



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ali & another v Ngige & 2 others (Land Case E095 of 2025)  
[2025] KEELC 7353 (KLR) (24 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 7353 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
LAND CASE E095 OF 2025  
TW MURIGI, J  
OCTOBER 24, 2025**

**BETWEEN**

**ABDILLAHI ADAN ALI ..... 1<sup>ST</sup> PLAINTIFF**

**ABDISHAKUR MUSE MOHAMED YUSUF ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**MARTIN NGIGE ..... 1<sup>ST</sup> DEFENDANT**

**KORE NASIRI JILLO ..... 2<sup>ND</sup> DEFENDANT**

**FATUMA MOHAMED HAJI ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. Before me for determination is the Notice of Motion dated 9<sup>th</sup> March 2025 brought under Sections 1A, 1B & 3A of the [Civil Procedure Act](#), Order 40 Rules 1 and 2 of the Civil Procedure Rules, in which the Applicants seek the following orders:
  - a. Spent.
  - b. Spent.
  - c. Pending the hearing and determination of this suit, the Court be pleased to grant a temporary injunction restraining the Respondents whether by themselves, their servants, agents or any person claiming through or under them from entering, selling, accessing or in any manner whatsoever interfering with the Applicants' quiet enjoyment and occupation of all that parcel of land known as L.R No. 36/11/148 Eastleigh Second Avenue, Nairobi (hereinafter 'the suit property') and the Officer Commanding Eastleigh North Police Station to ensure compliance with this order.
  - d. Costs of the application be provided for.



2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Abdullahi Adan Ali sworn on even date.

### **The Applicants' Case**

3. The deponent averred that the Applicants are lessees of the 3<sup>rd</sup> Respondent on the suit property. He further averred that on 6<sup>th</sup> March 2025, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents threatened to evict them from the suit property and demanded that the Applicants pay rent to them. The deponent is apprehensive that if the orders sought are not granted, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents may evict them from the suit property, resulting in substantial loss.

### **The 3<sup>rd</sup> Respondent's Case**

4. The 3<sup>rd</sup> Respondent filed a replying affidavit dated 12<sup>th</sup> March 2025. She averred that she is the bona fide owner of the suit property, which she has leased to the Applicants. She further averred that an illegal sale and transfer of the suit property occurred despite having paid the requisite auctioneer fees on behalf of the estate of Asha Mohamed Heshi. She pointed out that a commercial suit is pending in the High Court, and therefore, the 2<sup>nd</sup> Respondent's threatened eviction is geared towards defeating the outcome of that suit.

### **THE 2<sup>ND</sup> RESPONDENT'S CASE**

5. The 2<sup>nd</sup> Respondent filed a replying affidavit dated 14<sup>th</sup> March 2025 in opposition to the application. He averred that he purchased the suit property on 17<sup>th</sup> December 2021 at a public auction for Kshs. 100,000,000/= an amount that he is repaying as a loan. He further averred that the 1<sup>st</sup> Respondent is unknown to him.
6. He noted that the 3<sup>rd</sup> Respondent filed Milimani HCCOMM No. 327 of 2017 seeking damages for the alleged illegal sale. He also stated that vacant possession was a key condition of the sale. He averred that the two tenants occupying the suit property pay him rent. He further averred that the Applicants are not in occupation of the suit property and have not been threatened with eviction. The deponent stated that the issue of the occupation of the suit property is res judicata.
7. The 2<sup>nd</sup> Respondent also filed a Notice of Preliminary Objection dated 13<sup>th</sup> March 2025 raising the following grounds:-
  - a. That the Honourable court lacks original jurisdiction to hear this matter by dint of the Appellate jurisdiction vested in the Court by Section 13 of the [Environment and Land Court Act](#) as read together with Article 162 of [the Constitution](#) of Kenya.
  - b) That the Honourable Court lacks jurisdiction to hear and determine this suit as against the 2<sup>nd</sup> Defendant as the same offends the provisions of Article 162 of [the Constitution](#) of Kenya, Section 7 of the [Civil Procedure Act](#) as read together with Article 159(2) and Article 169(1)(d) and (2) of [the Constitution](#) of Kenya 2010 and Section 9(2) and (3) of the Fair Administrative Actions Act particularly the doctrine of exhaustion.
  - c. That this suit is in breach of the sub judice rule under Section 6 of the [Civil Procedure Act](#) as well as breach of the res judicata rule under Section 7 of the [Civil Procedure Act](#) and a violation of the overriding objective under Section 1B of the [Civil Procedure Act](#) which requires that there be an efficient use of the available judicial and administrative resources for the reasons that the following suits are determined and others pending in the Business Premises Rent Tribunal; (1) NAIROBI BPRT NO. 1108 OF 2024 (Consolidated with BPRT NO. 1107 OF 2024 & BPRT



NO. 1106 OF 2024) – scheduled for hearing on 14<sup>th</sup> March 2025. (2) NAIROBI BPRPT NO. E881 OF 2022 consolidated with NAOROBIBPRT NO. E911 OF 2022 – determined on 2<sup>nd</sup> June 2023.

8. The preliminary objection was canvassed by way of written submissions.

### **The 2<sup>nd</sup> Defendant's Submissions**

9. The 2<sup>nd</sup> Defendant filed his submissions dated 9<sup>th</sup> May 2025.
10. On behalf of the 2<sup>nd</sup> Defendant, Counsel outlined the following issues for the court's determination: -
- a. Whether the Environment and Land Court has jurisdiction to hear this suit?
  - b. Whether the suit is barred by the doctrines of res judicata and sub judice?
  - c. Whether the application for an injunction meets the threshold under *Giella v Cassman Brown*
  - d) Whether the suit and application constitute an abuse of court process warranting dismissal.
11. On the first issue, Counsel submitted that the ELC Court lacks original jurisdiction to hear this suit as the dispute primarily concerns a landlord-tenant relationship governed by the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*. To buttress this point, Counsel relied on the case of *Mukisa Biscuit Manufacturing Company Limited –vs- West End Distributors Limited* (1969) EA 696.
12. Counsel further submitted that since the Plaintiffs' case is based on lease agreements with the 3<sup>rd</sup> Defendant, the proper forum is the BPRT, while the appellate jurisdiction falls with the ELC. To buttress this argument, reliance was placed on the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1. Counsel submitted that the Plaintiffs' filing of BPRT No. E1108 of 2024, as consolidated with E1107 and E1106 of 2024, confirms that the BPRT is the proper forum and therefore the ELC cannot assume original jurisdiction. It was submitted that the suit is incompetent as the Environment and Land Court cannot assume original jurisdiction.
13. Regarding the second issue, Counsel contended that the suit is res judicata, as disputes concerning tenancy over the suit property were determined in Nairobi BPRT No. E881 of 2022 and later appealed to both the High Court and the Court of Appeal, confirming the finality of these proceedings. To buttress this point, reliance was placed on the case of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] KECA 477 (KLR).
14. It was further submitted that the suit is sub-judice because of the ongoing BPRT proceedings involving the same parties. To substantiate this contention, Counsel referenced Sections 6 of the *Civil Procedure Act*, along with the case of *Republic v Senior Registrar of Titles Ex-Parte Brookside Court Limited* [2012] KEHC 1067 (KLR).
15. On the third issue, Counsel submitted that the Applicants have not satisfied the criteria for the grant of an injunction because: the Applicants have no landlord-tenant relationship with the 2<sup>nd</sup> Respondent who is the lawful owner of the suit property; the Applicants are not in occupation of the suit property; the Applicants losses can be compensated by damages and the balance of convenience tilts in favour of the 2<sup>nd</sup> Respondent who is the lawful owner. To support this argument, reliance was placed on the cases of *Giella Cassman Brown & Co. Ltd* [1973] EA 358 and *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* [2017] KECA 79 (KLR)
16. In conclusion, Counsel submitted that the Plaintiffs' suit and application constitute an abuse of the court process because they seek to re-litigate finalized matters and undermine the lawful ownership



vested in the 2<sup>nd</sup> Defendant. Counsel argued that the instant suit should be struck out. Counsel further submitted that the failure to disclose prior and pending BPRT proceedings violates the duty of candor, warranting the dismissal of the application. Reference was made to the cases of Satya Bhama Gandhi v Director of Public Prosecutions & 3 others [2018] KEHC 6100 (KLR) and Bahadurali Ebrahim Shamji v. Al Noor Jamal & 2 Others Civil Appeal No. 210 of 1997.

### **The 1<sup>st</sup> Defendant/respondent's Submissions**

17. The 1<sup>st</sup> Defendant filed his submissions dated 2<sup>nd</sup> May 2025. On behalf of the 1<sup>st</sup> Defendant, Counsel outlined the following issues for the court's determination: -
  - a. Whether the 2<sup>nd</sup> Defendant/Respondent's Preliminary Objection is a proper Preliminary Objection?
  - b. The impropriety of raising objections of sub judice and res judicata herein and whether the suit is barred by the two doctrines.
  - c. Whether the court is clothed with the requisite jurisdiction to handle this suit?
18. On the first issue, Counsel submitted that the preliminary objection does not fit the description of a preliminary objection as it is based on highly contested matters of fact which ought to be argued during the pendency of the suit.

To support this point, reliance was placed on the cases of Oraro v Mbaja [2005] KEHC 3182 (KLR), Henry Wanyama Khaemba v Standard Chartered Bank (K) Ltd & another [2014] KEHC 4804 (KLR) and Kandara Residence Association & another v Ananas Holdings Limited & 4 others; Director of Survey & 3 others (Interested Parties) [2020] KEELC 1238 (KLR).
19. Regarding the second issue, Counsel submitted that the preliminary objection has been improperly raised as matters of sub-judice and res judicata require investigation of facts and therefore, cannot form the subject of a preliminary objection.
20. It was submitted that the sub-judice and res judicata objections were not properly raised as the Plaintiffs and 1<sup>st</sup> Respondent were not parties to the BPRT references. The cases of ASL Credit Limited v Abdi Basid Sheikh Ali & another [2019] KEHC 9216 (KLR) and Republic v Registrar of Societies-Kenya & 2 Others Ex Parte Moses Kirima & 2 others [2017] eKLR were relied upon.
21. On the third issue, Counsel relied on Article 162 of *the Constitution* and Section 13 of the ELC Act to submit that issues relating to occupation and title to the suit property are within the Court's jurisdiction.
22. Concluding his submissions, Counsel urged the court to dismiss the preliminary objection with costs.

### **The Plaintiffs Submissions**

23. The Plaintiffs filed their submissions dated 13<sup>th</sup> May 2025. On behalf of the Plaintiffs, Counsel outlined the following issues for the Court's determination:-
  - a) ) Whether the Preliminary objection raises pure points of law?
  - b) Whether this Honourable Court has jurisdiction to hear and determine the matter?
24. Counsel submitted that the preliminary objection does not raise pure points of law but requires the Court to examine the factual questions regarding whether this suit is res judicata and sub judice on account of BPRT No. E881 of 2022 and BPRT No. E1108 of 2024. To support this argument, reliance



was placed on Mukisa Biscuits (Supra), Ushago Diani Investment Limited v Abdulwahab [2023] KEELC 20213 (KLR), and Attorney General & another v Andrew Maina Githinji & another [2016] KECA 817 (KLR),

25. Regarding the second issue, Counsel submitted that the lease agreement between the 3<sup>rd</sup> Defendant and the Plaintiffs is for 15 years. The ELC Court should therefore address disputes arising from it and not the BPRT as it is not a controlled tenancy. Counsel relied on Section 13 of the ELC Act, Section 2 of the Landlord and Tenancy Act and the case of Republic v Chairman, Business Premises Rent Tribunal & another; Carrington Complex Ltd (Exparte Applicant) [2023] KEELC 16272 (KLR) .
26. Concluding his submissions, Counsel submitted that the Preliminary Objection does not meet the threshold of a preliminary objection and should be dismissed with costs.

### **Analysis And Determination**

27. The law on preliminary objections is well settled. A Preliminary Objection must be based on a pure point of law.
28. In Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors Ltd (1969) EA 696, Law JA stated;

“So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which, if argued as a preliminary point, may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

29. Further on, Sir Charles Newbold JA stated;

“The first matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

30. In Oraro Vs Mbaja (2005) eKLR Ojwang J (as he then was), described it as follows;

“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. An assertion which claims to be a Preliminary Objection and yet it hears 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.”



31. The Court of Appeal in *Nitin Properties Ltd Vs Singh Kalsi & Another* (1995) eKLR also captured the legal principle when it stated as follows;

“A preliminary objection 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.”

32. Having considered the Preliminary Objection and the rival submissions, the following issues fall for determination

- a) Whether this court has jurisdiction to hear and determine this matter.
- b) Whether the instant suit is *res judicata* and *sub judice*.

33. The issue of jurisdiction can resolve the matter preliminarily without the necessity of determining the facts. The preliminary objection raised by the Defendant aligns with the description of a preliminary objection as outlined in the *Mukisa Biscuits* case *supra*.

34. On the first issue, the 2<sup>nd</sup> Defendant contends that this Court lacks jurisdiction as the dispute is founded on a lease agreement and should therefore be determined by the BPRT. The 1<sup>st</sup> Defendant argued that the dispute relates to occupation and title of the suit property, which should be determined by this Court and not by the BPRT. The Plaintiffs argued that the lease between them and the 3<sup>rd</sup> Respondent was for 15 years and was therefore not a controlled tenancy to be dealt with by the BPRT.

35. It is trite law that jurisdiction is everything, and without it, the court cannot take one more step in the case. In the celebrated case of *Owners of Motor Vessel ‘Lillian S’ Vs Caltex Oil (Kenya) Limited* (1989) eKLR, the Court held that:

“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...”

36. Similarly, the Supreme Court in the case of *Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others* [2012] eKLR pronounced itself thus:

“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....”

37. A court derives its jurisdiction from *the Constitution*, legislation, or both. The jurisdiction of this court is derived from Article 162(2)(b) of *the Constitution* and Section 13 of the *Environment and Land Court Act*.

38. The jurisdiction of the ELC Court is set out in Section 13 of the ELC Act as follows under :

- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
2. In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes—



- a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- (b) relating to compulsory acquisition of land;
- (c) relating to land administration and management;
- (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- (e) any other dispute relating to environment and land

39. The Jurisdiction of the BPRT is outlined in Section 12 of the Landlord and Tenants Act as follows:

A Tribunal shall, in relation to its area of jurisdiction have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in addition to and without prejudice to the generality of the foregoing shall have power—

- a. to determine whether or not any tenancy is a controlled tenancy;
- b. to determine or vary the rent to be payable in respect of any controlled tenancy, having regard to all the circumstances thereof;
- (c) to apportion the payment of rent payable under a controlled tenancy among tenants sharing the occupation of the premises comprised in the controlled tenancy;
- (d) where the rent chargeable in respect of any controlled tenancy includes a payment by way of service charge, to fix the amount of such service charge;
- (e) to make orders, upon such terms and conditions as it thinks fit, for the recovery of possession and for the payment of arrears of rent and mesne profits, which orders may be applicable to any person, whether or not he is a tenant, being at any material time in occupation of the premises comprised in a controlled tenancy;
- (f) for the purpose of enabling additional buildings to be erected, to make orders permitting landlords to excise vacant land out of premises of which, but for the provisions of this Act, the landlord could have recovered possession;
- (g) where the landlord fails to carry out any repairs for which he is liable—
  - i. to have the required repairs carried out at the cost of the landlord and, if the landlord fails to pay the cost of such repairs, to recover the cost thereof by requiring the tenant to pay rent to the Tribunal for such period as may be required to defray the cost of such repairs, and so that the receipt of the Tribunal shall be a good discharge for any rent so paid;
  - (ii) to authorize the tenant to carry out the required repairs, and to deduct the cost of such repairs from the rent payable to the landlord;
- (h) to permit the levy of distress for rent;



- i. to vary or rescind any order made by the Tribunal under the provisions of this Act;
- (j) to administer oaths and order discovery and production of documents in like manner as in civil proceedings before the High Court, to require any landlord or tenant to disclose any information or evidence which the Tribunal considers relevant regarding rents and terms or conditions of tenancies, and to issue summons for the attendance of witnesses to give evidence or produce documents, or both, before the Tribunal;
- (k) to award costs in respect of references made to it, which costs may be exemplary costs where the Tribunal is satisfied that a reference to it is frivolous or vexatious;
- (l) to award compensation for any loss incurred by a tenant on termination of a controlled tenancy in respect of goodwill, and improvements carried out by the tenant with the landlord's consent;
- (m) to require a tenant or landlord to attend before the Tribunal at a time and place specified by it, and if such tenant or landlord fails to attend, the Tribunal may investigate or determine the matter before it in the absence of such tenant or landlord;
- (n) to enter and inspect premises comprised in a controlled tenancy in respect of which a reference has been made to the Tribunal.

40. Section 2 of the Landlord and Tenants Act defines a controlled tenancy as follows:

a tenancy of a shop, hotel or catering establishment—

- a. which has not been reduced into writing; or
- b. which has been reduced into writing and which—
  - i. is for a period not exceeding five years; or
  - ii. contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or
  - iii. relates to premises of a class specified under subsection (2) of this section:

41. The 2<sup>nd</sup> Defendant alluded to the lease agreement in his pleadings. This is prima facie evidence that he does not deny its existence. The lease states that it is renewable and runs from 1<sup>st</sup> April 2024 to 30<sup>th</sup> April 2039. It is therefore a fifteen-year lease that does not fall within the definition of a controlled tenancy.

42. The jurisdiction of the BPRT is restricted to controlled tenancies. The lease period and the fact that it can be renewed ousts the jurisdiction of the BPRT. Based on the foregoing, I find that this Court has jurisdiction to hear this matter as it deals with disputes relating to enforceable interests in land such as the one created by the aforementioned lease.

43. In view of the foregoing, the first point of law relied upon by the 2<sup>nd</sup> Defendant fails.

44. Regarding the second issue, the 2<sup>nd</sup> Defendant maintained that the instant suit is sub-judice and res judicata on account of previous and ongoing proceedings before the BPRT. The 1<sup>st</sup> Defendant and the Plaintiffs argued that determining whether a suit is sub-judice or res judicata requires going into factual



details, which is beyond what is required in determining a preliminary objection. It was further stated that the 1<sup>st</sup> Defendant and the Plaintiffs were not parties to the BPRT references.

45. In the case of Odeny (Formerly Victor Onyango Odeny) v Attorney General (Petition E415 of 2022) [2024] KEHC 5627 (KLR) the court when faced with a similar situation stated as follows:

Two clear observations emerge. First is that the Respondent relied on a contested factual matter to raise the instant Preliminary objection. For this Court to decide on the instant Preliminary Objection, it would first have to inquire into the existence of the alleged suit by the Petitioner as this is not admitted by the Petitioner and cannot be confirmed from the Petitioner's pleadings. The claim was made by the Respondent for the first time in the Notice of Preliminary Objection. The fact that the Court has to ascertain a fact that the Respondent relies on to raise the Preliminary Objection means that the Preliminary Objection does not meet the legal threshold required of a preliminary objection as a preliminary objection cannot be based on a disputed factual matter.

The second conclusion is that without availing the evidence of the previous suit, a factual issue that the Petitioner categorically denied, this Court was denied the opportunity of examining the two pleadings in order to determine if they are identical or substantially similar. In the absence of the evidence, the Court has nothing to assess in order to determine if Section 6 of The *Civil Procedure Act* was contravened so as to reach a finding on whether or not there is sub-judice.

46. The 2<sup>nd</sup> Defendant relied on a contested factual matter in raising his preliminary objection. He stated that the suit is res judicata and sub judice because of previous and ongoing BPRT references.
47. The Plaintiffs and the 1<sup>st</sup> Defendant denied participating in the said references. Based on the foregoing, the Court would have to ascertain which of the parties is stating the truth. That is beyond the threshold of a preliminary objection.
48. Additionally, the 2<sup>nd</sup> Defendant did not adduce any evidence of the said BPRT references to enable the Court to compare them with the pleadings in the instant suit and make the findings of res judicata or sub judice.
49. In view of the fact that there was no evidence to help the Court make a finding that the instant suit is res judicata or sub judice, the second point of law raised by the 2<sup>nd</sup> Defendant fails.
50. The third point of law raised by the 2<sup>nd</sup> Defendant is that the suit violates the doctrine of exhaustion. None of the parties made submissions on this ground. The Court can therefore not make a determination on it.
51. In end, I find that the Preliminary Objection dated 13<sup>th</sup> March 2025 is devoid of merit and the same is hereby dismissed.

**RULING SIGNED, DATED, AND DELIVERED VIA MICROSOFT TEAMS THIS 24<sup>TH</sup> DAY OF OCTOBER, 2025.**

.....

**HON. T. MURIGI**

**JUDGE**

In The Presence Of : -

Ochieng for the 2<sup>nd</sup> Defendant



