



REPUBLIC OF KENYA



Mvungu & another v Mvungu (Environment and Land Miscellaneous Case E042 of 2025) [2025] KEELC 6507 (KLR) (25 September 2025) (Ruling)

Neutral citation: [2025] KEELC 6507 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS CASE E042 OF 2025
MN KULLOW, J
SEPTEMBER 25, 2025**

BETWEEN

BRANISLAV PETKOVIC 1ST PLAINTIFF

SLAVICA VULETOVIC PETKOVIC 2ND PLAINTIFF

AND

PATRICK NTHIGA MVUNGU DEFENDANT

RULING

1. By a Notice of Motion dated 11th July 2025, brought under Sections 1A, 1B, 3A, and 6 of the *Civil Procedure Act* (Cap 21), Sections 2, 4, 6, and 12 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Cap 301 (“the Act”), Article 159(2) of *the Constitution* of Kenya, 2010, and Order 51 Rule 1 of the Civil Procedure Rules, 2010. The Applicant seeks orders striking out the Plaintiffs’ suit for want of jurisdiction, or in the alternative, staying the proceedings and referring the dispute to the Business Premises Rent Tribunal (BPRT).
2. The genesis of this dispute is a lease agreement dated 29th February 2024, entered into between the Plaintiffs, Branislav Petkovic and Slavica Vuletovic Petkovic (landlords) and the Defendant, Patrick Nthiga Mvungu (tenant), over commercial premises known as L.R. No. 26661, situated along Old Mombasa Road, Nairobi. The lease was for a fixed term of one year, expiring on 28th February 2025.
3. The Plaintiffs’ pleadings and affidavits state that the Defendant defaulted in paying rent from October 2024, leading to rent arrears that escalated to over KShs. 7,000,000. The Plaintiffs served several demand notices and eventually instructed auctioneers to proclaim the Defendant’s goods for distress. Despite the expiry of the lease on 28th February 2025, the Defendant remained in occupation of the premises. Consequently, the Plaintiffs filed the present suit in this Court on 20th February 2025 seeking eviction, recovery of arrears, and mesne profits.



4. The Defendant/Applicant, on his part, contends that the suit is incompetent as the dispute arose from a controlled tenancy within the meaning of Section 2 of the Act. He argues that the arrears, eviction, and proclamation all arose during the tenancy's subsistence, thereby mandating that the matter be referred to the BPRT under Section 12(1) of the Act. The Applicant further submits that the Plaintiffs, being bound by their own pleadings that acknowledged a one-year tenancy, cannot depart therefrom to frame the matter as one of trespass so as to invoke the jurisdiction of this Court.
5. The Defendant additionally points out that a prior suit, Milimani CMCC No. E1160 of 2025, had been filed on 24th February 2025 in relation to the same premises, lease, and arrears, thereby raising concerns of multiplicity of suits and forum shopping. He therefore prays that this Court declines jurisdiction in favour of the BPRT, which is a specialized statutory tribunal with exclusive mandate to determine disputes arising from controlled tenancies.
6. The Plaintiffs/Respondents oppose the Application through the Replying Affidavit sworn by Branislav Petkovic on 13th August 2025. They contend that the lease expired by effluxion of time on 28th February 2025, leaving no subsisting tenancy to be governed by the Act. They assert that the Defendant's continued occupation of the premises is illegal and amounts to trespass, which is a matter falling within the original jurisdiction of this Court under Article 162(2)(b) of *the Constitution* and Section 13 of the *Environment and Land Court Act*. The Plaintiffs further argue that CMCC No. E1160 of 2025 was dismissed on a preliminary objection and therefore the plea of sub judice is without basis.
7. The parties have filed rival submissions. The Defendant emphasizes the principle of exhaustion of statutory remedies and cites authorities such as Kenya Commercial Bank Ltd v Stage Coach Kenya Ltd [2012] eKLR and Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd [2009] KLR 389 in support of the argument that the Plaintiffs ought to have pursued the matter before the BPRT. Conversely, the Plaintiffs submit that the tenancy having expired, the relationship between the parties is no longer governed by the Act, and that this Court is properly seized of jurisdiction to grant the reliefs sought, including eviction and recovery of mesne profits.
8. Against this background, the Court must now determine whether the lease agreement between the parties gave rise to a controlled tenancy, whether this Court has jurisdiction to entertain the present dispute, and what orders are appropriate in the circumstances.

Issues For Determination

9. Upon consideration of the Application, the affidavits, and rival submissions, the following issues arise for determination:
 - a. Whether the lease agreement dated 29th February 2024 constituted a controlled tenancy within the meaning of Section 2 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Cap 301.
 - b. Whether the expiry of the lease by effluxion of time on 28th February 2025 divested the BPRT of jurisdiction and transformed the dispute into one of trespass falling within the jurisdiction of the Environment and Land Court.
 - c. Whether the Plaintiffs' suit is incompetent for want of jurisdiction and therefore liable to be struck out or stayed pending reference to the BPRT.



Analysis and Determination

ISSUE NO.1: Whether the lease agreement dated 29th February 2024 constituted a controlled tenancy within the meaning of Section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301.

10. The Court has carefully considered the pleadings and documents filed by both parties. It is not disputed that on 29th February 2024, the Plaintiffs as landlords and the Defendant as tenant executed a written lease agreement over the premises known as L.R. No. 26661, Old Mombasa Road, Nairobi. The lease was for a fixed period of one year, commencing on 29th February 2024 and expiring on 28th February 2025.
11. Section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301 defines a “controlled tenancy” to include: “...a tenancy of a shop, hotel or catering establishment which has been reduced into writing and is for a period not exceeding five years.” The suit premises were let for business purposes, and therefore fall within the category of “shops” envisaged by the Act.
12. The lease in question was in writing and expressly limited to one year, which is a term not exceeding five years. On the plain wording of Section 2 of Cap 301, such a tenancy qualifies as a controlled tenancy. No evidence has been placed before this Court to suggest that the tenancy was exempted under Section 3 of the Act, which provides limited circumstances where tenancies are excluded from the Act’s operation.
13. The Defendant has correctly argued that disputes relating to such controlled tenancies fall within the statutory framework of Cap 301. Indeed, Section 12(1) of the Act expressly grants the Business Premises Rent Tribunal (BPRT) jurisdiction to determine disputes relating to the recovery of possession, the amount of rent payable, and other issues arising from controlled tenancies. Thus, once a tenancy falls within Section 2, jurisdiction attaches to the BPRT in the first instance.
14. In view of the above, this Court finds and holds that the lease agreement dated 29th February 2024 created a controlled tenancy within the meaning of Section 2 of Cap 301. The tenancy was written, was for business premises, and was for a term of one year, which falls squarely within the statutory threshold of not exceeding five years.

Issue No.2: Whether the expiry of the lease by effluxion of time on 28th February 2025 divested the BPRT of jurisdiction and transformed the dispute into one of trespass falling within the jurisdiction of the Environment and Land Court.

15. It is now trite law that issues touching on the jurisdiction of a court of law to determine any matter before it is fundamental questions of law which may be raised at any stage of the proceedings. Once raised, a determination thereon must be made before the Court can proceed further with the disposal of the matter. Where want of jurisdiction is demonstrated to exist, the Court has no option but to down its tools and proceed no further.
16. The classical exposition of jurisdiction remains the words of Nyarangi JA in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1* where the Court of Appeal held:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction... By jurisdiction is meant the authority



which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means... Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

17. The Supreme Court in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others*, Application No. 2 of 2011 affirmed this principle, observing that:

“(68) A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation....” (Emphasis provided).

18. Article 162(2)(b) of *the Constitution* mandates Parliament to establish courts of equal status to the High Court to hear and determine disputes relating to the environment, and the use and occupation of, and title to land. Pursuant to that Article, Parliament enacted the *Environment and Land Court Act*, No. 19 of 2011. Section 13 thereof sets out the Court’s jurisdiction, empowering it to hear and determine disputes relating to planning, title, tenure, boundaries, valuation, compulsory acquisition, administration, and contracts or other instruments granting enforceable interests in land. It is evident from the constitutional text and the statute that while the ELC has broad jurisdiction, that jurisdiction must always be read alongside other statutes which create specialized tribunals with exclusive mandates, such as Cap 301 in relation to controlled tenancies.
19. Applying these principles to the present case, although the Plaintiffs argue that the lease lapsed on 28th February 2025 and the Defendant’s continued occupation constitutes trespass, the dispute before the Court is rooted in arrears of rent and recovery of possession which accrued during the subsistence of a controlled tenancy.
20. Section 12(1) of Cap 301 vests the BPRT with exclusive original jurisdiction over such disputes. The mere expiry of the lease by effluxion of time did not divest the Tribunal of jurisdiction to resolve disputes emanating from that tenancy. In accordance with *Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others*, Application No. 2 of 2011, this Court cannot arrogate to itself jurisdiction that Parliament has expressly placed in the BPRT. To hold otherwise would amount to usurping a jurisdiction this Court does not possess.
21. It is now trite that issues touching on the jurisdiction of a court of law to determine any matter before it is fundamental issues of law and may be raised at any stage of the proceedings. Once raised, a determination thereon should be made before a Court can proceed further with the final disposal of any matter before it. Also, that where want of jurisdiction is demonstrated in law to exist, the court has no option but to down its tools and proceed no further.

ISSUE NO.3: Whether the Plaintiffs’ suit is incompetent for want of jurisdiction and therefore liable to be struck out or stayed pending reference to the BPRT.

22. Having already determined under Issues 1 and 2 that the lease agreement dated 29th February 2024 constituted a controlled tenancy within the meaning of Section 2 of Cap 301, and that expiry by



effluxion of time did not divest the Tribunal of jurisdiction over disputes arising therefrom, the inescapable question is whether this Court can entertain the present suit.

23. The Plaintiffs commenced proceedings in this Court seeking, among other reliefs, possession of the premises and recovery of rent arrears. These are matters which Section 12(1) of Cap 301 expressly places within the original jurisdiction of the Business Premises Rent Tribunal. The doctrine of exhaustion of statutory remedies obliges parties to pursue the specialized forum provided by Parliament before approaching the courts. Where a suit is filed in a forum devoid of jurisdiction, it is incompetent from inception, and as the Court of Appeal emphasized in “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1 and the Supreme Court reiterated in Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others, Application No. 2 of 2011, this Court has no discretion but to down its tools.
24. Applying those principles, it follows that once this Court finds that jurisdiction lies with the BPRT, it cannot purport to regulate or preserve these proceedings by way of a stay. To do so would be to arrogate to itself jurisdiction it does not possess. The logical consequence is that the Plaintiffs’ suit is incompetent and unsustainable before this Court, and is liable to be struck out in its entirety, leaving the parties at liberty to ventilate their grievances before the Tribunal established under Cap 301.

Final Orders

25. Having considered the pleadings, affidavits, submissions, the law, and authorities cited, and for the reasons set out in the analysis above, the Court makes the following findings:
 - a. The lease agreement dated 29th February 2024 created a controlled tenancy within the meaning of Section 2 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Cap 301.
 - b. The expiry of the lease by effluxion of time on 28th February 2025 did not divest the Business Premises Rent Tribunal (BPRT) of jurisdiction over disputes relating to arrears, eviction, and possession which arose during the tenancy.
 - c. The Plaintiffs’ suit, having been instituted in this Court without first exhausting remedies under Cap 301, is incompetent for want of jurisdiction.
26. On the question of costs, and noting that the dispute between the parties remains alive for resolution before the BPRT, the Court finds it just and equitable that each party shall bear its own costs.

It is so ordered!

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THE 25TH DAY OF SEPTEMBER, 2025.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

Mr. Kariithi for the Plaintiff

Ms. Murage for the Defendants

Philomena W. Court Assistant

