Ganjoni Properties Limited & 11 others v Al-Riaz International Limited; F. Kinyua Kamundi & Muyaa D. T t/a Kinyua Muyaa & Co. Advocates & 11 others (Affected Party) (Civil Appeal E090 & E091 of 2022 (Consolidated)) [2025] KECA 1711 (KLR) (24 October 2025) (Judgment)

Neutral citation: [2025] KECA 1711 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E090 & E091 OF 2022 (CONSOLIDATED)

P NYAMWEYA, KI LAIBUTA & GW NGENYE-MACHARIA, JJA

OCTOBER 24, 2025

BETWEEN

GANJONI PROPERTIES LIMITED ..... 1ST APPELLANT

LALITCHANDRA DURGASHANKER PANDYA ..... 2ND APPELLANT

RAMESHCHANDRA DURGASHANKER PANDYA ..... 3RD APPELLANT

JOEL TITUS MUSYA ..... 4TH APPELLANT

JONATHAN MUSYA TITUS ..... 5TH APPELLANT

JULIUS MAITHYA TITUS ..... 6TH APPELLANT

KAMBUA MAITHYA ..... 7TH APPELLANT

KYALO TITUS ..... 8TH APPELLANT

MICHAEL KITILI TITUS ..... 9TH APPELLANT

DIANA TITUS ..... 10TH APPELLANT

RUTH MULEH T/A MAKURI AUCTIONEERS LIMITED ..... 11TH APPELLANT

AND

AL-RIAZ INTERNATIONAL LIMITED ..... RESPONDENT

AND

F. KINYUA KAMUNDI & MUYAA D. T T/A KINYUA MUYAA & CO. ADVOCATES ..... AFFECTED PARTY

AS CONSOLIDATED WITH

CIVIL APPEAL E091 OF 2022

BETWEEN

F. KINYUA KAMUNDI & MUYAA D. T T/A KINYUA MUYAA & CO. ADVOCATES ..... APPELLANT

AND

AL-RIAZ INTERNATIONAL LIMITED ..... RESPONDENT

AND

GANJONI PROPERTIES LIMITED ..... AFFECTED PARTY

LALITCHANDRA DURGASHANKER PANDYA ..... AFFECTED PARTY

RAMESHCHANDRA DURGASHANKER PANDYA ..... AFFECTED PARTY

JOEL TITUS MUSYA ..... AFFECTED PARTY

JONATHAN MUSYA TITUS ..... AFFECTED PARTY

JULIUS MAITHYA TITUS ..... AFFECTED PARTY

KAMBUA MAITHYA ..... AFFECTED PARTY

KYALO TITUS ..... AFFECTED PARTY

MICHAEL KITILI TITUS ..... AFFECTED PARTY

DIANA TITUS ..... AFFECTED PARTY

RUTH MULEH T/A MAKURI AUCTIONEERS LIMITED ... AFFECTED PARTY

(Being appeals against the Ruling and Orders of the High Court of Kenya at Mombasa (Njoki Mwangi, J.) dated 15th July 2022 in H.C.C.C No. 158 of 2014)

JUDGMENT

1. Before us are two consolidated appeals, to wit, Civil Appeal No. E090 and E091 both of 2022, and from the same ruling of the High Court of Kenya at Mombasa (Njoki Mwangi, J.) delivered on 15th July 2022 in Mombasa HCCC No. 158 of 2014. In consequence of the consolidation, and for good order, we think it prudent to refer to the parties as hereunder:

   Ganjoni Properties Limited .....1St Appellant Lalitchandra Durgashanker Pandya .....2Nd Appellant Rameshchandra Durgashanker Pandya.... 3Rd Appellant

   Joel Titus Musya.....4Th Appellant Jonathan Musya Titus..... 5Th Appellant Julius Maithya Titus..... 6Th Appellant

   Kambua Maithya... 7Th Appellant

   Kyalo Titus... 8Th Appellant

   Michael Kitili Titus..... 9Th Appellant Diana Titus..... .....10Th Appellant

Ruth Muleh

T/a Makuri Auctioneers Limited..... 11Th Appellant

F. Kinyua Kamundi & Muyaa D. T

T/a Kinyua Muyaa & Co. Advocates .....12Th Appellant And

Al-riaz International Limited. Respondent

2. The genesis of the two appeals is the respondent's suit against the 1st appellant, Ganjoni Properties Limited, vide a plaint dated 31st December 2014 in which the respondent, Al-Riaz International Limited, averred that the 1st appellant was the registered proprietor of Mombasa Block XX/340 (the suit property); that the respondent was at all material times the 1st appellant's tenant in respect of a commercial building situate on the suit property, which the respondent had developed and on which it was carrying on business of importation and sale of motor vehicles; that the tenancy commenced sometime in January 2010 and was to be renewed at the end of every five years; that the lease was due for renewal on 1st January 2015; that the respondent paid a monthly rent of Kshs. 360,000; and that the rent had been paid up to date.

3. The respondent further averred that the 1st appellant had unreasonably demanded that the respondent pays a monthly rent of Kshs. 600,000 as condition for renewal of the lease on 1st January 2015; that the 1st appellant further stated that, if the respondent failed to comply with its demand to pay the revised rent, then the respondent would be required to vacate the suit premises on or before 31st December 2014; and that, in default, the respondent would be evicted from the premises.

4. In addition to the foregoing, the respondent contended that it was a protected tenant under and by virtue of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Cap. 301 (hereinafter "the Act"); and that the threatened eviction was in breach of statute law. By reason of the matters aforesaid, the respondent prayed for: a declaration that the tenancy between the respondent and the 1st appellant was a controlled tenancy as defined in the Act, and that the terms thereof could not be altered unless with the approval of the Business Premises Rent Tribunal (the tribunal); an order of injunction to restrain the 1st appellant from evicting the respondent from the suit premises or otherwise interfering with the respondent's peaceful and quiet occupation thereof; costs of the suit; and interest thereon at court rates.

5. Contemporaneous with its plaint, the respondent filed a Notice of Motion of even date seeking temporary injunction to restrain the 1st appellant from evicting or in any other way interfering with the respondent's quiet possession and enjoyment of the suit premises pending hearing of the suit inter partes.

6. In their defence and counterclaim dated 24th February 2015, the 1st appellant denied the respondent's claim and averred that the tenancy relationship terminated on 31st December 2014; that the respondent refused to accept the terms of renewal thereof; that no rent had been paid and accepted since January 2015 as there was no landlord-tenant relationship between the respondent and the 1st appellant upon expiry of the lease; that the respondent refused to renew the lease at a monthly rent of Kshs. 600,000; that, in consequence of the refusal, the 1st appellant secured a tenant who agreed to pay a monthly rent of Kshs. 900,000, clearly showing that the offer of Kshs. 600,000 made to the respondent was reasonable; and that it was agreed in terms of the lease between the parties that the provisions of the Act did not apply to the lease or to the tenancy thereby created.

7. In addition to its defence, the 1st appellant counterclaimed on account of mesne profits from 1st January 2015 to the date of vacant possession at the rate of Kshs. 900,000 per month; vacant possession of the suit property; costs and interest thereon.

8. From the record as put to us, it would appear that the respondent did not file a reply to defence or defence to the 1st appellant's counterclaim.

9. In its ruling dated 24th August 2015, the trial court (Mary Kasango, J.) held that, in order to determine whether the respondent had established a prima facie case with a probability of success, the court had to consider whether the tenancy relationship between the parties was subject to the provisions of the Act; and whether the 1st appellant had breached the provisions of the Act. The learned Judge found that the tenancy relationship was controlled and subject to the provisions of the Act on a prima facie basis, and that, it appeared that the 1st appellant attempted to alter the terms of the tenancy without first complying with section 4 of the Act; and that, therefore, the respondent had established a case with a probability of success and laid a basis for the grant of a temporary injunction as sought.

10. Subsequently, the 1st appellant and the respondent recorded a consent order on 14th December 2016 as appears on page 39 of the record of appeal in Civil Appeal No. 90 and page 38 of the record in Civil Appeal No. 91. The terms of the consent order in issue are also set out in the proceedings of the High Court of 14th December 2016 at pages 361-362. The order was in the following terms in determination of an application dated 9th March 2016:

> " 1. That the plaintiff is hereby ordered to deposit all the rent arrears and mesne profits at the rate of Kshs. 360,000 in an interest earning account in the names of the advocates for the parties within 45 days.
>
> 2. That the plaintiff be and is hereby ordered to pay Kshs. 360,000 and mesne profits per month as and when the same falls due on or before the 5th of each relevant month pending the determination of the suit.
>
> 3. That in default of Orders number 1 and 2 (above), the defendant be at liberty to effect recovery by distress.
>
> 4. That this matter be mentioned on 15th February 2017 to confirm compliance for a pre-trial conference.
>
> 5. That all parties are hereby ordered to file all requisite statements and documents to be relied upon at trial before the mention date."

11. The consent order aforesaid was recorded by learned counsel, Miss. Abuodha for the respondent and Mr. Mungunya for the 1st appellant when the 1st appellant's Motion dated 9th March 2016 came for hearing before P. J. O. Otieno, J.

12. In a turn of events, the respondent filed a Notice of Motion dated 27th February 2017 seeking review of the consent order aforesaid and transfer of its suit to the BPRT on the grounds that, before the 1st appellant filed its Motion dated 9th March 2016, the respondent had already filed a notice of reassessment of rent in the BPRT in January 2016 challenging the monthly rent payable for the premises which, according to the respondent, ought to have been Kshs. 100,000; that the 1st appellant chose not to challenge the Notice to the tribunal despite service upon it, which failure automatically rendered the alterations under the Notice effective; and that the 1st appellant had threatened to levy

distress for the sum then owing and stated as Kshs. 9,000,000 while the respondent was ready and willing to pay such reasonable rent as requested in the Notice, or as may be assessed by the Tribunal.

13. On 28th February 2017, the High Court (P. J. O. Otieno, J.) certified the respondent's application urgent and issued an ex parte order granting interim stay of execution of the consent order dated 14th December 2016 on the condition that the respondent pays the rent due at Kshs. 100,000 per month from January 2015 to the date of the order within 14 days next following; and that the 1st appellant be served with the application within 3 days of his order.

14. Subsequently, the 1st appellant raised a preliminary objection dated 20th November 2017 on the grounds that the court was not vested with jurisdiction to entertain the respondent's suit relating to the alleged controlled tenancy within the meaning of section 2 of the Act; that the court had no jurisdiction to hear and determine the suit by virtue of Article 162(2) (b) of *the Constitution* and section 13(2) of the *Environment and Land Court Act*, 2011; and that the court became functus officio on determination of the issue of forum vide its ruling dated 24th August 2014. We find nothing on record to suggest that this preliminary objection was ever considered and determined.

    What is clear, though, is that the proceedings were plagued with more applications and orders to which we will shortly return.

15. Among the orders recorded when the suit came for further mention on 14th December 2017 is the one issued by P. J. O. Otieno, J. in the following terms:

> " 1. That this matter be stood over to 25th January, 2018 to enable parties try and negotiate its dispute and record a possible consent.
>
> 2. That the tenant is not clothed with any order to stop paying rent just like the Landlord has no injunction to refrain from receiving the rent.
>
> 3. That prevailing orders be maintained till the hearing date."

16. Next came an order issued by Njoki Mwangi, J. on 16th January 2018 in consideration of the urgency of the respondent's Motion dated 15th January 2018 (also not on record). That order was issued in the following terms:

> " 1. That the application dated 15th January, 2018 be and is hereby certified as urgent;
>
> 2. That the status quo appertaining as at 14th December, 2017 be restored forthwith.
>
> 3. That the application dated 15th January, 2018 will be heard by Judge P.J. Otieno on 29th January, 2018.
>
> 4. That costs shall be in the cause."

17. On the heels of the foregoing orders came other orders issued by Njoki Mwangi, J. on 22nd January 2018 likewise in consideration of the urgency of the respondent's Motion dated 22nd January 2018 (also excluded from the record before us) in terms that:

> " The status quo appertaining as at 14.12.2017 is well known to the parties in this suit and succinctly captured in Judge Otieno's orders of 14.12.2017. The said orders remain in force until the application dated 15.1.2018 is heard and determined."

18. Despite the numerous restraining orders albeit interim in nature, the 1st appellant proclaimed 18 of the respondent's motor vehicles on 21st December 2017 and attached 30 more vehicles on 5th January 2018 on account of alleged rent arrears and, evicted the respondent from the suit premises on the same date. Thereafter, the 1st appellant instructed the 4th to 11th appellants T/A Makuri Auctioneers Limited to levy distress and sell the respondent's attached motor vehicles by public auction, which they did on 20th January 2018.

19. In response to the 1st appellant's distress for rent and sale of its motor vehicles, the respondent filed a Notice of Motion dated 29th January 2018 (likewise not on record), which was determined by the order of P. J. O. Otieno, J.'s issued on 29th January 2018 in the following terms:

> " 1. That in the interim, the plaintiff be reinstated to the premises forthwith and before midday on 30/1/2018.
>
> 2. That the OCS Central Police Station to provide security and to ensure no public disturbance ensues.
>
> 3. That pending the hearing and determination of the application dated 15/1/2018 there be registered a restriction against the transfer of any vehicles taken away and allegedly sold.
>
> 4. That this matter shall be heard on 20/2/2018.
>
> 2. That the parties to file any submissions they may wish to file on the application dated 15/01/2018."

20. Subsequently, the respondent filed a Motion dated 31st January 2018 seeking orders to "amend" the orders made on 29th January 2018, which application was allowed with orders that:

> " 1. That the Honourable court be and is hereby pleased to amend the court order given on 29/01/2018 to read as:
>
> i. That in the interim, the plaintiff be reinstated to the premises forthwith.
>
> ii. That leave be and is hereby granted to the plaintiff to break open and enter the premises should the same be locked and/or barricaded and whilst thereat, hand over to the landlord/owner and/or carefully remove any goods therein that do not belong to the Plaintiff.
>
> iii. That the OCS Central Police Station, Mombasa to supervise the execution of this order, provide security, ensure no public disturbances ensues; and maintain law and order throughout and after the Execution of this order.
>
> iv. That pending the Hearing and Determination of the Application dated 15/01/2017, there be registered a Restriction against the Transfer and /or Registration of any vehicles taken away and allegedly sold.
>
> v. That this matter be heard on 20.02.2018.

vi. That the parties to file any submissions they may wish to file on the application dated 15.01.2018.

vii. That all parties appear in court on 6.02.2018 at 2.30 pm to report on the progress with the compliance with court orders.

viii. That the OCS Central Police Station also attend court in person."

21. Dissatisfied by the orders of the High Court (P. J. O. Otieno, J.) dated 29th January 2018 and "amended" on 1st February 2018, the 1st appellant moved to this Court on appeal in Mombasa Civil Appeal No. 14 of 2018 on the following grounds set out in paragraph 15 of the Court's judgment, namely that the learned Judge erred in law and in fact: by refusing to determine the issue of jurisdiction; by finding that there was a breach of the orders dated 14th December 2017; by ordering the respondent's reinstatement to the suit premises, which had already been let to the affected party (Fuji King Motors Limited); by issuing the impugned orders in favour of the respondent who had not paid rent; and by issuing orders contradicting the consent order dated 14th December 2016.

22. While the appeal was pending determination, the respondent filed the Motion dated 22nd February 2018 seeking orders to declare that the appellants were jointly and severally in contempt of the court orders issued on 14th December 2017, 16th January 2018, 22nd January 2018, 29th January 2018 and 1st February 2018; and an order that the appellants be committed to civil jail for a maximum term of six (6) months each or, in the alternative, to impose a penalty of a fine for contempt of court for their deliberate disobedience of the court orders aforesaid; and that they bear the costs of the application.

23. The respondent's Motion was supported by the annexed affidavit of its Director, Rehan Riaz Malik, sworn on 22nd February 2018 deposing to the grounds on which the application was founded, namely: that the court orders in issue were duly served on all the relevant parties; that, despite service upon it, the 1st appellant's Directors continued to lock out the respondent from the suit premises; that despite the consent orders recorded on 14th December 2017, the 12th appellant's firm proceeded to prepare and perfect a lease agreement under which the 1st appellant leased out the suit premises to a third party, Fuji King Motors Limited; that all the appellants were jointly and severally in defiance of the court orders aforesaid; and that they were in contempt of court.

24. In reply to the respondent's Motion, the 1st appellant filed a replying affidavit of its Manager, Mohamed Abdulrahman Salim, sworn on 5th March 2018 stating that their preliminary objection dated 20th November 2017 ought to be heard first; that the 1st appellant and its Directors would no longer submit themselves to a court that had no jurisdiction; that the contempt application was done without any care for details; that there was no affidavit of service of any of the orders in issue; that the 2nd appellant died on 3rd June 2014 before the suit was filed and that, therefore, could not have been served with the orders aforesaid; that the application was meant to harass and intimidate the appellants; that the respondent had joined the 4th appellant's wife and children without any attempt to show that they were auctioneers, or that they were served with any court orders; that the respondent vacated the premises on 5th January 2018 after the 4th appellant removed 38 motor vehicles from the suit premises; that the orders to show cause had also been made against the OCS Central Police Station, but that the OCS had been excluded from the contempt application; that the respondent could not be reinstated to the suit premises because it vacated voluntarily; that the suit premises was occupied by Fuji King Motors Limited, which had orders of injunction against the 1st appellant and the respondent from the

Environment and Land Court in Mombasa ELC Case No. 20 of 2018; and that the respondent was aware of those orders because it unsuccessfully tried to have them set aside.

25. In his replying affidavit sworn on 8th March 2018, the 12th appellant, learned counsel Mr. Kinyua Kamundi, essentially reiterated the facts deposed to in the 1st appellant's replying affidavit, but added that the respondent was in breach of the consent orders dated 14th December 2016 and had not paid any of the sums thereby agreed; that the order issued on 14th December 2017 did not restrain the 1st appellant from taking steps to recover rent; that all the orders issued before 14th December 2017 had either been complied with by the 1st appellant, had lapsed, or had not taken effect in consequence of the respondent's refusal, failure or neglect to comply with their preconditions; that the 1st appellant and the respondent were in concurrence that, since 2017, the court had no jurisdiction to entertain the suit; and that the appellants did not disobey any lawful court orders.

26 Likewise, the 4th appellant filed a replying affidavit of Joel Titus Musya sworn on 8th March 2018 taking the position that the court had no jurisdiction to entertain the suit. He deponed that there were no orders restraining the 1st appellant or himself from levying distress for rent and mesne profits pursuant to the consent orders recorded on 14th December 2016 and 15th February 2017; that the 5th to 11th appellants, who are the wife and children of the 4th appellant, were not auctioneers and had nothing to do with Makuri Auctioneers; that the 4th appellant was the only licenced auctioneer trading as Makuri Auctioneers; that "Makuri Auctioneers Limited " was a dormant company that could not be licenced as an auctioneer, and that the entity that carried out the distress for rent was Makuri Auctioneers and not Makuri Auctioneers Limited; that the dispute between the 1st appellant and the respondent was pending before the ELC; that there can be no contempt of court in respect of invalid orders; and that the 4th appellant did not evict the respondent from the suit premises.

27. The respondent's Motion prompted the 12th appellant's preliminary objection dated 5th March 2018 on the grounds:

> " 1. That this court has no jurisdiction to hear and determine any aspect of this suit as such jurisdiction is exercisable only by the Environment and Land Court under the provisions of Article 162(2)(b) of *the Constitution* of Kenya.
>
> 2. That this Honourable Court is expressly prohibited by Article 165(5)(b) of *the Constitution* of Kenya from having any jurisdiction on matters falling within the jurisdiction of the *Environment and Land Court Act*.
>
> 3. Under the provisions of the *Environment and Land Court Act*, this court is not a court of law in so far as matters relating to the use and occupation of land are concerned.
>
> 4. The 11th and 12th Respondents cannot submit to the jurisdiction of this court in relation to this suit without violating Article 3 of *the Constitution*, which requires every person including Honourable judges of this court to respect, uphold and defend this Constitution. To submit to the jurisdiction of this court on matters relating to the use and occupation of land would be to disrespect and violate *the Constitution*. The respondents are officers of this Court, they respect the Court and Constitution and they cannot violate *the Constitution*.
>
> 5. The 11th and 12th respondents are the subject of prior orders to show cause in this suit relating to the said documents described as court orders and alleged

to have violated. Those show cause orders have not been vacated and the respondents cannot be subjected to two processes in regard to the alleged violation of the same set of documents described as court orders;

6. The Notice of Motion application dated 22.2.2018 is incompetent as it does not contain any affidavit of service. No contempt of court application can be heard or considered in the absence of evidence of service.

7. Appendices 1 to 12 of the purported affidavit of REHAN RIAZ MALIK have not been sealed with the Seal of the Commissioner for Oaths as is required under Section 5 [of] the *Oaths and Statutory Declarations Act* Cap 15 Laws of Kenya as read together with Rule 9 [of] the Oaths and Statutory Declarations Rules and the Appendices and paragraphs that refer to them should be struck out.

8. The application dated 22.2.2018 and the affidavit in support do not show the manner in which any order was allegedly violated.

9. There were no orders in force capable of violation.

2. There were no valid or lawful orders in force. Any orders given by a court without jurisdiction is a nullity for all intents and purposes."

28. Then, soon thereafter, came the 4th to 11th appellants' preliminary objection to the respondent's application to have them cited for contempt of court. Their preliminary objection dated 8th March 2018 was anchored on the following grounds:

"1. That this court has no jurisdiction on a dispute relating to the use and occupation of land. Its jurisdiction is expressly ousted by Article 165(5)(b) of *the Constitution*.

2. There were no orders restraining the Defendant or the 3rd respondent from levying distress for rent and for mesne profit in accordance with the consent orders given on 14.12.2016 and 15.2.2017.

3. There is no affidavit of service included in that Motion. The 4th, 5th, 6th, 7th, 8th, 9th and 10th Respondents are not auctioneers and have nothing to do with Makuri Auctioneers. The person holding Auctioneers License is the 2nd Respondent who trades as Makuri Auctioneers. The 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 10th Respondents do not trade as Makuri Auctioneers Limited. A limited liability company cannot hold an Auctioneer's license. As can be seen from the Proclamation and the advertisement, the entity that carried out distress for rent was Makuri Auctioneers and not Makuri Auctioneers Limited.

4. The issue between the Plaintiff and the Defendant is pending in the Environment and Land Court in ELC Suit No. 458 of 2017 and 20 of 2018. That is the only competent court.

5. The Court must first decide whether any orders issued by this Court were valid or competent or not. There can be no contempt of Court concerning invalid orders that are null and void under *the Constitution*."

29. Ultimately, this Court pronounced itself on Mombasa Civil Appeal No. 14 of 2018 in its judgment dated 12th July 2018 thereby setting aside the orders of the High Court (P. J. O. Otieno, J.) dated 29th January 2018 as "amended" on 1st February 2018 and observed:

> " 27. Mr. Ngonze mentioned that the parties had already put in written submissions with respect to the jurisdiction issue which is pending for determination. Without pre-empting the High Court's decision on the same, all we can direct is that the issue be considered and determined on priority basis as soon as reasonably practicable.
>
> 28. As for the impugned orders, we do not think the learned Judge exercised his discretion properly in issuing them. We say so because the right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system ....
>
> 29. It is common ground and the record bears witness that before issuing the impugned orders the learned Judge was brought to speed concerning the affected party's possession of the suit premises. To us, that should have prompted the learned Judge at the very least to give the affected party an opportunity to address him since any orders issued with respect to those premises would affect it. By failing to do so, the learned Judge breached the rules of natural justice.
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> 30. Furthermore, the orders issued being in the nature of a mandatory injunction should as a general rule have been granted in clear circumstances. See this Court's decision in Magnate Ventures Limited vs. Eng Kenya Limited [2009] eKLR. We doubt that the circumstances that were pertaining at the time the learned Judge issued the said orders were clear. It is common ground that he based his orders on the earlier order he had issued on 14th December, 2017 and in particular limb 3 thereof which read:
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> 'THAT prevailing orders be maintained till the hearing date.'
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> 28. What were these prevailing orders? This question can only be answered when the parties respective positions are heard, more so, in light of the numerous orders that had been so far issued prior to the impugned orders. That is as much as we are willing to say on that issue lest we make findings touching on the application dated 15th January, 2018 which is still pending before the High Court.
>
> 29. We think we have said enough to demonstrate that we should interfere with the learned Judge's exercise of discretion. Consequently, we find that the appeal has merit for the reasons stated herein above and we hereby set aside the orders dated 29th January, 2018 and 1st February, 2018 in their entirety. Due to the circumstances under which the impugned orders were issued we do not think it will be just to make orders on costs."

31. The orders of P. J. O. Otieno, J. issued on 29th January and 1st February 2018 having been set aside by this Court in Civil Appeal No. 14 of 2018, the only court orders subsisting and touching on the parties are those made on 14th December 2017 (giving the parties time to explore amicable settlement and, in the meantime, the respondent to continue paying rent); 16th January 2018 (restoring the status quo

subsisting as at 14th December 2017); and 22nd January 2018 (directing that the orders of 14th December 2017 remain in force pending determination of the Motion dated 15th January 2018). Those are the orders allegedly disobeyed by the appellants, and forming the basis of the respondent's application dated 22nd February 2018 praying that the appellants be cited for contempt of court.

32. In its ruling dated 15th July 2022, the trial court (Njoki Mwangi, J.) dismissed the 12th appellant's preliminary objection dated 5th March 2018 and the 4th to 11th appellants' preliminary objection dated 8th March 2018 for the following reasons, which we take the liberty to replicate in extenso:

> " 37. In order to determine whether the Preliminary Objections raised herein have been property taken and if they raise pure points of law, the Court needs to consider the grounds raised. The 1st ground by the 11th and 12th respondents is that this Court has no jurisdiction to hear and determine any aspect of this suit as such jurisdiction is exercisable only by the ELC under Article 162(2)(b) of *the Constitution* of Kenya. The first ground is closely linked to the second, third and fourth grounds raised in the Preliminary Objection in that the High Court is expressly prohibited by Article 165(5)(b) of *the Constitution* of Kenya from having any jurisdiction on matters falling within the jurisdiction of the ELC Act.
>
> 38. In my understanding, the 11th and 12th respondents are stating that this Court is estopped from considering whether the orders issued in this matter by this Court and Judge P. J. Otieno were disobeyed because the orders were given in a matter in which the two Judges had no jurisdiction. By so stating, the said respondents seem to be alluding to the fact that they were aware of Court orders having been made, but they deliberately ignored or declined to comply with the same because the Judges who granted them had no jurisdiction to issue the said orders.
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> 38. Further, looking at grounds 5, 6, 8 and 9, of the Preliminary Objection, by the 11th and 12th respondents they raise factual issues which would call for the plaintiff to respond by way of affidavit. The said grounds can therefore not be considered to be pure points of law that can be addressed by way of a Preliminary Objection.
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> 39. The 3rd to 10th respondents in their Preliminary Objection raised an issue of law in their first ground. The second, third, fourth and fifth grounds of their Preliminary Objection raise factual issues.
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> 40. It is therefore apparent that the Preliminary Objections raised by the respondents fall short of the test in the Mukisa Biscuit Manufacturing case (supra) as they [are] of mixed fact and law ....
>
> 45. In this case, an application for contempt of Court exists. Noting that the Notices of Preliminary Objection filed by the respondents herein did not limit the issues for consideration to points of law only but issues of facts were brought in the mix, it would be improper to cherry pick only the issues of law and address them to finality and put the issues of facts in the back burner. Having opted not to limit the said notices to legal issues only, the applicants herein have caged themselves to the position that they find themselves in ....

47. This Court is alive to the decision in the Owners of the Motor Vessel Lilian S v Caltex Kenya Ltd (supra) but it is also aware of the need for the dignity and respect of Court orders to be upheld unless orders have been reviewed, set aside or discharged.

48. As such, the Notices of Preliminary Objection filed herein are dismissed with costs to the plaintiff/applicant. The application dated 28th February, 2018 will be heard and determined together with the jurisdictional challenge."

33. Aggrieved by the decision of Njoki Mwangi, J., the 1st to 11th appellants moved to this Court on appeal in Civil Appeal No. E090 of 2022 on a whopping 21 grounds set out in their memorandum of appeal dated 21st September 2022 against the grain of rule 88 of the Court of Appeal Rules, 2022 which mandates appellants to ensure that a memorandum of appeal sets forth under distinct heads, and without argument or narrative, the precise grounds of objection to the decision appealed against. This is more so in an appeal as the one before us founded on few issues. Suffice it to observe that we have duly considered them and find that no useful purpose would be served by replicating them here.

34. Likewise, the 12th appellant lodged Civil Appeal No. E091 of 2022 on 5 grounds set out in his memorandum of appeal dated 30th August 2022, which was consolidated and heard together with Civil Appeal No. E090 of 2022, which constitutes the lead file.

35. On the other hand, the related Civil Appeal No. E143 of 2022 subsequently lodged by the 1st appellant was withdrawn by an order of the Court issued with the consent of the parties on 7th April 2025 when the three appeals came up for hearing.

36. In the two consolidated appeals, the appellants fault the learned Judge for, inter alia: disregarding the orders and directions of this Court (Visram, Karanja & Koome, JJ.A.) given on 12th July 2018 in Civil Appeal No. 14 of 2018; failing to determine the jurisdictional issue raised in the appellants' preliminary objections; failing to hold that a preliminary objection of jurisdiction is a pure point of law that must be determined in limine whether or not the objection is raised along with other objections founded on points of fact; acting and reaching the impugned decision without jurisdiction; failing to find that there were no orders on record capable of being disobeyed; pre- determining the respondent's application for contempt without hearing the parties thereby violating the appellants' right to a fair trial and the right to hearing; disregarding binding judicial decisions cited by the appellants; failing to consider the respondent's application to transfer its suit to the tribunal as well as the 1st appellant's request to stay proceedings pending determination of its case in ELC No. 458 of 2017; and for delivering a ruling tainted with bias against the appellants.

37. In support of the appeal, learned counsel for the 1st to 11th appellants, M/s. Kinyua Muya & Company, filed written submissions dated 2nd April 2025 essentially reiterating the 10 grounds on which their preliminary objection was raised.

38. On their part, learned counsel for the 12th appellant, M/s. Muli & Ole Kina, filed written submissions dated 3rd April 2025 citing the case of Abok James Odera T/A A. J. Odera & Associates v John Patrick Machira T/A Machira & Co. [2013] eKLR highlighting the duty of this Court on 1st appeal.

39. In rebuttal, learned counsel for the respondent, M/s. Mutisya Mwanzia & Ondeng, filed written submissions dated 3rd April 2025 citing 5 judicial authorities, including the cases of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Lagat [2020] eKLR; and Nasri Ibrahim v IEBC & 2 Others [2018] eKLR, highlighting the need to comply with rule 88 of this Court's Rules with regard to the form and content of a memorandum of appeal; Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors

(1969) EA 696, highlighting the principle 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 and cannot be raised if any facts have to be ascertained from elsewhere, or if the court is called upon to exercise judicial discretion; and Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR, contending that, since the trial court stated that it would deal with the jurisdictional challenge when determining the application for contempt, it would be improper for this Court to take over the jurisdiction of the trial court with regard to the jurisdictional issue.

41. In our considered view, three main issues commend themselves for our determination, namely: (i) whether the learned Judge was at fault in failing to determine the jurisdictional challenge before all else:

(ii) whether the trial court had jurisdiction to make the orders which the appellants are accused of having disobeyed; and (iii) if the answer to (ii) is in the negative, whether the trial court had power to pronounce itself on any aspect of the suit and the interlocutory proceedings in issue.

42. On the 1st issue, we hasten to observe that the learned Judge dismissed the appellants' preliminary objections on the grounds, inter alia: that they contained both points of law and fact; that the objections fell short of the test in the Mukisa Biscuits Manufacturing Case (supra), as they are of mixed fact and law; and that it would be improper to cherry-pick only the issues of law and address them to finality and put the issues of fact in the back banner.

43. Taking issue with the learned Judge's decision, counsel for the 1st to 11th appellants submitted that it is beyond any argument that jurisdiction, once challenged, must be determined before the court takes any further steps in the proceedings in view of the fact that, without jurisdiction, the proceedings would be null and void; that without determining the jurisdictional challenge, the learned Judge intended to hear the respondent's application against the appellants for contempt of court; that the learned Judge had been directed by this Court to determine the issue of jurisdiction on priority basis and as soon as reasonably practicable; and that the learned Judge withheld her decision for 4 years and still declined to determine the jurisdictional challenge in disregard of this Court's directions aforesaid.

44. Counsel for the 12th appellant associated himself with the submissions made by counsel for the 1st to 11th appellants.

45. In response, counsel for the respondent submitted that the manner in which the appellants' preliminary objections were drafted was improper in that they called upon the court to interrogate the fact; and that, accordingly, the learned Judge was not at fault in dismissing the preliminary objections.

46. We call to mind this Court's orders and directions dated 12th July 2018 in Civil Appeal No. 14 of 2018 by which the Court required the trial court to consider and determine the issue of its jurisdiction "on priority basis [and] as soon as reasonably practicable" as is the conventional practice. However, the learned Judge acted otherwise and proceeded to make substantive pronouncement that led to the contempt proceedings in issue.

47. In Owners of The Motor Vessel "Lillian S v Caltex Oil (Kenya) Ltd [1989] KLR 1, Nyarangi, JA. held that:

> "... a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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." [Emphasis ours]

48. In Njenga v Cabinet Secretary, Ministry of Information Communication and Technology & 8 others [2020] KESC 25 (KLR), the Supreme Court observed that:

> " 21. It is trite law that a jurisdiction challenge whenever raised has to be determined in limine as it goes to the core of the case for where a court finds that it has no jurisdiction, it cannot make a further step." [Emphasis added]

49. In Kenya Ports Authority v Modern Holdings [E.A] Limited [2017] KECA 293 (KLR), this Court held that:

> " We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised:
>
> '... at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the Court itself
>
> - provided only that where the Court raises it suo motu, parties are to be accorded an opportunity to be heard.'
>
> (See All Progressive Grand Alliance (APGA) v. Senator Christiana
>
> N.D. Anyanwu & 2 others, LER [2014] SC. 20/2013 Supreme Court of Nigeria)."

50. It is clear from the chronology of events on record that the appellants raised their jurisdictional challenge time and again beginning as early as 20th November 2017 as appears from the 1st appellant's preliminary objection. The preliminary objection on record as recited in the foregoing paragraph 14 is clear in terms. The 3 grounds on which the challenge is anchored are pure points of law. However, that objection was inexplicably accorded a wide berth.

51. The same fate befell other jurisdictional challenges that ensued, namely: (i) the 12th appellant's preliminary objection dated 5th March 2018 in which item Nos. 1 to 4 and 10 are pure points of law on which the court's jurisdiction was challenged; and (ii) the 4th to 11th appellants' jurisdictional challenge contained in their preliminary objection dated 8th March 2018 also raising pure points of law in item Nos. 1 and 5. To our mind, the appellants did all they could to urge the trial court to determine whether it had jurisdiction to entertain the respondent's suit, but in vain. Though expected to pronounce itself on the jurisdictional challenge before all else, the learned Judges before whom those objections were raised, including Mary Kasango J., P. J. O. Otieno, J. and Njoki Mwangi, J. whose impugned ruling is the subject of the instant appeal, were at fault in failing to determine the objections before pronouncing themselves on other issues and making far-reaching orders albeit interim in nature. For the learned Judge (to wit Njoki Mwangi, J.) to elect to determine the jurisdictional challenge in tandem with the contempt proceedings was, in our respectful view, a decision in error as a matter of principle and procedure.

52. Turning to the 2nd issue as to whether the learned Judge had jurisdiction to entertain the respondent's suit and issue the impugned orders , counsel for the 1st to 11th appellants submitted that the learned Judge had no jurisdiction to entertain the suit and issue the contested orders; that, in its ruling dated 24th August 2015, the trial court found that "... the cause of action in the suit was a dispute between a landlord and tenant over the possession and use of land in a controlled tenancy and for payment of rent and mesne profits"; and that what was required of the subsequent Judges was to hold that the High

Court had no jurisdiction to entertain the suit, which ought to have been transferred to the tribunal in accord with the respondents application aforesaid.

53. Counsel for the 12th appellant associated themselves with the submissions by counsel for the 1st to 11th appellants.

54. On their part, counsel for the respondents contended that the learned Judge had elected to deal with the jurisdictional issue together with the contempt proceedings which, to our mind, offends tested practice and procedure deeply ingrained in statute law and rules of civil procedure.

55. In Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] KESC 8 (KLR), the Supreme Court held 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. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*."

56. In Republic v National Land Commission Ex-Parte Ephrahim Muriuki Wilson & others [2018] KEHC 9259 (KLR) Mativo, J. (as he then was) held that:

> " 20. .... Jurisdiction is determined on the basis of pleadings and not the substantive merits of the case. The South African Constitutional Court [in the matter between Vuyile Jackson Gcaba vs Minister for Safety and Security First & Others Case CCT 64/08 [2009] ZACC 26] had this to say:
>
> 'Jurisdiction is determined on the basis of the pleadings... and not the substantive merits of the case... In the event of the Court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim ..., one that is to be determined exclusively by.....{another court}, the High Court would lack jurisdiction...'"

57. The pleadings in the respondent's suit clearly showed that the dispute related to a landlord and tenant relationship, which continued on termination of the 5-year lease with the effect that it became a controlled tenancy under the Act.

58. In Pritam v Ratilal and another [1972] 1 EA 560, Madan J. observed that:

> " As stated in the Act itself, it is for an Act of Parliament to make provision with respect to certain premises for the protection of tenants of such premises from eviction or from

exploitation and for matters connected therewith and incidental thereto. The scheme of this special legislation is to provide extra and special protection for tenants. A special class of tenants is created. Therefore the existence of the relationship of landlord and tenant is a prerequisite to the application of the provisions of the Act. Where such a relationship does not exist or it has come to or been brought to an end, the provisions of the Act will not apply. The applicability of the Act is a condition precedent to the exercise of jurisdiction by the tribunal; otherwise the tribunal will have no jurisdiction. There must be a controlled tenancy as defined in s. 2 to which the provisions of the Act can be made to apply. Outside it the tribunal has no jurisdiction."

59. Section 12(1) of the Act provides:

12. Powers of Tribunals

1. 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;

...

(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;

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;

...

(n) to enter and inspect premises comprised in a controlled tenancy in respect of which a reference has been made to the Tribunal.

60. It is instructive that the respondent's lease terminated on 1st January 2015 consequent upon which its tenancy relationship with the 1st appellant reverted to a controlled tenancy, which is governed by the Act. The Act defines a controlled tenancy in section 2 as:

> " controlled tenancy" means 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:
>
> Provided that no tenancy to which the Government, the Community or a local authority is a party, whether as landlord or as tenant, shall be a controlled tenancy;

61. We believe that it was in appreciation of this statutory provision that the respondent sought a declaration that it was a protected tenant whereupon it took a prudent step to apply for its suit to be transferred to the tribunal vide its Notice of Motion dated 27th February 2017 which, as appears from the record as put to us, remains inexplicably undetermined. Be that as it may, we find that the respondent was effectively a protected tenant within the meaning of Cap. 301 during the period between 1st January 2015 and 5th January 2018 when it was evicted, thereby prompting the contempt proceedings commenced on 22nd February 2018.

62. In view of the foregoing, we hasten to observe that, prior to the respondent's eviction or vacation of the suit premises, the High Court had no jurisdiction to hear and determine the respondent's suit or issue any interlocutory orders relating to the dispute between the 1st appellant and the respondent, which was the preserve of the tribunal under and by virtue of section 12 of the Act. Be that as it may, it is not lost on us that, after eviction, such jurisdiction reverted to the ELC as contemplated in section 13 of the *Environment and Land Court Act*, 2011.

63. In Imed Healthcare Limited v Kenya Reinsurance Corporation Limited [2021] KEELC 4002 (KLR) the following observation by Eboso J. is also persuasive:

> " 24. Before a court of law exercises jurisdiction to grant an interim measure of protection, it must satisfy itself that there is a dispute to be adjudicated upon by another legally competent adjudicatory body. Secondly, it must satisfy itself that it has the requisite jurisdiction to entertain the plea for interim measure of protection ....
>
> 25. .... The only court with unlimited original jurisdiction over disputes reserved for the Business Premises Rent Tribunal is the Environment and Land Court. That unlimited original jurisdiction is granted by Section 13 of the *Environment and Land Court Act*. Even then, that unlimited original jurisdiction is invoked only when it is demonstrated that the Tribunal is not properly constituted or quorated."

64. It matters not that the parties had purportedly agreed in Clause III (e) of their now expired lease (also not on record) that: "It is the express intention of the parties to exclude this lease and the tenancy it creates from the operation of the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Cap. 301 of the Laws of Kenya." While their misperceived agreement might have been intended to oust the jurisdiction of the tribunal, it was nonetheless contrary to statute law out of which parties cannot contract in view of the express prohibition in section 3 of the Act, which reads:

> 3. Matters relating to controlled tenancies generally
>
> ... .
>
> (6) Any agreement relating to, or condition in, a controlled tenancy shall be void in so far as it purports to—
>
> (a) preclude the operation of this Act;

65. The general principle in law is that parties cannot contract out of statutory obligations that are designed to protect the public or a particular class of persons. This principle is rooted in the concept that statutes are intended to be mandatory and enforceable, and parties cannot agree to violate them. The principle that one cannot contract out of statutory law means that a contract cannot circumvent or override a law that has been enacted by a legislative body. This principle ensures that statutory laws, which are meant to apply to all, are not bypassed through private agreements. If a contract attempts to contradict or negate a statutory provision, it is generally considered void and unenforceable.

66. Addressing itself to the general rule that Courts do not enforce contracts which are in contravention of statute law, the Court of Appeal in D. Njogu & Company Advocates v National Bank of Kenya Limited [2016] eKLR stated as follows:

> " 23. Likewise we reiterate that any contract that contravenes a statute is illegal and the same is void ab initio and is therefore unenforceable."

67. On the authority of D. Njogu & Company Advocates v National Bank of Kenya Limited (ibid), the High Court could not arrogate to itself the jurisdiction to entertain the respondent's suit on the basis of an agreement made in contravention of statute law. Having held that the High Court had no jurisdiction to entertain the respondent's suit, and having considered the provisions of sections 2 and 12 of the Act, we reach the inescapable conclusion that the learned Judge had no jurisdiction or power to entertain the respondent's suit or issue any orders therein.

68. By reason of the matters aforesaid, we find that the 1st to 11th and the 12th appellants' appeals succeed and are hereby allowed. Consequently, we hereby order and direct as follows:

a. The ruling and orders of the High Court (Njoki Mwangi, J.) dated 15 th July 2022 made in Mombasa HCCC No. 158 of 2014 be and are hereby set aside,

b. The suit in Mombasa HCCC No. 158 of 2014 be and is hereby remitted to the Environment and Land Courtat Mombasa for hearing and determination on a priority basis.

c. The entire file and record in Mombasa HCCC No. 158 of 2014 shall be placed before the Presiding Judge of the Environment and Land Court at Mombasa, and mentioned within 45 days of the date of this judgment for the necessary directions to facilitate its expeditious hearing and determination.;

d. The Deputy Registrar of this Court shall take immediate steps to ensure transmission of this judgment together with the orders hereby made to the Presiding Judge of the High Court at Mombasa and the Presiding Judge of the Environment and Land Court at Mombasa to facilitate the expeditious transfer and hearing of Mombasa HCCC No. 158 of 2014.

e. The parties in the consolidated appeals herein shall bear their own costs of the appeals.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 24 TH DAY OF OCTOBER 2025.

P. NYAMWEYA

....

JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR