief Magistrate Suit No. 375 of 2021 seeking similar orders against Diani Properties Limited but that too was struck out with costs which he has not paid. Cotswold Estate Limited was fully owned by Diani Properties Limited and the deponent was and is still one directors of Diani Properties Limited which had been managing the property.
  - e. Further to the above the Plaintiff filed "Mombasa High Court Civil Suit No. E025 of 2022 – Versus - Cotswold Estates Limited, Diani Properties Limited and Joel Titus Musya T/A Makuri Auctioneers" arising out of distress of rent he was claiming an aggregate of a sum of Kenya Shillings Sixty Four Million Nine Ninety Nine Thousand Two Seventy Hundred (Kshs.64,999,270.00/=). They challenged jurisdiction and the Plaintiff eventually withdrew that suit with costs through his advocate's letter dated 10<sup>th</sup> January, 2025. Their advocates wrote to the Plaintiff's advocates on 13<sup>th</sup> January, 2025 tabulating their costs in the sum of Kenya Shillings One Million One Twelve Thousand Nine Seventy One Hundred (Kshs.1,112,971.00/=). Those costs had not been paid.
  - f. They had lost the challenge to jurisdiction in HCCC No. E025 of 2022 referred to above and they appealed to the Court of Appeal in Civil Appeal No. E097 of 2023. With the withdrawal of the suit the appeal would be allowed automatically. The Plaintiff would be unable to pay costs in that appeal.
  - g. Their Advocates served a Landlord's Notice upon the Plaintiff under the provision of Section 4 (5) of the Landlord and Tenant (Shops Hotels and Catering Establishments) Act to terminate



the tenancy and gave him 2 months to vacate with effect from 31<sup>st</sup> October, 2024 terminating on 31<sup>st</sup> December, 2024. In response to that Notice the Plaintiff instructed his Advocates on record, Messrs. Gikandi & Co. who wrote to their advocates on 24<sup>th</sup> October, 2024 informing their advocates that the Plaintiff would not comply with the Notice and asking for a copy of the Title documents for the property.

- h. Further to the above on 9<sup>th</sup> December, 2024 the Plaintiff filed a Reference in this Honourable Tribunal in which it described Cotswold Estate Limited as “previous Landlord”. Cotswold Estate Limited has always been the Plaintiff’s Landlord. The Plaintiff refused to recognize the Defendant’s title even though the Plaintiff had filed an earlier Reference at Nairobi, No. 68 of 2006 which was also dismissed.
- i. With regard to the Plaintiff’s position that the Defendant was not the Landlord and he stated as follows: -
  - i. The Government had approved their application for extension of lease by letter from the Commissioner of Lands dated 9<sup>th</sup> May, 2000. Cotswold Estate Limited complied with the conditions for the extension of lease and they were granted an extension of 50 years from 1<sup>st</sup> May, 1999 scheduled for expiry on 30<sup>th</sup> April, 2049. The Tenant had relied on that letter in the Petition in the Environment & Land Court.
  - ii. Cotswold Estate Limited was eventually given the Certificate of Lease for the said property dated 24<sup>th</sup> July, 2024 for a term of 50 years from 1<sup>st</sup> May, 1999. The reasons the Tenant relied upon for refusal to pay rent are therefore not valid.

These matters were the subject of the Judgment in Kwale ELC Petition No.4 of 2021 and it was a gross abuse of the process of Court and severe misconduct for the Plaintiff’s advocate to continue re-litigating the same issue.
- j. They had suffered heavy losses as they could not use the property or lease it to someone else. The Plaintiff was unable to pay rent and appeared to be bankrupt. He was ordered to pay costs in Mombasa Chief Magistrate Misc. Application No. 375 of 2021 in the sum of Kenya Shillings Six Thirteen Thousand Six Twenty Nine Hundred (Kshs. 613,629.00/=) but was unable to pay it saying that he was struggling and offered to settle it in monthly instalments of a sum of Kenya Shillings Twenty Thousand (Kshs. 20,000.00/=). He had not paid a single instalment to date.
- k. The last time they received any money from the Plaintiff was on 13<sup>th</sup> March, 2020 when he paid a sum of Kenya Shillings Eighty Nine Thousand Six Hundred (Kshs. 89,600.00/=). Even at that time he was still in very heavy arrears. On their calculations the arrears now stood at a sum of Kenya Shillings Seventeen Million Eight Sixty Three Thousand Four Ninety Five Thousand and Thirty Cents (Kshs. 17,863,495.30/=). A sum of Kenya Shillings Kenya Shillings Eighty Nine Thousand Six Hundred (Kshs. 89,600.00/=) per month from March 2020 to January 2024 was a sum of Kenya Shillings Five Million One and Seven Thousand Two Hundred (Kshs. 5,107,200.00/=) based on what the Plaintiff claimed to be the monthly rent. They would like him to immediately pay that amount before he could be permitted to enter Shakatak Discotheque. He admitted that he had not paid any rent from March 2020. To continue using the property without payment of arrears of rent and to continue to accrue more rent per month is a violation of their right to property guaranteed by Article 40 of *the Constitution*.
- l. In addition to the failure or refusal to pay rent, the Plaintiff had exposed them to heavy legal costs in the suits he filed in the Magistrate’s Court at Mombasa and in the High Court in



Mombasa. As he was bankrupt they had no chance of recovering costs. He had nothing of value upon which we can levy distress to recover the rent that continues to accrue on a monthly basis and he had nothing that we can attach to execute the orders for their costs in the various suits that he filed and lost.

- m. They could not maintain the Plaintiff in their property as he had no means of paying the arrears of rent and the default was continuing. It was for that reason that they sought an order to strike out this suit and the costs to be paid by the Plaintiff's advocates.
- n. As the issue was pending before the Tribunal and the question of ownership was settled by the Judgment of this Court in ELC Petition No. 4 of 2021 this Honourable Court had no jurisdiction and should strike out the suit with costs to be paid by the Plaintiff's advocate for the reasons already given.
- o. Copies of all the documents except the Reference to the Tribunal were in his affidavit sworn in Mombasa BPRT Tribunal Case No. E283 of 2024 on 20<sup>th</sup> January, 2025.

#### **IV. Notice of Preliminary Objection by the Defendant**

- 6. The Defendant objected to the suit and the Application dated 3<sup>rd</sup> December, 2024. They raised an objection on the grounds that: -
  - a. Prayers (a) and (c) in the Plaint dated 3<sup>rd</sup> December, 2024 were for a declaration that the Notice by the Defendant dated 17<sup>th</sup> October, 2024 terminating the Plaintiff's lease was null and void.
  - b. Prayer (b) in the Plaint dated 3<sup>rd</sup> December, 2024 was for a declaration that the Defendant was neither the proprietor nor the Lessor of the property comprised in Title No. Kwale/Diani/63 and had therefore no capacity to serve a notice upon the Plaintiff terminating the tenancy.
  - c. Prayer (d) of the Plaint dated 3<sup>rd</sup> December, 2024 was for an injunction to restrain the Defendant from interfering with the Plaintiff's quiet and peaceful possession and occupation of property comprised of Title No. Kwale/ Diani/ 63 on the false allegation that the Defendant is not the proprietor of the property and had no capacity to serve notice of termination.
  - d. The Plaintiff and his advocates were aware before the filing of the suit that this Honourable Court in its Judgment given and Decree passed on 1<sup>st</sup> December, 2023 in "Kwale ELC Petition No. 4 of 2021 (formerly Mombasa ELC Petition No. 17 of 2019) had declared and found that the Defendant's lease was extended for a period of 50 years from the year 1999 thereby settling the issue of ownership conclusively and dismissing the Plaintiff's Petition with costs. The Defendant will refer to Paragraph 12 of the Plaint, second to the last paragraph of the Plaintiff's Witness Statement and a copy of the Judgment in that Petition annexed to the Supporting Affidavit sworn by the Plaintiff on 3<sup>rd</sup> December, 2024. The Judgment had not been set aside or varied.
  - e. The question of ownership having been determined by this Court in the said Petition rendered this suit "res judicata" as the same Court could not sit on appeal against its own decision so as to alter, by way of a suit, the Judgment in the said Petition.
  - f. Prayers (a), (c) and (d) were based on the false allegation in prayer (b) that the Defendant was not the proprietor of the suit premises. The Plaintiff and his Advocate knew that allegation to be false and were guilty of gross misconduct.



- g. The Plaintiff had pleaded that the Defendant served him with the Notice to Terminate Tenancy under the provisions of Section 4 (5) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*. This Court has no jurisdiction on that notice as the Notice was the subject of Mombasa BPRT Case No. E283 of 2024 between the same parties.
- h. Having annexed a copy of the Judgement in Kwale ELC Petition No. 4 of 2021 to the Affidavit sworn by the Plaintiff on 3<sup>rd</sup> December, 2024 in support of his application for orders of injunction and having averred in Paragraph 12 that Petition No. 17 of 2019 (Kwale ELC Petition No. 4 of 2021) was dismissed the Plaintiff and his advocate knew that the Defendant was the owner of the suit premises. Accordingly the Verifying Affidavit and Supporting Affidavit drawn by Gikandi & Company Advocates and sworn by the Plaintiff was false on the question of ownership of property comprised in Title No. Kwale/Diani/63. The Plaintiff and his Advocate were therefore guilty of perjury and sub - ordination of perjury. The Court could not determine this suit based on false affidavits.
- i. This suit should accordingly be struck out with costs to be paid by the Plaintiff and his Advocate jointly and severally.

#### **V. Further Affidavits by the Plaintiff**

7. The Plaintiff filed an 8 Paragraphed further affidavit sworn on 19<sup>th</sup> March, 2025 by Jurgen Fuks opposing the Defendant's Replying Affidavit dated 10<sup>th</sup> March, 2025 and Preliminary Objection dated 3<sup>rd</sup> February, 2025 where the Deponent averred: -
  - a. On or about 9<sup>th</sup> March, 2006, the deponent submitted an application to the Ministry of Lands seeking allocation of the suit premises in his name as the leasehold between the Government and the Defendant had expired by effluxion of time on August, 2003. Annexed and marked a copy of the said application letter as annexure as 'JF-1'.
  - b. As he failed to receive any response, he filed an application seeking information regarding the status of Parcel No. Kwale/Diani/63 being "HC Misc. Application No. 13 of 2018 Jurgen Fuks – Versus - Attorney General and Land Registrar Kwale. However, the said application was marked as settled after the Defendant presented documents in court indicating the said property had reverted to the Government of Kenya. Annexed and marked as annexure 'JF-2' and 'JF-3' respectively a copy of the letters dated 25<sup>th</sup> October, 2007 and 29<sup>th</sup> October, 2007.
  - c. The Defendant stated that its lease was renewed based on a letter dated 9<sup>th</sup> May, 2000, purportedly extending the lease for 50 years from 1999, and a certificate of lease dated 24<sup>th</sup> July, 2024. However, the Defendant had failed to annex any actual lease document or an application for the said lease extension. Additionally, the Deponent was not aware of any ground status report having been conducted prior to the alleged lease extension. This raises serious concerns about how a lease allegedly extended in 1999 resulted in the issuance of a certificate of lease only in 2024, over 24 years later. Furthermore, the Defendant had never produced any evidence of an application for the said lease extension, the lease document itself, or a ground status report to justify its claim.
  - d. The Deponent stated that the jurisdiction of the Business Premises Rent Tribunal was limited cases where a landlord-tenant relationship exists. In this matter, no such relations applied, as the property on which the suit premises was situated reverted to the Government in 2003.



- e. Consequently, a fundamental question arose as to whether the Defendant had any legal right to demand rent from the deponent, given that its lease had not be renewed. As this issue fell outside the jurisdiction of the Business Premises Re Tribunal and could not be effectively raised or determined therein, the Deponent was justified in filing this suit in the court herein.
  - f. The Deponent therefore believed that his application was well merited.
8. Additionally, the Plaintiff filed a 10 Paragraphed further affidavit sworn on 19<sup>th</sup> March, 2025 by Mr. Gikandi Ngibuini, an Advocate of the High Court of Kenya having been admitted to the bar in the year 1984 and practicing under the name and style of Gikandi & Company Advocates, in conduct of this matter on behalf of the Plaintiff who deponed that: -
- i. As far as he was concerned, he had conducted several matters relating to the disputes between the parties herein in the best interest of his client without any fear or favour and he promised that he would continue to represent him in the same manner as long as he retained his instructions in the said disputes.
  - ii. He also recalled in another matter, namely – “Malindi ELC No. 220 of 2015, Tropicana Hotels Limited – Versus - SBM Bank (Kenya) Limited whereby Tropicana Hotels Limited” borrowed some money from SBM Bank (Kenya) Limited, that in that case, Mr. Kinyua Kamundi had always represented the Plaintiff while he represented the Defendant.
  - iii. That the attempts by SBM Bank (Kenya) Limited to recover its monies from Tropicana Hotels Limited had been thwarted through many suits and applications that Tropicana Hotels Limited had filed namely “Malindi ELC No. 220 of 2015, Tropicana Hotels Limited – Versus - SBM Bank (Kenya) Limited, Malindi COA Civil Appeal No. 9 of 2019; “Tropicana Hotels Limited – Versus - SBM Bank (Kenya) Limited and Malindi High Court Commercial Cause No. E018 of 2024; “Tropicana Hotels Limited – Versus - SBM Bank (Kenya) Limited and another”. Copies of the Judgements and Ruling in the said matters were in the affidavit annexed and marked as annexures ‘GN-1’, ‘GN-2’ and ‘GN-3’.
  - iv. In fact, the decision in the Environment and Land Court described Tropicana F Limited’s denial that it owed money and/or that it executed a valid charge and further charge document as a cock and bull story. In all these attempts, Mr. Kinyua Kamundi had passionately defended the interests of Tropicana Hotels Limited.
  - v. Although the Counsel disagreed with the unreasonable position taken by Mr. Kinyua Kamundi in the said matters, he yet respected his position since as an Advocate of the High Court of Kenya, he expected him to defend the position of his client to the best of his ability. Hence, he had not resulted in applying to have Mr. Kinyua Kamundi investigated either by the Law Society of Kenya or the Director of Criminal Investigations because he believed that to do so was to introduce a very dangerous precedent whereby parties would use such an opening for the purpose of intimidating certain Advocates with the fear that they would be persecuted on account of the Advocate’s conduct for their matters.
  - vi. If the price to pay to uphold the freedom of expression, particularly in their courts would required that he faced any investigation at the request of Mr. Kinyua Kamundi and his client, then he was ready to do so.
  - vii. His only appeal was that if this became the norm, then he prayed that Mr. Kinyua Kamundi should be ready to receive the same treatment in the Tropicana/SBM matter.



- viii. The Defendant commenced the action by issuing the notice to vacate. That triggered the filing of the reference at the Business Premises Rent Tribunal being Mombasa BPRT Tribunal Case No. E283 of 2024 and this case.
- ix. If in the event the Defendant and his advocate were of the view that the actions taken by the Plaintiff were not valid or proper, the Defendant should apply to strike out the suit as they have done but not result to harassment and intimidation of the Plaintiff and his advocates’.

## **VI. Submissions**

9. On 25<sup>th</sup> March, 2025 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 3<sup>rd</sup> December, 2024 and Notice of Preliminary Objection dated 3<sup>rd</sup> February, 2025 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and on 24<sup>th</sup> April, 2025 the Learned Counsels Mr. Gikandi and Mr. Kinyua Advocates were accorded an opportunity to highlight their submissions a duty they executed with high standards of professionalism, dedication, devotion, diligence, decorum and resilience. The Honourable Court was sincerely grateful to them for depicting mentor ship to the young personalities in this noble profession whatsoever.
10. Thereafter, a ruling date was reserved for 10<sup>th</sup> June, 2025 by Court accordingly. However, due to unavoidable circumstances it was eventually delivered on 16<sup>th</sup> June, 2025.

### **A. The Written Submissions by the Plaintiff/Applicant**

11. The Plaintiff/Applicant through the Law firm of Messrs. Gikandi & Co. Advocates filed their written submissions dated 19<sup>th</sup> March, 2025. Mr. Gikandi Advocate commenced his submission by providing Court on all the pleadings filed by each parties hereof. He stated that the Defendant had raised a Preliminary, Objection dated 3<sup>rd</sup> February, 2025, seeking to bar both the hearing and determination of the suit filed herein and the Plaintiff’s Notice of Motion application dated 3<sup>rd</sup> December, 2024. However, the Plaintiff contended that the said Preliminary Objection was devoid of merit as it failed to meet the established legal threshold. The objections raised therein necessitate an in-depth inquiry into factual issues, contrary to the well-settled principle that a Preliminary Objection must be confined strictly to matters of pure points of law, capable of being determined without reference to evidence.
12. The Learned Counsel averred that for a preliminary objection to succeed the following tests ought to be satisfied: firstly, it should raise a pure point of law. Secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A preliminary objection must be on a point of law. The Court of Appeal in the case of “Mukisa Biscuit Manufacturing Co. Ltd – Versus - West End Distributors Ltd [1969]EA 696 at page 700 paragraphs D-F” as cited in “Martha Akinyi Migwambo – Versus - Susan Ongoro Ogenda [2022]eKLR” stated thus: -

“A Preliminary Objection is in the nature of what used to be à demurrer. 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 is the exercise of judicial discretion.”



13. The Learned Counsel submitted that they further relied on the decision in “Civil Suit No. 85 of 1992 Oraro – Versus - Mbaja [2005]1 KLR 141” as cited in “Deepak Lalchand Nichani – Versus - Kenya Revenue Authority & another [2021]eKLR” where the court stated thus:

“ .... I think the principle is abundantly clear. A ‘preliminary objection’, correctly understood, is now well identified 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 process of evidence. Any assertions which claims to be preliminary objection, and 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.”
14. The Defendant stated that the present suit was “res judicata”, arguing that the issue of ownership of the property known as Kwale/Diani/63, where the suit premises was constructed on a portion of two (2) acres excised therefrom, was conclusively determined in “Kwale ELC Petition No.4 of 2021: Jurgen Fuks – Versus - The Attorney General & Others”. In the Judgment delivered on 1<sup>st</sup> December, 2023 by Hon. Justice A.E. Dena, the court held that the lease between the Government and the Defendant had allegedly been renewed for a period of fifty (50) years from the year 1999. However, the same Judgment found that the failure by the Commissioner of Lands to respond to the Plaintiff’s application for allocation of the suit premises violated national values.
15. According to the Learned Counsel, it was evident that the issue of ownership was not conclusively determined as critical and unresolved matters remain, including the legality and validity of the purported lease extension. The Plaintiff stated that the leasehold expired by effluxion of time in August 2003. The Plaintiff, having noted that the Defendant had failed to renew the lease, applied for allocation of the two (2) acres of land where the suit premises stood on 9<sup>th</sup> March, 2006 to the Ministry of Lands but received no response despite several follow-ups. This prompted the filing of “HC Misc. Application No. 13 of 2018: Jurgen Fuks – Versus - Attorney General & Land Registrar Kwale”, seeking information regarding the status of the said parcel of land. The said application was marked as settled when the Defendant therein presented letters dated 25<sup>th</sup> October, 2007 and 29<sup>th</sup> October, 2007 in court, confirming that the property had reverted to the Government of Kenya.
16. The Defendant subsequently joined the said Kwale ELC Petition No. 4 of 2021 as the 2<sup>nd</sup> Interested Party and relied on a letter dated 9<sup>th</sup> May 2000, allegedly extending the said lease for 50 years from the year 1999. Further, the Defendant annexed a Certificate of Lease dated 24<sup>th</sup> July 2024 to its Replying Affidavit dated 10<sup>th</sup> March, 2025, claiming that the said certificate proved that the lease was indeed extended. However, critical documents necessary to substantiate the extension of the said lease remain absent. The Defendant neither annexed a letter of application for extension, a copy of the actual lease document, nor a ground status report conducted prior to the purported renewal. These omissions cast serious doubts on the authenticity and validity of the alleged lease extension. Furthermore, the fact that a Certificate of Lease was issued 24 years after the alleged renewal raises profound questions. If the lease was purportedly extended in the year 1999, the Defendant must account for how it continued to claim rights over the land for 24 years before obtaining a certificate of lease in the year 2024. Crucially, did the Defendant had the legal right to demand rent or exercise ownership rights over the land during this period? These were weighty factual matters that demand thorough judicial scrutiny and could not be summarily determined as a preliminary objection.
17. Furthermore, the Judgment in the said Kwale ELC Petition No. 4 of 2021 relied solely on the letter dated 9<sup>th</sup> May, 2000 to hold that the lease had been extended, as evidenced in Paragraphs 69 to 70 of the said Judgment. However, the court did not inquire into the process by which the Defendant allegedly



- acquired this lease extension, leaving critical aspects unexamined. Therefore, the Plaintiff maintained that the question of whether the lease was lawfully extended remained open for determination.
18. The Learned Counsel asserted that for a matter to be *res judicata*, it must have been conclusively determined by a court of competent jurisdiction. However, in this case, the very validity of the Defendant's claim to the lease remained in dispute. Since the preliminary objection sought to rely on disputed facts that require detailed examination, it failed to meet the threshold of a pure point of law. The law was clear that a preliminary objection could not be sustained where the court was required to investigate and analyze factual issues (See “*Mukisa Biscuits Manufacturing Co. Limited – Versus - West End Distributors Ltd [1969] EA 696 (supra)*”). Given the numerous unresolved factual controversies, the Defendant's objection was untenable and ought to be dismissed. The Defendant further contended that this Honourable Court lacked jurisdiction to determine issues arising from the Notice to Terminate Tenancy as the matter was the subject of Mombasa BPRT Case No. E283 of 2024. However, it was well established that the jurisdiction of the Business Premises Rent Tribunal was confined to cases where a landlord-tenant relationship existed. In this case, no such relationship applied, as the property on which the suit premises was situated reverted to the Government in year 2003. Consequently, a critical legal question arose as to whether the Defendant had any lawful right to demand rent from the Plaintiff given that its lease had not been renewed. This issue was fundamental and falls outside the jurisdiction of the Business Premises Rent Tribunal, making it impossible to be effectively raised or determined therein. Therefore, the Plaintiff is justified in filing this suit before this Honourable Court, as it was the proper forum to adjudicate on the validity of the Defendant's claim over the suit premises.
  19. The Learned Counsel submitted that the Defendant's preliminary objection was not only devoid for legal merit but also amounted to an unwarranted personal attack on the Plaintiff's advocate, Mr. Gikandi Ngibuini, contrary to professional ethics and established legal practice. The Defendant, through its pleadings, had sought to shift focus from the substantive legal issues at hand by making unjustified allegation against the Plaintiff's advocate, Mr. Gikandi Ngibuini, and even urging this Honourable Court to refer him to the Law Society of Kenya and the Directorate of Criminal Investigations for investigation on the offences of perjury and gross misconduct. According to the Learned Counsel, such an approach was clearly aimed at intimidating the Counsel and was an abuse of the court process.
  20. According to the Learned Counsel, the legal profession operated on the principle that Advocates should represent their clients without fear or favor. By seeking to have the Plaintiff's Advocate investigated for simply representing his client, the Defendant and his Advocate sought to introduce a precedent that would undermine the independence of legal counsel and erode the fundamental right to legal representation. In a democratic society governed by the rule of law, courts must resist any attempts to weaponize disciplinary processes against opposing counsel in a bid to stifle fair representation. If such intimidation were allowed, it would set a dangerous precedent where legal practitioners could be harassed simply for advocating on behalf of their clients.
  21. The Learned Counsel posited that the Legal Profession (Practice and Ethics) Rules and the Code of Conduct for Advocates emphasized that Advocates should maintain a level of professional decorum in their dealings with each other. The Defendant's approach in seeking an investigation of opposing counsel rather than dealing with the substantive legal issues demonstrated professional misconduct on the part of his Advocate. If at all the Defendant took issue with the Plaintiff's legal arguments or filings, the proper recourse was through submissions and legal arguments and not unfounded allegations against an advocate's integrity. The Defendant's advocate had blatantly disregarded this principle by



turning the litigation process into a platform for personal vendettas rather than addressing the issues at hand.

22. The Learned Counsel relied on the provision of Article 50 of *the Constitution* of Kenya, 2010 guarantees every individual the right to legal representation of their choice. The Defendant's demand that the Plaintiff's Advocate be investigated directly interfered with this right and, if entertained, would have the effect of depriving the Plaintiff of effective legal representation. Additionally, the United Nations Basic Principles on the Role of Lawyers (1990), principle no.18 stated that:

“Lawyers shall not be identified with their clients or their clients’ causes as a result of discharging their functions.”

23. The Defendant's personal attack on the Plaintiff's Advocate, therefore, violated internationally recognized standards of legal representation and should not be tolerated by this Honourable Court. The Learned Counsel relied on the decision in the case of:- “Kuria & 3 Others – Versus – Attorney General [2002] 2 KLR 69” as cited in “Alfred Nyandieka – Versus – Director of Public Prosecutions & 2 Others [2020] eKLR” where the Court held thus: -

“The court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform....where the prosecution is an abuse of the process of court as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done but is seen to be done by staying and or prohibiting prosecutions brought to bear for ulterior and extraneous considerations.”

24. According to the Learned Counsel, it was evident from the further affidavit sworn by Mr. Gikandi Ngibuini that his conduct in this matter had been guided solely by his professional duty to act in the best interests of his client. There was no legal or factual basis upon which the Defendant could assert that his representation warranted investigation, especially considering that the Defendant's own Advocate, Mr. Kinyua Kamundi, had in the past vigorously defended his own client's interests in multiple cases without facing similar attacks. The attempt to criminalize or question an Advocate's conduct simply for representing a client zealously was an affront to the independence of legal practitioners and undermines the fundamental right to legal representation.

25. For this proposition, the Learned Counsel relied on the decision in the case of:- “Mohamed Feisal & 19 others – Versus - Henry Kandie, Chief Inspector of Police, OCS, Ongata Rongai Police Station & 7 others; National Police Service Commission & another (Interested Party) [2018]eKLR” where the High Court held thus: -

“Regarding the arrest of the 20<sup>th</sup> Petitioner, it is also not in doubt that he was charged with a cognizable offence. However, I am inclined to ask what the motivations behind his arrest were. The Petitioners averred that when the 20<sup>th</sup> Petitioner first approached the 3<sup>rd</sup> Respondent to inquire about the arrest of his clients, he was met with hostility. This claim remained uncontroverted. Thereafter, the 20<sup>th</sup> Petitioner who I am inclined to believe was acting not only on his duty to his clients but as an officer of the court followed the police vehicle to the police station to inquire about the arrest of his clients. It is expected that an advocate be zealous in defending the rights of his clients. As such it is unlikely that while at



the station, the 20<sup>th</sup> Petitioner was mollicoddling the Respondents. Be that as it may, I find it ludicrous that the Respondents would seek to paint a picture of the 20<sup>th</sup> Respondent as a drunk who was causing a raucous at a police station without offering an iota of evidence in support of such a claim. From where I stand, the arrest of the 20<sup>th</sup> Petitioner was occasioned by his spirited defence of his client.

It must be emphasized that in exercising statutory powers of arrest the Respondents must act reasonably and should not be oppressive or punitive under the guise that the petitioner was obstructing lawful execution of their duties.

In light of the overall constitutional obligations cast upon members of the legal profession and in the circumstances of this petition rules of police station protocol should not negate the realization of the right to legal representation to arrested persons. It's acknowledged that only legal counsels have the knack to agitate the rights of accused persons by applying the law to the facts of the case, whether at the police station or courtroom setup.

In the matter before me impairing such a right makes a mockery of the principles laid down in our constitution. It's my view that for a lawyer who has found himself at a police station for the sole purpose of representing his or her client the arrest and detention is not an option. However in the event he commits an offence within the precincts of police station the arrest and detention should be a measure of last resort”.

26. Lastly, according to the Learned Counsel, it was trite law that a preliminary objection must be confined to a pure point of law and could only seek orders for striking out of a suit. However, the Preliminary objection filed herein not only sought to strike out the suit but also improperly requests the Plaintiff's advocate be investigated by the Law Society of Kenya and the Directorate of Criminal Investigations for alleged perjury and misconduct. This was wholly irregular and an abuse of the Court process, as a preliminary objection could not be used as a vehicle to introduce extraneous and unfounded allegations against legal counsel. By making such a request, the Defendant was improperly expanding the scope of what a Preliminary objection could achieve, which was legally untenable. Preliminary objections were not the appropriate avenue for seeking ancillary orders beyond the dismissal or striking out of a suit.
27. The Learned Counsel submitted therefore, that a Preliminary Objection was primarily designed to challenge the legal foundation of a suit, aiming for its dismissal or striking out, and was not intended to request additional orders that require factual examination or are extraneous to the immediate legal issues at hand.
28. The Learned Counsel relied on the decision of:- “Johnson Waweru Kamau – Safaricom Limited [2020] eKLR”, where the Court held thus:-

“It is submitted that the preliminary objection would not dispose of the prayers for wrongful dismissal, unfair termination and remedies for wrongful dismissal as captured in the memorandum of claim together with the prayers for remedies for work related injuries...As was stated in Mukisa Biscuit case, a preliminary objection ought to be raised only where it is likely to dispose of the entire suit. The preliminary objection raised by the Respondent herein would not address the claim for unfair termination...For these reasons the preliminary objection fails and is accordingly dismissed with costs.”
29. The Learned Counsel submitted that in the light of the foregoing, it was evident that the Defendant's Preliminary Objection was fundamentally flawed, both procedurally and substantively. A Preliminary Objection must be limited to a pure point of law capable of disposing of the suit without the need for factual interrogation. However, the Defendant's objection not only raised contentious factual issues



requiring further investigation but also improperly sought extraneous orders beyond the striking out of the suit, including unwarranted attacks against the Plaintiff's Advocate. Consequently, they urged this Honourable Court to dismiss the Defendant's Preliminary Objection with costs and allowed the substantive suit to proceed to full determination on its merits.

30. With regard to submissions in support of the Plaintiff's notice of motion application. The Learned Counsel submitted that the Plaintiff sought injunctive relief restraining the Defendant from evicting him from the portion of land known as Kwale/Diani/63 and interfering with his quiet possession thereof. The Learned Counsel further submitted that the application meets the well-established principles governing the grant of an interlocutory injunction as set out in the decision in "Giella – Versus - Cassman Brown & Co. Limited (1973) EA 358" (as cited in the case of "King Investment Management Co. Limited – Versus - Rivatex East Africa Limited [2020] eKLR"), where the court held that an applicant must demonstrate:

- i. a prima facie case with a probability of success,
- ii. that they will suffer irreparable injury that cannot be adequately compensated by damages, and
- iii. that the balance of convenience lies in their favor.

31. The Learned Counsel submitted that the first consideration was whether the Plaintiff had established "a prima facie case with a probability of success. A prima facie case was defined in the decision in "Mrao – Versus - First American Bank of Kenya Limited & 2 Others [2003] eKLR" where the court described it thus: -

"...So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to for an explanation or rebuttal from the latter."

32. Further, they relied on the case of "Nguruman Limited – Versus – Jan Bonde Nielsen & 2 Others [2014] eKLR" where the Court of Appeal held thus:-

".....We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

33. According to the Learned Counsel, the Plaintiff had demonstrated that he had been in continuous possession and occupation of the suit premises. Further, the Plaintiff having lawfully entered into an oral sublease arrangement with the Defendant's director and subsequently paying increased rent with the understanding that he would later apply for direct lease from the Government of Kenya. The Plaintiff further stated that the Defendant's lease over the suit property expired in August 2003, reverting ownership to the Government of Kenya. This fact was confirmed in the aforesaid case



of: “HC Misc. Application No. 13 of 2018”, where the Defendant therein presented documents in Court acknowledging the reversion of the land to the Government as the lease had expired. Despite this, the Defendant had issued a notice of termination of lease purporting to evict the Plaintiff. The Defendant, having lost ownership of the land, lacked legal standing to issue such a notice. This established a clear prima facie, as the Plaintiff’s right to peaceful occupation was under unlawful threat by a party with no legal authority over the land.

34. The second limb required the Plaintiff to demonstrate that he would suffer irreparable harm that could not be adequately compensated by damages should the injunction be denied. The test for irreparable harm was enunciated in Halsbury’s Laws of England, Third Edition, Volume 21, paragraph 739, page 352 (as cited in “Robert Ochanda Abuya – Versus - Kenya Power and Lighting Company Limited [2021]KEELRC 462 (KLR)” which reads:-

It is the very first principle of injunction law that prima facie the Court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the Court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question”[As cited in Succession Cause No. 374 of 2010: Francis Muriithi Ndirangu – Versus - Ruth Wanjiku Nderitu [2016] eKLR]

35. The Learned Counsel submitted that the Plaintiff had invested substantially in the suit property, having established his residence and operated a thriving business, Shakatak Discotheque, on the premises for years. If the Defendant was not restrained, the Plaintiff risked losing not only his home but also his source of livelihood. The business had an established clientele and good will, both of which were intangible assets that could not be quantified in monetary terms. Further, eviction would cause the Plaintiff emotional and financial distress that no amount of damages could adequately compensate.
36. The third limb required the Court to consider where the balance of convenience lied. They relied on the decision in the case of:- “Paul Gitonga Wanjau – Versus - Gathuthi Tea Factory Company Limited & 2 others [2016] KEHC 7263 (KLR)” where the High Court held thus: -

“As for the balance of convenience, I reiterate what I stated above, “the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction.[20] The court will seek to maintain the status quo in determining where the balance on convenience lies.” Considering the facts of this case in totality, I find that the balance of convert demands that the status quo be retained.”

37. In the present case, the Plaintiff had been in uninterrupted possession of the suit property and relied on the representations of one of the Defendant’s former directors regarding future ownership. The Defendant, on the other hand, had not been in occupation of the portion in dispute and has not demonstrated any legally protected interest in it. If the orders sought were granted, the Defendant would suffer no prejudice, as it had never been in occupation of the suit premises nor made any



developments on the remaining portion of land for it to suffer any loss. On the contrary, if the injunction was denied, the Plaintiff faces eviction and irreversible losses. The balance of convenience, therefore, tilted in favor of the Plaintiff.

38. The Learned Counsel submitted that this Honourable Court had inherent jurisdiction to grant the orders sought in the interest of justice. Courts had consistently held that where an applicant establishes the three ingredients required for an injunction, the court must intervene to protect their rights. In the case of:- “Nguruman Limited – Versus - Jan Bonde Nielsen & 2 Others [supra]” the court held thus:- “In granting a temporary injunction, the court acts in aid of the legal right so that the property may be preserved in status quo.”
39. In conclusion, the Learned Counsel averred that in light of the foregoing, the Plaintiff he had met the threshold for the grant of an interlocutory injunction. He had established a prima facie case, demonstrated that he would suffer irreparable harm if evicted, and shown that balance of convenience lies in his favor. Accordingly, the Plaintiff prayed that this Honourable Court granted the orders sought in the Notice of Motion application with costs.

#### **B. The Written Submissions by the Defendant on the Plaintiff’s Notice of Motion Application dated 3<sup>rd</sup> December, 2024**

40. The Defendant through the Law firm of Messrs. Kinyua Muyaa & Co. Advocates filed their written submissions dated 25<sup>th</sup> March, 2025. Mr. Kinyua Advocate commenced the submission by laying down the basis of the Plaintiff’s case and the defence mounted by the Defendants through the filing of the replies and the Preliminary Objection to have the entire suit struck out thereof. He stated that in dated 3<sup>rd</sup> December, 2024, the Plaintiff sought orders of injunction restraining the Defendant from evicting him from the suit premises pending the hearing and determination of the application and the suit. There were 5 grounds in support of the motion the main ones being that the Defendant served the Plaintiff with a Tenancy Notice dated 17<sup>th</sup> October, 2024 but that the Notice was unlawful and null and void because the Defendant does not own that property. Those grounds were verified by the Plaintiffs Supporting Affidavit sworn on the same date. In opposing the application, the Defendant filed a Replying Affidavit sworn by its director Harald Kampa on 10<sup>th</sup> March, 2025 to which he annexed a copy of the Plaintiff’s Reference to the Tribunal, BPRT Case No. E283 of 2024 dated 3<sup>rd</sup> December, 2024 and a copy of his Supporting Affidavit in that Tribunal case sworn on 20<sup>th</sup> January, 2025. The Plaintiff’s suit was a gross abuse of process and the application and affidavit did not establish any prima facie case.
41. The main thrust of the Plaintiff’s case was that there was no Land – Tenant relationship between the two. If there was no controlled tenancy on that grounds why did he file the Reference in the BRPT? The Plaintiff ran a business on property he did not own and had tried to grab from the year 2007. He said that the Defendant was not his Landlord. So who was his Landlord?”
42. The Learned Counsel submitted that the Plaintiff also alleged that the Defendant’s lease from the Government expired in the year 2003 and that therefore the Defendant had no capacity to serve a Tenancy Notice. The Plaintiff and his advocates knew those allegations to be false. In the Replying Affidavit on pages 37- 39 the Honourable Court would see a Supporting Affidavit in a suit filed by the Plaintiff against Diani Properties Limited and Makuri Auctioneers on 24<sup>th</sup> June, 2021 in the Chief Magistrate’s Court, Mombasa. Diani Properties Limited was the Defendant’s sister company that managed the suit premises. Makuri Auctioneers had been appointed by Diani Properties Limited, the manager, to levy distress against the Plaintiff. Throughout that affidavit the Plaintiff admitted on oath that he was a tenant of the Defendant. In paragraph 6 he admitted that he was in arrears of



rent totaling to a sum of Kenya Shillings One Million Two Hundred Thousand (Kshs.1,200,000.00/=) up to March 2020. He claimed the monthly rent was a sum of Kenya Shillings Eighty Thousand (Kshs. 80,000.00/=). He had not paid any rent from March, 2020. There were 60 months from March 2020 to March 2025 meaning that at a sum of Kenya Shillings Eighty Thousand (Kshs. 80,000.00/=) the Plaintiff had not paid rent in the sum of Kenya Shillings Six Million (Kshs.6,000,000.00/=) including the arrears he admitted to be owing in the sum of Kenya Shillings One Million Two Hundred Thousand (Kshs.1,200,000.00/=) up to February, 2020. In paragraph 9 of that affidavit (page 38 of the Replying Affidavit) he had been advised by Mr. Gikandi which advice he believed to be true that he was a protected tenant. It was the same Mr. Gikandi who drew that affidavit and the Supporting Affidavit in this suit sworn by the same Plaintiff. If the Plaintiff and his advocate believed in the existence of a controlled tenancy in June 2021, why did they no longer believe in that tenancy? They had better reasons to believe in the existence of the tenancy after the Court pronounced itself on the ownership of that property in the Judgment that determined the Plaintiff's Petition. If the Plaintiff believed that the Defendant's lease from the government expired in the year 2003 what was it he claimed to co-own with the Defendant from the year 2006? The Learned Counsel referred the Court to the Plaintiff's Further Affidavit sworn on 4<sup>th</sup> July, 2006 in the BPRT Nairobi proceedings and in particular Paragraph 9 on page 48 of the Replying Affidavit in which the Plaintiff referred to an oral agreement with the Landlord that he was to pay the Landlord more than the agreed rent so that he and the Landlord could own the property on a 50 - 50 basis. In paragraph 10 on page 48 he explained that rent was increased from a sum of Kenya Shillings Sixty Thousand (Kshs. 60,000.00/=) to a sum of Kenya Shillings Eighty Thousand (Kshs. 80,000.00/=) to enable him to acquire a 50% stake in the property. In paragraph 11 of that affidavit on page 48 he claimed on 4<sup>th</sup> July, 2006 that the property returned back to the Government. That was an issue he raised in the Tribunal and lost. He could not revisit the same issue in this Court.

43. The Defendant annexed a copy of the Judgment in Kwale ELC Petition No. 4 of 2021 which the Plaintiff had filed against the Attorney General and the National Land Commission and in which Diani Properties Limited and Cotswold Estates Limited were named as Interested Parties. From the contents of Paragraphs 63 to 70 of that Judgment, the Honourable Court would see the analysis leading up to the conclusion in Paragraphs 69 and 70 that the Defendant's lease was extended by the Commissioner for Lands for a period of 50 years from 1<sup>st</sup> May, 1999. Instead of appealing against that Judgment the Plaintiff being encouraged by the same Advocate had now returned to this Court with the Plaintiff criticizing the Hon. Lady Justice Dena and asking the Honourable Court to find fault with that Judgment and re-hear and determine the whole dispute all over again. This was absurd.
44. On pages 47 to 48 of the Replying Affidavit, it could be seen a Further Affidavit sworn by the Plaintiff on 4<sup>th</sup> July, 2006 in Nairobi BPRT Misc. App. No. 68 of 2006 and in particular paragraph 3 that the initial monthly rent was a sum of Kenya Shillings Sixty Thousand (Kshs. 60,000.00/=) but with the addition of 1 flat rent was raised to a sum of Kenya Shillings Eighty Thousand (Kshs. 80,000.00/=). The Plaintiff then turned around and lied in the said Petition, and in this suit that the addition of a sum of Kenya Shillings Twenty Thousand (Kshs. 20,000.00/=) was for purposes of co-ownership of the property. The Plaintiff filed "Mombasa Chief Magistrate Civil Case Nos. 375 of 2021 and E947 of 2021" to prevent distress for rent. One was struck out and the other one was withdrawn with costs which the Plaintiff was yet to pay because he was bankrupt.
45. The Learned Counsel submitted that the Plaintiff then filed Mombasa HCCC No. E025 of 2022 against the Defendant, its manager, Diani Properties Limited and the auctioneer claiming a sum of Kenya Shillings Sixty Four Million Nine Ninety Nine Thousand Two Seventy Thousand (Kshs. 64,999,270.00/=) which he withdrew on 10<sup>th</sup> January, 2025 with costs exceeding a sum of Kenya Shillings One Million (Kshs. 1,000,000.00/=). He had not paid those costs because he was bankrupt. The Defendant served 2 months' Notice upon the Plaintiff. The Notice did not take effect because



the Plaintiff filed the Reference. The Defendant had sought vacant possession in its application in the BPRT. The Defendant had not evicted the Plaintiff and was waiting for the determination of its application in the BPRT.

46. In the Plaintiff's affidavit in support of the motion the Court could see from pages 10, 11,12,13,14, 15, 16, 17, 18 and 19 copies of cheques and ETR Receipts for part payment of rent by the Plaintiff in the year 2018 at the time he alleged that the Defendant's lease from the Government had expired in the year 2003. The BPRT was a Tribunal established by Parliament to deal with controlled tenancies for business premises. The flat leased to the Plaintiff at a sum of Kenya Shillings Twenty Thousand (Kshs. 20,000.00/=) according to his 2006 affidavit in Nairobi BPRT Misc. App. No. 68 of 2006 was not subject to the BPRT as Cap 301 was not concerned with residential premises.
47. In paragraph 18 of his Supporting Affidavit sworn on 3<sup>rd</sup> December, 2024 the Plaintiff falsely alleged that the Defendant had not been in occupation or possession of the property for which he was making a claim of ownership. He had no such claim and this Honourable Court could not give him property that Lady Justice Dena denied him. In any event Courts do not issue Grants of Leases of public land. The Defendant had never lost possession of the property. The Plaintiff had been paying rent intermittently and refusal or inability to pay rent does not extinguish the Landlord's title. The Defendant was in possession and served the Notice terminating the tenancy so as to obtain a determination by the BPRT to evict the Plaintiff from its property.
48. According to the Learned Counsel, this suit was "res judicata". The Hon. Lady Justice A.E. Dena determined the issue of ownership conclusively. There was no appeal against that Judgment and it was gross abuse of process of Court to ask another Judge of the same Court to re-open that Petition and reach a different conclusion through this suit. Additionally, the Plaintiff had raised the same issue in Nairobi BPRT Application No. 68 of 2006 and lost. He could not raise it again here or in Mombasa BPRT Case No. E283 of 2024 in his Reference dated 3<sup>rd</sup> December, 2024. Doing so would be a back door appeal against that decision almost 20 years later. As registered proprietor the Defendant was entitled to receive rent and to evict the Plaintiff for refusal or inability to pay rent.
49. The Plaintiff continued to pay rent on and off throughout the period in which he alleged that the Defendant was not the owner of the property. Rent arrears were now in excess of a sum of Kenya Shillings Seventeen Million (Kshs. 17,000,000.00/=) and were the subject of the Reference in the BPRT arising from the notice to terminate the tenancy. No tenant could obtain an order of injunction so as to remain on the Landlord's property without payment of rent. The Plaintiff now invited the Honourable Court to violate the provision of Article 40 of *the Constitution* to arbitrarily deprive the Defendant of rental income from its property. The Learned Counsel urged the Honourable Court to decline that invitation. The Plaintiff did not make any offer to immediately pay the arrears of rent he admitted in 2021 and subsequent arrears from March 2020 to date amounting to a sum of Kenya Shillings Six Million (Kshs. 6,000,000.00). The rent was actually more than that but they were using his own admission.
50. There would not be a fair trial or a fair hearing when the entire suit was founded on false affidavits and witness statements. According to the Learned Counsel, the phrase "fair trial" and "fair hearing" as provided for under the provision of Article 25 (c) and 50 (1) of *the Constitution* had not been given proper interpretation and application by our Courts. There was no fairness in requiring Defendants to respond to suits based on perjury and subornation of perjury. Advocates were not immune from the provisions of *the Constitution* and the Penal Code. The right to practice law and to represent clients in Courts was not a right to assist clients to commit perjury. All the Plaintiff's affidavits and pleadings in his suits in the Chief Magistrate's Courts at Mombasa, in the High Court at Mombasa and the Petition and the suit in the ELC Kwale were drawn by the same advocate. He had filed the



ELC Petition at Mombasa in 2019 claiming that the Defendant's lease had expired and demanding to be allocated the property. When he swore the affidavit in the Chief Magistrate Courts at Mombasa on 24<sup>th</sup> June, 2021 admitting arrears of rent. He would not have made that admission and lamented about the consequences and insurgence of the pandemic global COVID - 19 protocols if there was no controlled tenancy. His Petition was still pending. This perjury and subornation of perjury cannot go unpunished.

51. At the allegation that his rent was at a sum of Kenya Shillings Eighty Thousand (Kshs. 80,000.00) per month, he ought not to have filed this suit in the ELC. Annual rent at a sum of Kenya Shillings Eighty Thousand (Kshs. 80,000.00/=) per month was totaling at a sum of Kenya Shillings Nine Sixty Thousand (Kshs. 960,000.00/=). Under the provision of Section 11 of the *Civil Procedure Act*, Cap. 21 every suit shall be instituted in the Court of the lowest grade competent to try it except that where there are more subordinates Court than one with jurisdiction in the same district competent to try it, a suit may, if the party instituting the suit or his advocate certifies that he believes that a point of law was involved or that any other good and sufficient reason exists be instituted in any one of such subordinate Courts. The ELC is not a subordinate Court and the Honourable Court is not a Magistrate of the lowest grade. As the suit should not have been filed in the ELC it should meet the same fate as all such suits and should be struck out with costs. The ELC could not be saddled with simple straight forward suits that a Resident Magistrate has jurisdiction to hear and determine.
52. There was only one reason why the Plaintiff filed this suit in the ELC instead of the Resident Magistrate's Court at Msambweni or perhaps Kwale. He knew that no Magistrate could attempt to interfere with the decision of the Hon. Lady Justice Dena delivered in that Petition and that he could improve his odds by bringing the suit to another Judge of concurrent jurisdiction. That was forum shopping on a matter already determined. He must have known that a suit in a Magistrate's Court disputing ownership of the property would have been met with a speedy Judicial Review application.
53. The Learned Counsel submitted that he noted from the contents of Paragraph 27 of the Plaintiff's submissions dated 19<sup>th</sup> March, 2025 the allegation that the Defendant lost ownership of land and that therefore the Plaintiff had a prima facie case. The Learned Counsel further stated he found that very disturbing in view of the Judgment of this Court delivered on 1<sup>st</sup> December, 2023 holding otherwise. If the plea of res judicata does not succeed, the Plaintiff would not bring any evidence beyond what Lady Justice Dena considered nor would he be permitted to re-visit the Judgment in the Petition.
54. Additionally, the Plaintiff was the one who filed the Reference in the BPRT asking that Tribunal to investigate the matter and determine the issues of arrears of rent and eviction. He could not be heard to now say that the Defendant was not the Landlord. Due to the existence of that Reference this Court had no original jurisdiction. The Plaintiff could only come to this Court on appeal against the decision of the BPRT. This suit was therefore premature even assuming that it was not res judicata.
55. In conclusion, the Learned Counsel urged the Honourable Court to strike out this suit with costs to be paid by the Plaintiff and his advocate jointly and severally and to take appropriate steps in the manner proposed in discharge of the Honourable Court's duty under the provision of Article 3 of *the Constitution* to respect, uphold and defend *the Constitution*. The right to a fair trial and fair hearing are under attack through the filing of false affidavits. The Honourable Court will respect, uphold and defend *the Constitution* by striking out the suit and referring the Plaintiff and his advocate to the DCI for perjury and subornation of perjury and referring the Plaintiff's advocate to the Disciplinary Committee.



### C. The Written Submissions by the Defendant to the Notice of Preliminary objection dated 3<sup>rd</sup> February, 2025

56. The Defendant through the Law firm of Messrs. Kinyua Muyaa & Co. Advocates filed their written submissions dated 10<sup>th</sup> March, 2025. Mr. Kinyua Advocate submitted that in its Notice of Preliminary Objection dated 3<sup>rd</sup> February, 2025 the Defendant objected to the hearing and determination of this suit and the Notice of Motion application dated 3<sup>rd</sup> December, 2024 on the grounds that: -
- a. Prayers (a) and (c) in the Plaint dated 3<sup>rd</sup> December, 2024 are for a declaration that the Notice by the Defendant dated 17<sup>th</sup> October, 2024 terminating the Plaintiff's lease is null and void.
  - b. Prayer (b) in the Plaint dated 3<sup>rd</sup> December, 2024 is for a declaration that the Defendant is neither the proprietor nor the Lessor of the property comprised in Title No. Kwale/ Diani/ 63 and has therefore no capacity to serve a notice upon the Plaintiff terminating the tenancy.
  - c. Prayer (d) of the Plaint dated 3<sup>rd</sup> December, 2024 is for an injunction to restrain the Defendant from interfering with the Plaintiff's quiet and peaceful possession and occupation of property comprised of Title No. Kwale/ Diani/ 63 on the false allegation that the Defendant is not the proprietor of the property and had no capacity to serve notice of termination.
  - d. The Plaintiff and his advocates were aware before the filing of the suit that this Honourable Court in its Judgment given and Decree passed on 1<sup>st</sup> December, 2023 in Kwale ELC Petition No. 4 of 2021 (formerly Mombasa ELC Petition No.17 of 2019) had declared and found that the Defendant's lease was extended for a period of 50 years from 1999 thereby settling the issue of ownership conclusively and dismissing the Plaintiff's Petition with costs. The Defendant will refer to paragraph 12 of the Plaint, second to the last paragraph of the Plaintiff's Witness Statement and a copy of the Judgment in that Petition annexed to the Supporting Affidavit sworn by the Plaintiff on 3<sup>rd</sup> December, 2024. That Judgment has not been set aside or varied.
  - e. The question of ownership having been determined by this Court in the said Petition renders this suit *res judicata* as the same Court cannot sit on appeal against its own decision so as to alter, by way of a suit, the Judgment in the said Petition.
  - f. Prayers (a),(c) and (d) are based on the false allegation in prayer (b) that the Defendant is not the proprietor of the suit premises. The Plaintiff and his advocate knew that allegation to be false and are guilty of gross misconduct.
  - g. The Plaintiff has pleaded that the Defendant served him with the Notice to Terminate Tenancy under the provisions of Section 4(5) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*. This Court has no jurisdiction on that notice as the Notice is the subject of Mombasa BPRT Case No. E283 of 2024 between the same parties.
  - h. This suit should accordingly be struck out with costs to be paid by the Plaintiff and his advocate jointly and severally.
57. The Learned Counsel observed that the Plaintiff represented by the Law firm of Messrs. Gikandi & Company Advocates filed Mombasa ELC Petition No. 17 of 2019 against the Attorney General and the National Land Commission as Respondents and Diani Properties Limited and Cotswold Estate Limited as Interested Parties. The Petition was transferred to this Court as ELC Petition No. 24 of 2021. The Petitioner was challenging ownership of that property by the Defendant. Indeed, in his



Further Amended Petition he wanted to be registered as the proprietor of the entire property, Kwale/ Diani Beach/63.

58. The Learned Counsel submitted that further to paragraph 2 above this Court (Hon. Lady Justice A.E Dena) in her Judgment delivered on 1<sup>st</sup> December, 2023 found that the lease in favour of the Defendant was extended by a period of 50 years from 1<sup>st</sup> May, 1999. That Judgment had not been set aside nor varied. To return to this Court by a Plaint 1 year later to get another Judge of this Court to alter that Judgment constituted gross misconduct. It also constituted offences relating to the administration of justice under Part XI of the Penal Code as the Plaint and the application for injunction were based on affidavits containing false statements.
59. The Learned Counsel averred that Mr. Gikandi & Company Advocates had represented the Plaintiff in two suits in the Chief Magistrate's Court at Mombasa, in one Petition in the ELC at Mombasa transferred to this Court as ELC Petition No.4 of 2021, Mombasa HCCC No. E025 of 2022 which the Plaintiff withdrew with costs exceeding to a sum of Kenya Shillings One Million (Kshs. 1,000,000.00/=) and Mombasa BPRT Case No. E283 of 2024. Therefore, the said Advocate knew of the decision of this Honourable Court in the ELC Petition on the ownership of the suit premises.
60. The Plaint in this suit was verified by the Plaintiff vide his Verifying Affidavit sworn on 3<sup>rd</sup> December, 2024. That affidavit was drawn by the same law firm, Gikandi & Company Advocates. The Plaintiff and his advocate knew the Verifying Affidavit to be false because in Paragraph 3 it specifically referred to Petition No. 17 of 2019 which was transferred to this Court as Petition No. 4 of 2021 and determined on 1<sup>st</sup> December, 2023. Thus, the Plaintiff and his advocate had committed perjury and subornation of perjury punishable by 7 years' imprisonment without the option of a fine.
61. The Learned Counsel submitted that the Court had special jurisdiction under the provision of Section 3 of the *Civil Procedure Act*, Cap. 21 read with Section 56 of the Advocates' Act to discipline any officer of the Court. A copy is attached for Court's ready reference. The Plaintiff's advocate was an officer of the Court. He knowingly prepared a false Verifying Affidavit, got it sworn by his client and filed it. He also drew a Supporting Affidavit sworn by the Plaintiff stating in paragraph 19 that there is no Tenant-Landlord relationship between the Plaintiff and the Defendant, an allegation he knew to be false.
62. In exercise of this Honourable Court Special Jurisdiction under Section 3 of the *Civil Procedure Act* and 56 of the Advocates' Act, they asked that the Honourable Court to strike out this suit with costs to be paid by Gikandi & Company Advocates and the Honourable Court issue the following additional orders to restore sanity to the Plaintiff and his advocate and to preserve the dignity of this Honourable Court: -
- i. The entire Court file to be photocopied and certified as true copy of the original and be forwarded to the Directorate of Criminal Investigations together with this Honourable Court ruling and order for the investigation of the offences of perjury by the Plaintiff contrary to the provision of Section 108 (1) of the Penal Code and subornation of perjury by Messrs. Gikandi & Company Advocates contrary to Section 108 (2) of the Penal Code. A copy was attached for this Honourable Court ready reference.
  - ii. Refer Gikandi & Company Advocates to the Disciplinary Committee under Section 55 of the *Advocates Act* for gross misconduct. A copy was attached for this Honourable ready reference.
63. The Defendant had spent millions of shillings defending suits and Petitions at the Magistrate's Courts, in the High Court, in the Environment & Land Court and in the BPRT filed by a bankrupt tenant who had not paid rent for over 4 years and had not paid a cent in costs for all the suits and Petitions he had filed and lost over the years. To put a stop to this, the Court was under a duty to discourage



the Plaintiff and his advocates from further gross misconduct and commission of other offences. This Honourable Court would not be the first Judge to take action against an advocate for offences and misconduct committed during, or in the course of or relating to proceedings before the Court. To buttress on this issue, the Learned Counsel referred the Court to a decision by the Hon. Mr. Justice Olola formerly of the ELC Malindi now at the ELC Mombasa who took the same course in “Petition No. 23 of 2017 [Bhavasara Anadkumar t/a Sarax Enterprises – Versus - Beloilco Holdings Limited, The Registrar of Titles Mombasa, The Officer Commanding Police Station, Kilifi & The Attorney General]”. A copy of his Ruling was attached for this Honourable Court ready reference. Persons of interest to be investigated included advocates and a Deputy Registrar of the High Court. That was how serious the matter was. If a Court could take action against a Deputy Registrar it could certainly do so against an advocate.

64. Similarly, faced with evidence of extortion by the officers of the DCI to unfairly enrich an advocate the Hon. Prof (Dr) Nixon Sifuna in Nairobi Misc. Criminal Application No. E480 of 2023 had no hesitation when he directed that his orders be extracted and served upon the Director of Criminal Investigations and Ethics and Anti-Corruption Commission with specific orders that EACC should forthwith record statements and thoroughly carry out investigations and take action against DCI offices and that advocate. A copy of that Ruling delivered on 10<sup>th</sup> January, 2024 was attached for this Honourable Court ready reference. How the Learned Counsel wished that the Courts should follow the lead by the afore – mentioned two (2) Judges of two different superior Courts acting independently and obliviously of each other.
65. The Learned Counsel contended that the Honourable Court had further powers under the provision of Articles 10 (2), 159 and 259 of *the Constitution* of Kenya in making the orders sought to address the crimes committed in these proceedings and the gross misconduct of Counsel. If the Honourable Court did not take that action the Plaintiff assisted by the same advocate would continue filing suits based on perjury. The order for costs was not efficacious against a bankrupt person who could not pay rent or an advocate who intended to continue misconducting himself and abusing the process of the Court perhaps in the hope that he would own the whole or part of the beach hotel known as Diani Sea Lodge built partly on the suit premises. Accordingly, when the Honourable Court apply and interpret the provision of Section 3 of the *Civil Procedure Act* and Section 56 of the *Advocates Act*, did so through the lenses of Article 10(2), 159 and 259 of *the Constitution*.
66. The Learned Counsel submitted that the Defendant could not had a fair trial guaranteed under Article 25(c) of *the Constitution*, proper access to justice guaranteed under Article 48 of *the Constitution*, fair hearing guaranteed under Article 50(1) of *the Constitution* or protection of its property under Article 40 of *the Constitution* including recovery of its property and arrears of rent for over 4 years in circumstances in which Messrs. Gikandi & Company Advocates aid and abet the Plaintiff in committing perjury to deny the Defendant those rights. Perjury and subornation of perjury were some of the offences against the administration of justice. The Constitutional guarantees he had referred to would be meaningless if the Honourable Court turn the Honourable Court to face against these crimes and gross misconduct.
67. The filing of vexatious suits affected not just Defendants but took up the time that the Court might otherwise allocate to deserving cases. By exercising the special jurisdiction under the provision of Section 56 of the *Advocates Act* as proposed the Honourable Court would prevent further and ongoing gross misconduct and abuse of process. In this country no one has ever gone to jail for perjury. That should change. They asked for referral to the DCI because the ready excuse by our National Police Service for failure to investigate perjuries was that they cannot investigate perjury in judicial proceedings without an express order of the Court. They urged the Honourable Court to make that order. After



making the orders in exercise of this Honourable Court's special jurisdiction to please set down the case for mention some weeks later to see whether the Honourable Court orders would had been complied with.

68. Under the provision of Article 3(1) of *the Constitution* every person had an obligation to respect, uphold and defend *the Constitution*: they had discharged that obligation by bringing notice of these crimes and gross misconduct to the Court. If the Honourable Court held, as the Court must, that there was evidence of perjury, subornation of perjury and gross misconduct, then the Honourable Court's obligation under that Article was not to look the other side and merely strike out the suit. The duty is to redress the violation of those articles and discourage future misconduct by the same party and the same advocate. It is up the Disciplinary Committee, the DCI and the DPP to determine what to do with the Reference by the Court.
69. In conclusion, he submitted that in the special circumstances of this suit the Honourable Court should strike out the suit with costs to be paid in the manner proposed and that the Honourable Court should exercise that special jurisdiction.

## VII. Analysis and Determination

70. I have carefully read and considered the pleadings herein and the relevant provisions made by the by the parties. In order to arrive at an informed, fair, reasonable and Equitable decision, the Honorable Court has framed the following five (5) issues for its determination.
- a. Whether the Preliminary Objection dated 3<sup>rd</sup> February, 2025 by the Defendant met the thresholds of an objection as stipulated under the law and precedents.
  - b. Whether this suit is res judicata?
  - c. Whether this Honourable Court is clothed with the Jurisdiction to entertains this suit filed by the Plaintiffs herein taking into the Notice to Terminate Tenancy under the provisions of Section 4(5) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*.
  - d. Whether if the answer in (a), (b) and (c) above are in the negative the Notice of Motion dated 3<sup>rd</sup> December, 2024 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.
  - e. Whether there was any occurrence and/or proof to the allegations meted by the Defendant pertaining to and/or in connection with alleged perjury and subornation committed by the Advocate for the Plaintiff and the legal consequences thereof.
  - f. Who will bear the Costs of Notice of Motion application 3<sup>rd</sup> December, 2024 and the Notice of Preliminary Objection dated 3<sup>rd</sup> February, 2025.

### **Issue No. a). Whether the Preliminary Objection dated 3<sup>rd</sup> February, 2025 by the Defendant met the thresholds of an objection as stipulated under the law and precedents.**

71. Under this Sub – heading, the Honourable Court will decipher on the substratum of the matter is whether the objection raised pure points of law. In determining this instant Notice of Preliminary Objection, the Court will first consider what amounts to a Preliminary Objection and then Juxtapose the said description herein and come up with a finding on whether what has been raised herein fits the said description.



72. 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.....”
73. The above legal proposition has been made graphically clear in the now famous case of “Mukisa Biscuits – Versus - Westend Distributor Ltd [1969] EA 696”, the court observed that: -
- “A Preliminary Objection is in the nature of what used to be a demurrer. 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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. ”
74. This statement of the law has been echoed time and again by the courts: see for example, “Oraro – Versus - Mbaja [2007] KLR 141”. The same position was held in the case of “Nitin Properties Ltd – Versus - Jagjit S. Kalsi & another Court of Appeal No. 132 of 1989[1995-1998] 2EA 257” where the Court held that;
- “A preliminary Objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any facts has to be ascertained or if what is sought is the exercise of Judicial discretion.”
75. Similarly in the case of “United Insurance Company LTD – Versus - Scholastica A Odera Kisumu HCC Appeal No. 6 of 2005(2005) LLR 7396”, the Court held that;
- “A preliminary Objection must be based on a point of law which is clear and beyond any doubt and Preliminary Objection which is based on facts which are disputed cannot be used to determine the whole matter as the facts must be precise and clear to enable the Court to say the facts are contested or disputed .”
76. Therefore from the above holdings of the Courts, it is clear that a preliminary Objection must be raised on a pure point of law and no fact should be ascertained from elsewhere. See also the case of “In the matter of Siaya Resident Magistrate Court Kisumu HCCMisc. App No. 247 of 2003” where the Court held that;
- “A Preliminary Objection cannot be raised if any facts has to be ascertained.”
77. 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.



78. Taking into account the above findings and holdings of various Courts on what amounts to a preliminary Objection, the Court now turns and applies these legal principles to the grounds raised by the Defendant herein. Primarily, the defendant has raised two - prong aspects – Firstly, the issue of the jurisdiction of the Honourable Court to hear this suit on a matter that had already been determined and one that the Notice to Terminate Tenancy under the provisions of Section 4(5) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*. Secondly, that this suit contravenes and/or breaches the Doctrine of “Res Judicata” contrary to the provision of Section 7 of the Civil Procedure Rules, 2010. Therefore, based on these, the Learned Counsel has emphatically and vehemently argued that the suit instituted before this Honourable Court by the Plaintiff herein should be outrightly struck out for being vexatious and an abuse of the Court. From these objections, I am fully satisfied that the objection raises pure points of law as stated out from the Notice of Preliminary objection. Significantly, since an issue going to the jurisdiction of this Court has been raised that issue must be dealt with in limine.
79. Be that as it may, and in all fairness, the other grounds on the Notice of Preliminary objection do not raise any triable issues under law therefore I shall not indulge this Honourable Court’s to determine the same.

**Issue No. b). Whether this suit offended the Doctrine of “Res judicata”.**

80. As already indicated above, the preliminary objection herein is premised on the alleged violation of the doctrine of res judicata. The doctrine of res judicata is premised on the provision of Section 7 of the *Civil Procedure Act*, Cap. 21. It prevents the Court from re-determining a matter/issue that has been finally determined by a competent Court. It is not in doubt that this issue goes to the jurisdiction of the Court and is capable of preliminarily disposing off the suit.
81. However, the question as to whether the issue of res judicata can be argued by way of preliminary objection has been the subject of debate. In the case of “Henry Wanyama Khaemba – Versus - Standard Chartered Bank Limited & Another [2014] eKLR”, the Court held as follows: -
- “That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1<sup>st</sup> Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1<sup>st</sup> Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objection. Court of laws have always had a well-founded quarrel with parties who resort to raising preliminary objections in improperly.”
82. Similarly, the Court in the case of “Moses Mbatia – Versus - Joseph Wamburu Kihara [2021] eKLR”, also considered whether the question of res judicata was a proper preliminary objection as follows: -
- “It is my view that all the relevant facts as summarized above are not in dispute and the matter did not call for the exercise of the trial Court’s discretion. Resultantly therefore the objection is a pure point of law.”
83. From the filed pleadings, the Plaintiff herein is represented by the Law firm of Messrs. Gikandi & Company Advocates filed Mombasa ELC Petition No. 17 of 2019 against the Attorney General and the National Land Commission as Respondents and Diani Properties Limited and Cotswold Estate Limited as Interested Parties. The Petition was transferred to this Court as ELC Petition No. 24 of



2021. He was challenging ownership of that property by the Defendant and in his Further Amended Petition he wanted to be registered as the proprietor of the entire property, Kwale/ Diani Beach/63.

84. I fully concur with the submissions by the Learned Counsel for the defendant and the records bear me right too. That on 1<sup>st</sup> December, 2023, upon hearing this case to its logical conclusion, Hon. Lady Justice A. E. Dena delivered the Judgment by and large in favour of the Defendant particularly on the ownership of the suit property. Paragraph 2 of the said Judgment, this Court found that the lease in favour of the Defendant was extended by a period of 50 years from 1<sup>st</sup> May, 1999. Clearly, to date, the said Judgment has not been set aside or varied. To return to this Court by a Plaint 1 year later to get another Judge of this Court to alter that Judgment constitutes gross misconduct. It also constitutes offences relating to the administration of justice under Part XI of the Penal Code as the Plaint and the application for injunction are based on affidavits containing false statements. Gikandi & Company Advocates have represented the Plaintiff in two suits in the Chief Magistrate's Court at Mombasa, in one Petition in the ELC at Mombasa transferred to this Court as ELC Petition No.4 of 2021, Mombasa HCCC No. E025 of 2022 which the Plaintiff withdrew with costs exceeding Kshs. 1,000,000.00 and Mombasa BPRT Case No. E283 of 2024. He therefore knew of the decision of this Honourable Court in the ELC Petition on the ownership of the suit premises.

85. It is not in doubt that a Preliminary Objection raises pure points of law, which are argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or if the court is called upon to exercise judicial discretion. Further, the Preliminary Objection must stem from the pleadings and should not deal with disputed facts nor should it derive its foundation from factual information. See the case of "Oraro – Versus - Mbaja [2005] 1KLR 141", where it was held that:-

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence.”

86. For the Court to ascertain whether or not the matter is Res Judicata, it will have to confirm the facts as pleaded by the Applicant and probe the bundle of documents filed in court. As stated above, some crucial documents not in the bundle of documents will be required to ascertain certain facts. In doing so, the Court will be probing evidence. In the case of "Henry Wanyama Khaemba – Versus - Standard Chartered Bank Ltd & Another [2014] eKLR", the Court held that: -

“That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1st Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1<sup>st</sup> Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objections. Courts of law have always had a well-founded quarrel with parties who resort to raising preliminary objections improperly.”

87. Further, in the case of "George Kamau Kimani & 4 Others – Versus - County Government of Trans Nzoia & Another [2014] eKLR", where the Court held that: -

“I have considered the points raised by the 1<sup>st</sup> Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of Preliminary Objection. The best way to raise a ground of res



judicata is by way of a Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection.”

88. Legally speaking, the doctrine of res judicata is founded on public policy and is aimed at achieving two objectives namely; that there must be finality to litigation and the individual should not be harassed twice with the same account of litigation. This was stated in the Court of Appeal case of “Nicholas Njeru – Versus - the Attorney General and 8 Others Civil Appeal No. 110 of 2011 [2013] eKLR”. From the foregoing, it is clear that for res judicata to suffice, a Court should look at all the four corners set out above namely; the matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suits; the former suit must have been between the same parties or parties under whom they claim; the parties must have litigated under the same title; the Court which decided the former suit must have been competent and the former suit must have been heard and finally decided by the Court in the former suit.
89. Firstly, the matter in issue should be directly and substantially the same as in the former suit. The issue in this instant case is Title No. Kwale/ Diani/ 63 and the same judgment was entered and a decree passed on 1<sup>st</sup> December, 2023 in Kwale ELC Petition No. 4 of 2021 (formerly Mombasa ELC Petition No.17 of 2019) had declared and found that the Defendant's lease was extended for a period of 50 years from 1999 thereby settling the issue of ownership conclusively and dismissing the Plaintiff's Petition with costs. The Defendant will refer to paragraph 12 of the Plaint, second to the last paragraph of the Plaintiff's Witness Statement and a copy of the Judgment in that Petition annexed to the Supporting Affidavit sworn by the Plaintiff on 3<sup>rd</sup> December, 2024. That Judgment has not been set aside or varied.
90. The second and third tests are closely intertwined. That the former suit must have been between the same parties or parties under whom they claim and the parties must have litigated under the same title. The parties in Kwale ELC Petition No. 4 of 2021 (formerly Mombasa ELC Petition No.17 of 2019) were the same as the parties in this suit. It goes without saying that the parties in both cases are similar and indeed litigating under the same titles.
91. Lastly for res judicata to be sustained, the Court which decided the former suit must have been competent and the former suit must have been heard and finally decided. This Honourable Court was seized with requisite jurisdiction when it determined Kwale ELC Petition No. 4 of 2021 (formerly Mombasa ELC Petition No.17 of 2019). See Article 162 of COK and Section 13 ELC Act.
92. The gist of Section 7 of the *Civil Procedure Act* defines the principle of res – judicata to apply where the issues in the previous suit ought to have been “heard and finally decided.”BLACK’S LAW DICTIONARY 10<sup>TH</sup> EDITION defines the terms “heard and determined” as follows: -

“of a case, having been presented to a Court that rendered Judgment.”.
93. The term “hearing” is defined in the same dictionary as follows: -

“A judicial session usually open to the public held for the purpose of deciding issues of fact or of law sometimes with witnesses testifying.”
94. Consequently, on the issue of res judicata the Court discerns that the issue raised in the preliminary objection dated 3<sup>rd</sup> February, 2025 amounted to a Preliminary Objection.



95. The second ground in the preliminary objection on whether a tenant/landlord relationship exists between the parties to this suit.

**Issue No. C). Whether this Honourable Court is clothed with the Jurisdiction to entertains this suit filed by the Plaintiffs herein taking into the Notice to Terminate Tenancy under the provisions of Section 4(5) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.**

96. Under this sub title, assuming that res judicata was not an issue, certainly, the issue of jurisdiction as to where a matter is to be determined is critically important. The centrality of jurisdiction in any proceedings need not be over emphasized. Nyarangi J.A succinctly captured this in “Owners of Motor Vessel ‘Lillian S’ – Versus - Caltex Oil (Kenya) Limited [1989] KLR 1” as follows: -

“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...”

97. Similarly, the Court of Appeal in the case of “Kakuta Maimai Hamisi – Versus - Peris Pesu Tobiko & 2 Others [2013] eKLR” stated as follows: -

“So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.”

98. The crux of the Defendant’s contention in this regard is that the parties herein are in a controlled tenancy by virtue of the fact that the Lease between them lapsed and that as a result thereof, the Business Premises Rent Tribunal is vested with the jurisdiction to handle the dispute between them including the grant of the injunctive orders sought by the Plaintiff. In response, the Plaintiff asserts that the Tribunal does not have jurisdiction to grant injunctive orders and as such does not have jurisdiction over the present suit. To begin with, it is not disputed that the parties herein were in a landlord-tenant relationship over a business premises. This relationship was governed by a Lease.

99. In the instant suit and application, the Plaintiff is seeking to have the Defendant restrained from terminating the tenancy and/or evicting him from the suit premises. According to the Plaintiff, it is this court that has jurisdiction to issue injunctive orders notwithstanding that the tenancy in question is controlled. It is clear from the foregoing that the parties are in a controlled tenancy as defined by the provision of Section 2 of the Landlords and Tenant (Shops, Hotels and Establishments) Act (hereinafter the Act), which provides as one of the definitions of a controlled tenancy as a tenancy “which has not been reduced into writing.”

100. It is apparent that both parties are agreeable that the Business Premises Rent Tribunal is vested with jurisdiction to determine the matter. The point of divergence appears to be whether or not the Tribunal can issue the injunctive orders sought. The Plaintiff asserts that it cannot and that the matter is properly before this Court, whereas the Defendant contends that it can and by virtue thereof, this Court has no jurisdiction to entertain the dispute.

101. The Courts have had the occasion to determine the question of whether or not the Business Premises Rent Tribunal can issue injunctive or preservative orders and there are two schools of thought in that



respect. One school of thought contends that it is only the High Court (read ELC) which can issue injunctive orders whereas the other states that the Tribunal has jurisdiction to grant the same.

102. In the case of “Republic – Versus - Business Premises Rent Tribunal & Another & Exparte Davies Motor Corporation Limited [2013] eKLR”, Odunga, J. held as follows: -

“The issue for determination is therefore whether the Respondent had jurisdiction to grant an order of injunction. On my part I agree that the spirit of the Act which is to ensure the protection of tenants of controlled tenancies from eviction or exploitation would be rendered nugatory if the Tribunal was not similarly granted the jurisdiction to preserve the status quo between the landlord and the tenant pending the determination of the dispute before it. It is however not for this Court to grant to the Tribunal powers which it does not have. As was held by the Court of Appeal in *Italframe Limited – Versus - Mediterranean Shipping Co.* [1986] KLR 54; [1986-1989] EA 174:

“It is not competent to any court to proceed upon an assumption that Parliament has made a mistake, there being a strong presumption that Parliament does not make mistakes. If blunders are found in legislation, they must be corrected by legislature, and it is not the function of the Court to repair them. Thus, while terms can be introduced into a statute to effect to its clear intention by remedying mere defects of language and to correct obvious misprints or misnomers no provision which is not in the statute can otherwise be implied to remedy an omission... It is one thing to introduce terms into an Act of Parliament in order to give effect to its clear intention by remedying mere defects of language. It is quite another thing to imply a provision which is not in the statute in order to remedy an omission, without any ground for thinking that you are carrying out what Parliament intended. It is not the function of the Courts to repair the blunders that are to be found in legislation. They must be corrected by the legislature.”

Therefore, whereas it is my view that by not expressly granting the Tribunal the power to grant orders of injunction Parliament made a blunder since it rendered the intention and objective of the whole Act a mirage, based on the authorities from the Court of Appeal I am unable to find that the Tribunal is empowered under section 12 of the Act to grant orders of injunction.

In *Narshidas & Company Limited – Versus - Nyali Air Conditioning and Refrigeration Services Limited* Civil Appeal No. 205 of 1995, the Court of Appeal held that a controlled tenant confronted with an illegal threat of forcible eviction cannot go to the Business Premises Rent Tribunal established under the Act as that Tribunal has no jurisdiction to issue an injunction or similar remedy against the landlord. Similar holdings were made in *Caledonia Supermarket Limited – Versus - Kenya National Examinations Council* (supra) and *Tiwi Beach Hotel Limited – Versus - Julian Ulrike Stamm* (supra). It follows that by granting orders of injunction the Respondent acted outside its mandate.” (emphasis mine).

103. Notwithstanding the conflicting positions, this court, guided by the decisions of the Court of Appeal and the provision of Section 12 (4) of the Act is of the view that the Business Premises Rent Tribunal has jurisdiction to entertain this matter, and issue injunctive orders appropriately. I say so because the provision of Section 12(4) of the Act provides that in addition to any other powers specifically conferred on it by or under the Act, the Tribunal may investigate any complaint relating to a controlled



tenancy made to it by the landlord or the tenant, and may make such order thereon as it deems fit. The orders contemplated by the Act includes injunctive orders.

104. Indeed, it would not make legal sense for the Tribunal to entertain and investigate a complaint if it cannot issue orders preserving the suit premises pending the hearing and determination of the suit. The Court is in this respect further guided by the framework of the provision of Article 169 of *the Constitution* which categorizes local tribunals as subordinate courts. As subordinate courts, they have jurisdiction under the provision of Sections 3A and 40 of the *Civil Procedure Act*, cap. 21 to issue injunctive orders.

105. It is trite that where a mechanism is provided by legislation, that mechanism should be followed. This has been the consistent position of the courts in this jurisdiction. In the case of:- “Speaker of the National Assembly – Versus - Karume (2008) 1 KLR (EP) 425” the Court of Appeal expressed itself as follows: -

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.”

106. In conclusion, the Court finds that the Business Premises Rent Tribunal is duly vested with jurisdiction to handle the present dispute, and should this Court determine the same, it will be overstepping the Tribunal’s mandate. The Court must therefore down its tools. In the long run, therefore, I hold that the Preliminary Objection is found to be merited. Consequently the suit is hereby struck out.

**Issue No. d). Whether if the answer in (a), (b) and (c) above are in the negative the Notice of Motion application dated 3<sup>rd</sup> December, 2024 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.**

107. Under this sub - title being that the Notice of Preliminary objection dated 3<sup>rd</sup> February, 2025 was against the Notice of Motion application dated 3<sup>rd</sup> December, 2024, the Court downs its tools and in the end find that having found the matter res judicata and that the Court has no jurisdiction, it cannot proceed on to make any determination of the said application thereof.

**Issue No. e). Whether there was any occurrence and/or proof to the allegations meted by the Defendant pertaining to and/or in connection with alleged perjury and subornation committed by the Advocate for the Plaintiff and the legal consequences thereof.**

108. Under this sub – heading extremely serious issues were raised by the Defendant’s preliminary objection to the effect that the pleadings by the Plaintiff were not only devoid for legal merit but also amounted to an unwarranted personal attack on the Plaintiff’s advocate, Mr. Gikandi Ngibuini, contrary to professional ethics and established legal practice. The Defendant raised numerous allegations against the Plaintiff’s advocate, Mr. Gikandi Ngibuini, and even urging this Honourable Court to refer him to the Law Society of Kenya and the Directorate of Criminal Investigations for investigation on the offences of perjury and gross misconduct. The Counsel held that the Court had special jurisdiction under the provision of Section 3 of the *Civil Procedure Act*, Cap. 21 read with Section 56 of the Advocates’ Act to discipline any officer of the Court. Accordingly, the Plaintiff’s advocate was an officer of the Court. He knowingly prepared a false Verifying Affidavit, got it sworn by his client and filed it. He also drew a Supporting Affidavit sworn by the Plaintiff stating in paragraph 19 that there was no Tenant-Landlord relationship between the Plaintiff and the Defendant, an allegation he knew to be false. In exercise of this Honourable Court Special Jurisdiction under Sections 3 of the *Civil Procedure Act*, Cap. 21 and 56 of the Advocates’ Act, they asked that the Honourable Court to strike out this



suit with costs to be paid by Gikandi & Company Advocates and the Honourable Court issue the following additional orders to restore sanity to the Plaintiff and his advocate and to preserve the dignity of this Honourable Court: -

- iii. The entire Court file to be photocopied and certified as true copy of the original and be forwarded to the Directorate of Criminal Investigations together with this Honourable Court ruling and order for the investigation of the offences of perjury by the Plaintiff contrary to the provision of Section 108 (1) of the Penal Code and subornation of perjury by Messrs. Gikandi & Company Advocates contrary to Section 108 (2) of the Penal Code. A copy was attached for this Honourable Court ready reference.
  - iv. Refer Gikandi & Company Advocates to the Disciplinary Committee under Section 55 of the *Advocates Act* for gross misconduct. A copy was attached for this Honourable ready reference.
109. Further, the Counsel averred that the Defendant had spent millions of shillings defending suits and Petitions at the Magistrate's Courts, in the High Court, in the Environment & Land Court and in the BPRT filed by a bankrupt tenant who had not paid rent for over 4 years and had not paid a cent in costs for all the suits and Petitions he had filed and lost over the years. To put a stop to this, the Court was under a duty to discourage the Plaintiff and his advocates from further gross misconduct and commission of other offences. This Honourable Court would not be the first Judge to take action against an advocate for offences and misconduct committed during, or in the course of or relating to proceedings before the Court. To buttress on this issue, the Learned Counsel referred the Court to a decision by the Hon. Mr. Justice Olola formerly of the ELC Malindi now at the ELC Mombasa and the Hon. Prof (Dr) Nixon Sifuna in Nairobi Misc. Criminal Application No. E480 of 2023 whereby they directed the Director of Criminal Investigations and Ethics and Anti-Corruption Commission with specific orders thoroughly carry out investigations and take action against DCI offices and that advocate. That the Defendant could not had a fair trial guaranteed under Article 25(c) of *the Constitution*, proper access to justice guaranteed under Article 48 of *the Constitution*, fair hearing guaranteed under Article 50(1) of *the Constitution* or protection of its property under Article 40 of *the Constitution* including recovery of its property and arrears of rent for over 4 years in circumstances in which Messrs. Gikandi & Company Advocates aid and abet the Plaintiff in committing perjury to deny the Defendant those rights. Perjury and subornation of perjury were some of the offences against the administration of justice.
110. On its part, the Plaintiff was of the view that the legal profession operated on the principle that Advocates should represent their clients without fear or favor. By seeking to have the Plaintiff's Advocate investigated for simply representing his client, the Defendant and his Advocate sought to introduce a precedent that would undermine the independence of legal counsel and erode the fundamental right to legal representation. In a democratic society governed by the rule of law, courts must resist any attempts to weaponize disciplinary processes against opposing counsel in a bid to stifle fair representation. If such intimidation were allowed, it would set a dangerous precedent where legal practitioners could be harassed simply for advocating on behalf of their clients. That the Legal Profession (Practice and Ethics) Rules and the Code of Conduct for Advocates emphasized that Advocates should maintain a level of professional decorum in their dealings with each other. The Defendant's approach in seeking an investigation of opposing counsel rather than dealing with the substantive legal issues demonstrated professional misconduct on the part of his Advocate. If at all the Defendant took issue with the Plaintiff's legal arguments or filings, the proper recourse was through submissions and legal arguments and not unfounded allegations against an advocate's integrity. The Defendant's advocate had blatantly disregarded this principle by turning the litigation process into a platform for personal vendettas rather than addressing the issues at hand.



111. This Honourable Court has critically assessed all these issues. Undoubtedly, by all means they are not light matters at all. However, at this initial stage, and in the interest of sustaining the doctrine of Exhaustion, the Honourable Court advises the Defendant to consider lodging these allegations against the Advocate for the Plaintiff/Applicant herein with the appropriate well established statutory bodies for their appropriate legal action as mandated by law. These include the Advocates Disciplinary Committee (ADC) under the Law Society of Kenya; the Advocates Disciplinary Tribunal under the offices of the Attorney General or the Ethics & Anti – Corruption Commission (EACC). Thus, in the meantime, this Court has elected to reserve its comments on the matter for the time being.

**Issue No. f). Who will bear the Costs of Notice of Motion application 3<sup>rd</sup> December, 2024 and the Notice of Preliminary Objection dated 3<sup>rd</sup> February, 2025.**

112. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 Laws of Kenya holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise.

113. I have well stated in previous precedence and most especially in “Sagalla Lodge Limited – Versus - Samwuel Mazera Mwamunga & another (Suing as the Executors of Eliud Timothy Mwamunga – Deceased) [2022] eKLR”, that:

“ 58. The Black Law Dictionary defines “Cost” to means, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.

The provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. The issue of Costs is the discretion of Courts. From this provision of the law, it means the whole circumstances and the results of the case where a party has won the case. The events in this case is that the Notice of Motion application dated 7<sup>th</sup> December, 2021 by the Plaintiff has succeeded and hence they are entitled to costs of the application and that of the Defendants dated 21<sup>st</sup> December, 2021.”

114. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. 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. In the present case, the Honourable Court elects to award the Defendant the costs of the Notice of Motion application dated 3<sup>rd</sup> December, 2024 and the Notice of Preliminary objection dated 3<sup>rd</sup> February, 2025.

**VIII. Conclusion and Disposition**

115. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-



- a. That the Notice of Preliminary objection dated 3<sup>rd</sup> February, 2025 is partially found to have merit whereby it is sustained on grounds of res judicata and lack of jurisdiction.
- b. That the Notice of Motion application dated 3<sup>rd</sup> December, 2024 be and is hereby struck out for breaching and/or violating “the Doctrine of Res judicata” and for lack of jurisdiction.
- c. That suit as filed under the Plaint dated 3<sup>rd</sup> December, 2024 be and is hereby struck out for lack of merit.
- d. That in the meantime, based on the Doctrine of Exhaustion, the Honourable Court reserves its comments on the issues raised by the Defendant pertaining to and/or in connection with alleged perjury and subornation by the Advocate for the Plaintiff for the sake of sustaining professional decorum, dignity and decency to the Advocates Profession and Practise.
- e. That the cost of the Notice of Motion application dated 3<sup>rd</sup> December, 2024 and Notice of Preliminary Objection dated 3<sup>rd</sup> February, 2025 is awarded to the Defendant.

It is so ordered accordingly.

**RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT KWALE THIS 16<sup>TH</sup> DAY OF JUNE 2025.**

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

**ENVIRONMENT AND LAND COURT AT KWALE**

Ruling delivered in the presence of:

Mr. Daniel Disii the Court Assistant.

Mr. Gikandi Ngubuini Advocate for the Plaintiff/Applicant.

M/s. Muyaa Advocate for the Defendant/Respondent.

