



REPUBLIC OF KENYA



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Hotel Savana Limited v Omuga; Apondu & 2 others (Interested Parties) (Environment and Land Case E009 of 2025) [2025] KEELC 7479 (KLR) (30 October 2025) (Ruling)

Neutral citation: [2025] KEELC 7479 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIIAYA
ENVIRONMENT AND LAND CASE E009 OF 2025**

AE DENA, J

OCTOBER 30, 2025

BETWEEN

HOTEL SAVANA LIMITED PLAINTIFF

AND

CONCELLIA AOKO OMUGA DEFENDANT

AND

JOSEPHINE AUMA APONDU INTERESTED PARTY

PATRICIA ATIENO APONDU INTERESTED PARTY

CHRISTINE ANYANGO APONDU INTERESTED PARTY

RULING

1. The plaintiff commenced this suit as the registered proprietor of LR: Siaya/ambira/29 claiming the entry of the defendant and her continued occupation of the suit premises is illegal having been premised on an illegal lease. The plaintiff prays for the following orders
 1. That a declaration be and is hereby made that the lease agreement as drafted and executed between the Defendant, 1, 2nd, 3rd Interested parties and Florence Sunday Apondu dated 10th November 2017 is illegal null and void.
 2. That a declaration be and is hereby made that the entry and continued occupancy of the defendant on LR: Siaya/ambira/29 has been illegal and voidable at the benefit of the Plaintiff.
 3. That the Defendant be and is hereby permanently evicted from the suit land namely:LR: Siaya/ambira/29.



4. That the Defendant either by herself, relatives, family members, agents, any one working or acting on her behalf be and are hereby permanently restrained from entering, occupying, utilizing or in any manner dealing with the suit land LR: Siaya/ambira/29.
2. In opposing the suit, the defendant filed a Notice of Preliminary Objection dated 2nd May 2025 on the following verbatim grounds :-
- A. Article 162 (2) (b), 165 (5), 169 (1) (d) and 169 (2) of *the Constitution* of Kenya
1. Article 162 (2) (b), provides for creation of the Environment and Land Court by Parliament, while Article 169 (2), provides that Parliament shall enact legislation conferring jurisdiction, functions and powers on the courts established under clause (1).
 2. Article 165 (5) divests the High Court (and by extension Courts with status of High Court), of the jurisdiction to hear matters reserved for specific courts or local tribunals.
 3. Article 169 (1) (d), provides for establishment of subordinate courts and local tribunals while Article 169 (2), provides for enactment by Parliament of legislation conferring jurisdiction, functions and powers upon such courts.
- B. Sections 2, 4 and 12 of the Landlord & Tenant (Shops Hotels & Catering Establishments) Act (Cap 301).
4. Section 2 defines a controlled tenancy, while, Sections 4 and 12 of the Act confer upon the tribunal exclusive original jurisdiction over controlled tenancies and matters pertaining thereto.
- C. Section 13 (4) of the Environment & Land Court Act (Cap 12A)
and Section 15 of the Landlord & Tenant (Shops, Hotels & Catering Establishment) Act (Cap 301)
5. The two sections confer upon the Honourable Court an appellate Jurisdiction over the decisions arising from the subordinate courts and tribunals in respect of matters falling within its jurisdiction.

D. Plaintiff's pleadings and documents of the tenancy in dispute.

6. At paragraph 6 of the plaint dated 8th April 2025, the Plaintiff has pleaded thus :-

“The illegal lease agreement was dated even date and it allowed the Defendant vacant possession and required her to enjoy the following privileges and to perform the obligations listed hereunder :-

"a) To enjoy the occupancy and use of the suit land from the date of execution namely; 10th November 2017 for a period not exceeding 6 years being not later than 10th November 2023".
7. The Lease agreement (renewal) dated 10th November 2017 runs from pages 27 to 31 of the Plaintiff's documents.
8. Going by the clear terms of the lease and the Plaintiff's own averments aforesaid, it means that the Defendant became a controlled tenant as from 11th November 2023, following the expiry of the lease renewed on 10th November 2017, and as such the tenancy can only be terminated, or varied in accordance with the provisions of Cap 301, and not otherwise



E. Defendant's submissions on her preliminary objection

9. Her objection is jurisdictional and should be determined on priority basis;
10. The Honourable Court lacks original jurisdiction over the cause of action in this suit (it only has an appellate jurisdiction over it) and should, therefore, strike out the plaint dated 8th April 2025 with costs.

Submissions

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

Defendants Submissions

4. The defendants' submissions are dated 5/06/2025. Reiterating the contents of paragraph 6 of the Plaint herein it is submitted that the defendant became a controlled tenant after the lease expired in 1923. That being the case the courts jurisdiction is appellate. The court is referred to the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696, on the nature of preliminary objection and Samuel Kamau Macharia vs Kenya commercial Bank & 2 a/hers /20/2J eKLR emphasizing jurisdiction is conferred by the Constitution/statute and the court cannot abrogate itself jurisdiction it does not have.
5. It is submitted that the objection is properly raised as it is anchored on both constitutional and statutory issues, specifically that the dispute is in the first instance reserved for the jurisdiction of the BPRT, pursuant to Articles 165 (5),169 (1) (d) and 169 (2) of the Constitution of Kenya as read with sections 2 and 15 of CAP 301 and section 13 (4) of Cap.12A.
6. The court is invited to strike out the plaint dated 8th April 2025, with costs.
The Plaintiffs Submissions
7 The plaintiffs submissions are dated 3/06/2025.
8. The plaintiff identified four issues for determination namely Whether the cause of action as per the prayers in the plaint are grounded on a breach of a contract or actions of a recognized tenant? Whether the Plaintiff Hotel Savana Limited was a party to the alleged and legal lease agreement dated 10th November 2017? Whether the house of one of the directors of the plaintiff being the house of Gilbert Otieno Apondu lost their interests of 1/2 shares of Hotel Savana Limited once the said co-director died and if such house are entitled to claim the suit land at all or not? Was the lease agreement as drafted and dated 10th November 2017 valid or recognized to warrant a tenant land lord dispute?
9. It is contended that the lease agreement is between a stranger who had no title to lease. That a Zero Contract exists between the plaintiff and the Defendant to be litigated before the Business and Rent Tribunal therefore the tribunal has no jurisdiction on this matter as the Defendant is a pure encroacher inside the suit land and not a recognized tenant or a breaching party to a contract.
10. That the plaintiff was not a party to the lease agreement and should not be compelled to recognize it as is being the case on the side of the Defendant and the motive of this P.O.
11. That by leaving the house of Gilbert Otieno Apondu out the lease agreement dated 10th November 2017 was a deliberate abuse of the law and serious neglect that should not escape the dragnet of defining if the said agreement should be recognized as the plaintiff's document and be a subject to a Business Premises & Rent Tribunal.



12. It is urged that the facts Pleaded by the plaintiff on paragraph 6 of the plaint terms the lease agreement as invalid and illegal and are just mentioned merely to enable the court to get clear picture on the path and foot prints utilized by Defendant to start occupying the suit land. On that paragraph, the Plaintiff is NOT requiring the Defendant to act and to do good towards the contract neither condemning her for breach but explaining illegalities on the part of the Defendant. Therefore the Defendant's emphasis of the same as basis of this P.O lacks merit as the plaintiff has refused to recognize the said agreement as valid or as a breached contract.
13. The entire contract is termed hot air therefore the Business Premises & Rent Tribunal has no jurisdiction and that there exists no contract to interpret.
14. In conclusion it urges that the dispute is one of pure encroachment and illegal occupancy of the suit land LR: Siaya/ambira/29 by a stranger being the Defendant without the knowledge, blessings or permission of the plaintiff and is not a breach of contract dispute as alleged by the Defendant in her P.O. This is purely a land dispute on utilization and therefore the court is clothed jurisdiction over this matter.

Analysis And Determination

15. Upon considering the foregoing the main issue that commends determination is whether the preliminary objection is properly raised and if yes whether it is merited.

Whether the preliminary objection is properly raised

16. The nature and threshold of a preliminary objection was set out by the Court of Appeal in the case of Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors Ltd (1969) EA 696 as rightly cited by the defendant. Law JA at page 700 stated;

“ ... 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 plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
17. According to the Black Law Dictionary a Preliminary Objection is defined as:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”
18. In John Musakali vs. Speaker County of Bungoma & 4 others (2015) eKLR Mwita J elaborated the legal position thus;-

“The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law.”
19. The preliminary objection is raised on a jurisdictional issue and therefore it is properly raised. I also note that based on the pleadings there is no need to ascertain any facts as all the issues raised are based on the law.



20. A parties claim is based on its pleadings. From the plaint I note that the same is not as simple as it seems to be alleged as a dispute pitting the hotel business under the lease which is said to have expired but has become a controlled tenancy within the meaning of section 2 the Landlord & Tenant (Shops, Hotels and Catering Establishments) Act Chapter 301 of the Laws of Kenya. The jurisdiction of this court has been brought into question based on this point.
21. The plaint also reveals the plaintiff is suing as the registered owner of the parcel upon which the premises are built. That the defendants entry is based on an allegedly illegal lease. A declaration is sought that the entry and continued occupancy on the suit property LR Siaya/Ambira/29 has been illegal and therefore an eviction order should issue. Additionally an order of permanent injunction is sought against the defendants and her agents or in any manner dealing with the parcel.
22. The defendant has raised a defence to the effect that the suit is a ploy to circumvent refund of the resources she put into the renovation of the premises for which it was agreed she would recoup and or be refunded upon expiry of the alleged agreement. It is not in dispute that the agreement expired in the year 2023 but the defendant has continued to run her business.
23. Arising from the foregoing therefore I see the matter as a mixed grill. This concept was discussed in the following cases;-
24. In Mohamed Ali Baadi and others v Attorney General & 11 others[2018] eKLR, the High Court stated thus;-

“ 105. Subsequent to the above decisions, our Courts have identified the correct approach to determine the appropriate superior Court to hear such hybrid cases. The Courts have resolved the issue by inquiring what the most substantial question or issue presented in the controversy is. For example in Suzanne Butler & 4 Others v Redhill Investments & Another the Court stated the test in the following words: "When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works. The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse. Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue."

25. In the case of Suzanne Achieng Butler & 4 others v Redhill Heights Investments Limited & another [2016] eKLR, Justice Joel Ngugi as he then was stated as follows: -

‘17. At the same time, however, it is imperative that a Court should not approach jurisdiction in an ultra-technocratic fashion as an essentialist parsing of sticks in a bundle. Jurisdiction is a substantive standard aimed at ensuring only the right court or tribunal clothed with the legitimate mandate deals with a dispute or controversy. It is not a jurisprudential thaumatrope to keep litigants guessing to which Court their controversy belongs at the pain of having their timeously pleaded case struck out for not pigeon-holing their claim in the correct box. The correct approach to jurisdiction is one which treats



the question functionally as opposed to technically; one that looks at the constitutional objectives in creating equal status Courts as opposed to engaging in an essentialist, taxonomical and categorical analysis.

18. Happily, this is the approach taken by our Courts to the question. In this regard, I can do no better than quote Justice Abuodha of the Employment and Labour Relations Court, who, faced with a “mixed grill case” delivered this jurisprudential gem:

26. Applying the above to the present case I have already noted what the issues are from the pleadings and orders sought. I will apply the predominant test. It would appear the predominant issue in my view is the proprietorship of the land and who has authority over it. But on the flipside the defendant has allegedly plowed her money by refurbishing the property for which she wants to be compensated. Clearly this is not rent.
27. I must add that developing the suit premises does not equally bring the defendant to the definition of a tenant or the head, tenant in line with Section 2 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*.
28. In John Mugo Nganga -vs- Margaret M. Mwangi [2014] eKLR, the court cited Rent Restriction Tribunal -vs- Raval Exparte Mayfair Bakeries Ltd [1985] KUR 167, that a Tribunal has jurisdiction on matters related to a tenant or landlord. In the present case the plaintiff is not a Landlord neither is the defendant his tenant.
29. Indeed this court is aware that jurisdiction is everything and without it a court has to down its tools. See Motor Vessel Lillian ‘S’ -vs- Caltex Oil (K) Ltd [1989] KLR. The jurisdiction of the Tribunal is circumscribed by law. The Tribunal does not have jurisdiction to do anything not spelt out by Section 12 of the Act. See Amos Keireri Kanyugo -vs- Kireithi Trust [2017] eKLR, Moses N. Gitonga & Another -vs- George Gathara Kunjaga & Another [2014] eKLR.
30. Assuming there is a controlled tenancy Section 2 of the Act defines a controlled tenancy. In Narshidas & Co. Ltd -vs- Nyali Air Conditions & Refrigeration Service Ltd Civil Appeal No. 205 of 1995, the court held that a controlled tenant confronted with an illegal threat of forceful eviction cannot go to the Tribunal, for it has no jurisdiction to issue an injunction or similar remedy against the landlord. See also Michael Gachie Mwarangu -vs- Peter Gichuru Maina & Others [2016] eKLR. I find this to be a useful guide in the present suit. I have already pointed that an order of permanent injunction is sought and the tribunal is not clothed with jurisdiction to issue such orders.
31. Article 162 (2) (b) of *the Constitution* provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land, and shall determine the jurisdiction and functions of these courts. The jurisdiction of the said courts is found in section 13 of the *Environment and Land Court Act* of 2012 which provides that the court shall hear disputes relating to:
 - a. environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. compulsory acquisition of land;
 - c. land administration and management;
 - d. 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.



32. From the pleadings ownership of the suit property and its use stands out to be the predominant reason why the plaintiff is in court which is within the provisions of section 13 of the *Environment and Land Court Act*. The two claims cannot be severed.
33. Based on the foregoing the preliminary objection lacks merit and it is hereby dismissed.
34. Costs shall abide the outcome of the suit.

DELIVERED AND DATED AT SIAYA THIS 30TH DAY OF OCTOBER 2025

HON. LADY JUSTICE A.E. DENA

JUDGE

30/10/2025

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Ochido Holding Brief for Mr. Odera for the Plaintiff

Mr. Omuga for defendant

Court Assistant: Ishmael Orwa

