



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT NAIROBI
ELCA NO E199 OF 2024

MARY WAHU KIHARA - **APPELLANT**
/LANDLORD

VS

JOHN HEHO - **1ST RESPONDENT**
/TENANT

SANNEX ENTERPRISES AUCTIONEERS - **2ND**
RESPONDENT

**(Appeal from the order in the Ruling in BPRT No E938 OF
2024 of Hon Gad Chemoiyai delivered on 28/11/24)**

JUDGMENT

Introduction and background

1. This appeal arises from a reference filed by the 1st Respondent against the appellant and the 2nd Respondent in the BBRT No E938 of 2024. On the face of it, the 1st Respondent was the tenant and the appellant, the Landlord.

2. 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 “Landlord” as;
 - a. She has served me with a proclamation of rent arrears of Kshs 4,560,000/-, 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.
3. 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
4. It was the 1st Respondent's case that he had been served with a proclamation notice dated 14/8/24 for outstanding

rent arrears of Kshs 4,560,000 owed to the Appellant. He stated that he has never been a tenant in the suit premises but rather a landlord, and that he had not been served with any warrants of execution for the alleged arrears. He argued that the proclamation was merely a decoy to facilitate his eviction. He also referred to a consent recorded in court in 2013 between a company called Matumbo Co Limited and the Advocates for the appellant regarding the cost sharing of the rent income from the building, which was divided as 40% in favour of Matumbo Co Limited and 60% for the appellant.

5. The appellant opposed the application via her replying affidavit, sworn on 5/9/24, where she deponed that the 1st Respondent lacked locus to file the application since the court dismissed his alleged ownership status in its judgment delivered on 24/6/24 in ELC E025 of 2022.
6. Secondly, that the tribunal stands as *functus officio* in view of its decision in BPRT No E649 of 2023, which decision was affirmed in ELC E 025 of 2024.
7. Furthermore, that the issue of ownership of the suit land was definitively resolved in ELC E025 of 2024, a decision now under appeal in COA CAPPL E414 of 2024. 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.

8. 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.
9. Upon determining the application, the tribunal in its decision rendered on 28/11/24 ruled as follows;
 - 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
10. It is the above decision that has triggered the filing of this appeal on the following grounds;
 - a. The tribunal failed to find that the applicant lacked locus standi, his alleged ownership of the land having been determined.
 - b. The tribunal failed to find that the prayers sought could not be granted because the tribunal was functus officio in view of the decision of the tribunal in E649 of 2023, which decision was affirmed in ELC E025 of 2022.
 - c. The tribunal failed to find that the applicant ousted the tribunal's jurisdiction as there is no tenancy relationship between the parties herein.

- d. The tribunal failed to find that the prayers sought are meant to illegally usurp the jurisdiction of the High Court, which has since determined the issue of ownership. This decision is now subject to appeal in COA E414 of 2024 in cross conflict with the principle of stare decisis.
11. 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
12. 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.
13. I have read and considered the submissions on record, which now form part of this court's decision.

Analysis and determination

14. 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 rejudicata 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
15. 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...."

16. 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.

17. 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**.

18. 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.

19. 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...”

20. 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.”

21. 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.”

22. I must state that, except for the orders of the tribunal issued on 7/8/24, the appellant failed to file any pleadings before the court concerning the dispute in BPRT E649 of 2023. 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.
23. In the absence of the proceedings, pleadings, and the judgment in BPRT E649 of 2023, it is difficult for the court to

support a finding of res judicata. Therefore, I find that the reference in the tribunal was not res judicata and that consequently, the tribunal was not functus. This ground fails.

Whether the applicant lacked locus to institute any application/reference on behalf of Matumbo Co Limited

24. Another area under analysis, based on the said concept of res judicata, is whether the reference in the tribunal was res judicata in light of the judgment of the court in ELC E025 OF 2022. Similar to the previous case, except that, unlike in that case, none of the pleadings or the necessary materials were presented before the court to enable it to effectively investigate whether the dispute is res judicata.

25. That said, I have, however, had the opportunity to review the judgment of the court issued on 24/6/2024 in ELC e025 OF 2022 and find that in this judgment, the court resolved the issue of ownership of the disputed land in favour of the appellant herein. Therefore, to the extent that the 1st respondent has claimed that he is asserting his claim to the land through Matumbo Co Limited, where his father, James Kinuthia Njoroge, was a Director, the court concludes that the issue of ownership is bona fide res judicata. I state this because the 1st respondent is claiming under the said Matumbo Co Limited. Indeed, the 1st respondent testified as PW1 and, under para 22, stated that he was pursuing ownership rights based on the alleged shares held by his

father. He also admitted to being charged in a criminal court for forceful detainer and forgery.

26. It is also based on the said judgement that the 1st respondent alluded to a lease for five years at a rent of Kshs 17,000/- for a shop. The 1st respondent has described the application as a decoy intended to evict him from the premises. This statement implies that the 1st respondent is in possession of part of the suit land. The status of this possession or occupation has not been determined in this appeal or in the proceedings before the tribunal.

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

27. 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? I say no more to avoid embarrassing the tribunal that will ultimately hear and determine the matter.

28. The question that the tribunal needs to enquire is whether there is a tenancy relationship between the appellant and the 1st respondent. In my considered view, the question of whether or not the 1st respondent has locus

to file the reference and the application is premature. I say so because the said issue can only be resolved once the relationship between the parties is established upon taking evidence before the tribunal.

29. Without much ado, the conclusion in para 28 above answers issue No c in the negative.

What orders should the court grant in the circumstances

30. 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.

31. 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
32. Orders accordingly

DATED, SIGNED & DELIVERED AT NAIROBI VIA MICROSOFT TEAMS THIS 4th DAY OF NOVEMBER 2025.

J G KEMEI
JUDGE

Delivered Online in the presence of:

1. Ms Kamuyu HB for Mr Njugi for the Appellant
2. N/A for the Respondents
3. CA – Ms. Yvette