



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELCA NO E198 OF 2024

**MARY WAHU KIHARA
/LANDLORD**

- APPELLANT

VS

**BERNARD KANYI
/TENANT**

- 1ST RESPONDENT

SANNEX ENTERPRISES AUCTIONEERS

- 2ND RESPONDENT

**(Appeal from the order in the Ruling in BPRT No E937 OF 2024 of
Hon. Gad Chemoiyai delivered on 28/11/24)**

JUDGMENT

Introduction and background

1. This appeal arises from the decision of BPRT issued on 28/11/24 delivered by Hon Gad Chemoiyai, BPRT No E938 of 2024.
2. On the face of it, it would appear that the 1st Respondent is the tenant and the appellant, the Landlord.
3. On 27/8/24, the 1st Respondent petitioned the Hon Tribunal through a reference filed under section 12 (4) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (LTA). In it, he filed a reference as a Landlord concerning shops on the premises known as Matumbo House, LR No 209/138/164 (suit land), Nairobi Tenancy.

The nature of the complaint was directed against another unnamed "Landlord" as;

- a. She has served me with a proclamation of rent arrears of Kshs 3,040,000/-, despite me not being a tenant but a landlord of the above premises.
 - b. She has threatened to cart away my goods on 28/8/2024 for sale.
4. Simultaneously, the 1st Respondent filed a notice of motion of even date seeking the following orders;
- a. The Tribunal shall issue a restraining order prohibiting the respondents, including themselves, their agents, servants, or anyone acting on their behalf, from distressing or removing the applicants' goods until the hearing and determination of this application or as the court may direct.
 - b. That this court be pleased to set aside the proclamation herein unconditionally or as the court may direct
5. It was the 1st Respondent's case that he had been served with a proclamation notice dated 13/8/24 for outstanding rent arrears of Kshs 3,040,000/- owed to the Appellant.
6. He referred to a partnership agreement marked as BKM-2 dated 16/5/1998 between James Kinuthia Kinyanjui, the appellant's father-in-law, and Matumbo Company Limited, in which it is alleged that the said Matumbo Co Limited paid James Kinuthia Kinyanjui the sum of Kshs 2 million for a 40% share in the suit land and the remainder 60% was retained by James Kinuthia Kinyanjui.
7. He stated that he had never been a tenant at the suit premises, but rather a landlord, and that he had not been served with any warrants of execution for the alleged arrears.
8. He argued that the proclamation was merely a decoy to facilitate his eviction.

9. He also referred to a consent recorded in court in 2013 between Matumbo Co Limited and the Advocates for the appellant regarding the cost-sharing of rent income from the building, with 40% in favour of Matumbo Co Limited and 60% for the appellant.
10. The appellant opposed the application via her replying affidavit, sworn on 4/9/24, where she deponed that the 1st Respondent lacked locus to file the application since he is neither Agnes Wangui Mwangi nor a director of Matumbo Co Limited.
11. Further that the application is res judicata in view of the Ruling of the Tribunal issued on 15/3/25 in BPRT No E649 of 2023 rendering the tribunal functus officio.
12. Moreover, that the issues in the application had been determined to finality in ELC E025 of 2022 which decision was now the subject of appeal in COA E414 of 2024.
13. Secondly, that the tribunal stands is functus officio in view of its decision in BPRT No E649 of 2023, which decision was affirmed in ELC E 025 of 2024.
14. That because of the nature of the application before the court, the tribunal lacks jurisdiction, as the dispute involves two competing landlords; the 1st respondent having explicitly stated that there is no tenancy agreement between himself and the appellant.
15. The appellant also filed grounds of opposition to the application, reiterating the grounds outlined in the replying affidavit and set out in the immediately preceding paragraphs.
16. Upon determining the application, the tribunal in its decision rendered on 28/11/24 as follows;
 - a. The Landlady/1st Respondent at paragraph 4 of her Replying Affidavit has conceded in part that the Tenant herein is between two Landlords. Her assertions has been confirmed by the various myriad of annextures indicating concluded and partly concluded

pleadings betwixt the parties herein, a company associated with the tenant herein and/or family members.

- b. The Landlady further conceded at paragraph 4 above, that there is no tenancy relationship between herself and the tenant herein and therefore begs the question as to the legal justification by the Landlady herein to demand for rent amounting to Kshs 3,040,000/=.
 - c. From the foregoing there is no legal justification by the Landlady to levy distress against the tenant herein, with the aid of the 2nd Respondent for rent arrears amounting to Kshs 3,040,000/=.
 - d. No document by way of Lease agreement, rent receipt or otherwise has been adduced by the Landlady to the effect that the Tenant is required to pay a requisite payment per month; so as to justify the rent arrears above.
 - e. The Upshot of the foregoing am persuaded to grant the orders prayed by the Tenant in their application dated 27/8/2024.
 - f. Since the prayers made in the Tenant's Reference dated 27th August 2024 are joined at the hip with the Tenant's application dated 27th August 2024; it will be futile to fix the same for hearing as the prayers therein are strikingly similar.
17. Finally, the tribunal held that ;
- a. The tenant/applicant's application dated 27/8/24 is allowed as prayed.
 - b. The Tenants' reference dated the 27/8/24 is allowed as prayed
 - c. The Landlord/1st Respondent bear costs of the application and the reference.
 - d. Right of appeal of 14 days from the date of delivery of the Judgment.
18. It is the above decision that has triggered the filing of this appeal on the following grounds;

- a. The Learned Magistrate erred in law by failing to find that the entire application was res judicata and similar to an earlier one before the very Tribunal and already effectively determined.
 - b. The Learned Magistrate erred in law in failing to find that the applicant lacked locus standi and is a stranger to the proceedings he sought to rely on.
 - c. The Learned Magistrate erred in law in failing to find that the prayers sought could not issue as the Tribunal was functus officio in view of the Applicant's Affidavits in Tribunal Case No. E649 of 2023 which decision was affirmed in ELC E025 of 2022.
 - d. The Learned Magistrate erred in law in failing to find that the prayers were meant to illegally usurp the jurisdiction of the High Court, which had since conclusively determined ownership therein vide ELC No. E025 of 2022 and the Court of Appeal which is seized of a similar application before it, in gross conflict of the doctrine stare decisis.
 - e. The Learned Magistrate misinterpreted and misconstrued the appellant's pleadings and submissions and thereby misdirected himself on the law, when indeed the Applicant had from the very onset, ousted the Tribunal's jurisdiction and the same lies elsewhere.
19. Consequently, the appellant sought the following orders;
- a. The appeal be allowed with costs
 - b. The Ruling and all the consequential orders be set aside and vacated ex debito justitiae.
 - c. The appellant be awarded costs of the suit before the tribunal
20. On 28/5/25, the parties agreed to canvass the appeal through written submissions. The appellant submitted their submissions on 12/6/25. The respondents failed to comply with the court's directions and therefore did not file any submissions.

21. I have read and considered the submissions on record, which now form part of this court's decision.

Analysis and determination

22. Having read and considered the appeal in its entirety and the written submissions the issues that commend themselves are;

- a. Whether the application and the reference is res judicata in view of the decision in BPRT No E649 of 2023, and if so, whether the tribunal was functus officio
- b. Whether the applicant lacked locus to institute any application on behalf of Matumbo Co Limited
- c. Whether there is a valid reference before the court, given that the dispute is between two alleged competing landlords with no tenancy relationship.
- d. What orders should the court grant in the circumstances
- e. Who meets the cost of the appeal

23. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, this principle was enunciated as thus:

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...."

24. Having set out the background of the dispute in the preceding paragraphs, and with the above principles in mind, I will proceed to analyse the appeal.

Whether the application and the reference are res judicata in view of the decision in BPRT No E649 of 2023, and if so, whether the tribunal was functus officio.

25. It is the appellant's case that the prayers in the reference and the application are res judicata in view of the decision of the **BPRT No E649 of 2023**.

26. The plea of res judicata is anchored under Section 7 CPA as follows:-

7. Res judicata

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation. —(1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

27. The **Black's Law Dictionary 10th Edition** defines “res judicata” as “An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”

28. The essence of this doctrine is that judicial determinations must be final, binding and conclusive. There must be finality to litigation. This position was affirmed by the Supreme Court decision in **John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others [2021] eKLR** and for the plea of res judicata to succeed, the following ingredients must be satisfied;

- a. There was a former judgment or order which was final;
- b. The judgment or order was on merit;
- c. The judgment or order was rendered by a court having jurisdiction over
the subject matter and the parties; and

d. There had to be between the first and the second action identical

parties, subject matter and cause of action.”

29. The above position is reflected in South Africa as well. In the case of **FirstRand Bank Limited v Badenhorst NO & others [2023] ZAGPJHC 779** it was observed that the doctrine of *res judicata* is an element of justice that seeks to protect litigants, and the courts, from repetitive litigation. To determine whether a suit is *res judicata* Q Leech JA held as follows; -

“In my view, the cause of action must be determined from an assessment of the whole of the case in which the final judgment was delivered. The basic ingredients or the factual basis - the necessary, material, central basic facts - that emerge from such an assessment must be compared against the facts distilled from the subsequent case in which the defence of *res judicata* is raised. The defence will find application if those facts are the same, and the other requirements are satisfied.”

30. I must state that, apart from the Ruling of the tribunal issued on 15/3/23 culminating in the resulting orders of 7/8/24, the appellant failed to file any pleadings before the court concerning the dispute in BPRT E649 of 2023.

31. What can be gleaned from the aforesaid ruling is that the parties were 13 tenants against the appellant herein and Matumbo Co Limited. The tenants filed a reference on the grounds that there were contradicting instructions on who to pay rent between the appellant and Matumbo Co Limited [respondents therein] and sought orders restraining the said respondents from interfering with their quiet enjoyment of their respective tenements in the premises. They sought further directions from the court on whom they should pay rent as it fell due.

32. The orders mentioned herein specify that all monies deposited and held by the tribunal under this cause should be immediately released to the 1st Respondent (Mary Wahu Kihara) via her account (details provided), and that the tenants/respondents are hereby ordered to deposit rent into the applicant's aforementioned account on or before the 5th of each subsequent month when such rent becomes due.
33. From the contents of the above Ruling, the court finds that the instant reference was not res judicata for two reasons; the 1st Respondent herein was neither a party to the suit in BPRT BPRT E649 of 2023 nor a director of Matumbo Co Limited. See para 19 of the Ruling delivered on 15/3/24 where the tribunal found that;
- “The issue of one Bernard Kanyi Mwangi to preside over these proceedings on behalf of the 2nd Respondent has also been brought into question. Annexure MKW1 of the 1st Respondent's affidavit, sworn on 27/7/2023, shows the directions of the 2nd Respondent in form CR 12. They said Bernard Kanyi Mwangi is not one of them,
34. The second reason why the doctrine of res judicata does not apply is that the subject matter of the current suit is different. In the previous case, the parties were disputing over who should receive rent between the appellant and Matumbo Co Limited; however, in this instance, the 1st Respondent is contesting the proclamation notice issued on behalf of the appellant for the payment of rent amounting to Kshs 3,040,000/-.
35. In conclusion, I find that the reference in the tribunal was not res judicata and, therefore, the tribunal was not functus. This ground fails.

Whether the applicant lacked locus to institute any reference to institute the application/reference

36. The appellant contends that the tribunal erred in failing to find that the 1st Respondent lacked locus to initiate the application on behalf of Matumbo Company Limited, despite not having been a director of the said company.
37. The court would offer a short and straightforward answer to this issue. The answer is found in the proclamation notice dated 13/8/24, in which the 1st respondent was notified to pay the sum of Kshs 3,040,000/- to the appellant; his goods will be attached/distrained within 14 days.
38. Based on the material presented before me in this appeal, it is sufficient to state that, under the proclamation notice issued on behalf of the appellant, the 1st respondent had locus to bring his grievance against the appellant before the tribunal for determination.

Whether there is a valid reference before the court, given that the dispute is between two alleged competing landlords with no tenancy relationship.

39. This dispute was triggered by the proclamation notice dated 14/8/24 issued by the 2nd respondent on behalf of the appellant. Throughout the proceedings before the tribunal, the appellant has remained silent regarding the reason for issuing the proclamation notice. Does this imply a tenant-landlord relationship?
40. To the extent that the appellant has remained silent about the grounds for issuing the proclamation, the question of whether a landlord-tenant relationship existed between the appellant and the 1st Respondent was a matter that was ripe for determination by the tribunal. I will make the appropriate orders in due course on that matter.
41. Without much ado, the conclusion to this issue will be answered by the tribunal that will ultimately hear and determine the reference.

What orders should the court grant in the circumstances

42. In the case **Mbaki & Others Vs. Macharia & Another (2005) 2 EA 206, at page 210**, this Court stated as follows:

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

43. The tribunal's ruling was made, and the reference was summarily decided without permitting the parties to present evidence on the matter. As previously discussed, determining whether a tenancy or landlord relationship exists between the main parties cannot be settled in this appeal. I conclude that the tribunal erred in summarily allowing the reference without parties adducing evidence, thus, depriving itself of the opportunity to address the genuine issues raised therein.

44. Final orders for disposal

For that reason, the appeal partially succeeds and I make the following resultant orders;

- a. The appeal be and is partially allowed.
- b. Save for allowing the application dated 27/8/24 for purposes of maintaining status quo, the Ruling and all the consequential orders be set aside and vacated *ex debito justitiae*.
- c. The reference dated 27/8/24 is hereby remitted for hearing on a priority basis before another Tribunal member other than Hon Gad Chemoiyai.
- d. Each party to bear their own costs

45. Orders accordingly

**DATED, SIGNED & DELIVERED AT NAIROBI VIA MICROSOFT
TEAMS THIS 13TH DAY OF NOVEMBER 2025.**

J G KEMEI

JUDGE

Delivered Online in the presence of:

1. Ms. Kimuyu H/B for Mr Njugi for the Appellant
2. N/A for the Respondents
3. CA - Ms. Yvette