



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT NAIROBI**

**ELCA NO E186 OF 2024**

---

**STEPHEN MUNYWOKI MBEVI**

**t/a KIANDU TYRES**

**- APPELLANT/TENANT**

**VS**

**KIRIYE HOUSE LIMITED**

**- RESPONDENT /LANDLORD**

**(Appeal from the Ruling of Hon Gad Chemoiyai in BPRT No E756 of 2024 delivered on 31/10/24)**

**JUDGMENT**

**Introduction and background**

1. The appeal arises from the Ruling in BPRT No E 756 of 2024 delivered by Hon Gad Chemoiyai on 31/10/24.
2. On 7/6/24 , the Landlord issued a notice to terminate the tenancy of Shop No G on LR No 209/136/183 Kiriye House, Nairobi, effective 1/9/24 , to the tenant under the provisions of Section 4(1) of the Landlord Hotels and Catering Establishment Act, Cap 301. The grounds for termination of the tenancy were that the Landlord intends to occupy the premises for the purpose of conducting high-value machine storage and related services.
3. Vide a letter dated 19/6/24, the Tenant acknowledged receipt of the termination notice of 7/6/24

4. On 10/7/24, the Landlord filed a reference under section 12 (4) of Cap 301 on the basis that the Landlord has issued a legal notice to terminate the tenancy. The tenant is opposed to complying with the notice to vacate, and the tribunal was urged to investigate the Landlord's complaint and make the necessary orders therein.
5. Consequently, on 26/7/24, the Landlord filed a notice of motion seeking orders for vacant possession of shop No. 3 on the suit land after the notice to vacate the premises expired; distress for rent; termination of tenancy; leave to break into the tenant's business premises for personal use under the supervision of the OCS, Kamukunji Police Station; and, lastly, costs of the application.
6. In response, the Tenant opposed the complaint /reference dated 10/7/24 vide the Preliminary objection dated the 26/7/24 on the following grounds;
  - a. The Landlord, by notice of 7/6/24, is seeking to terminate the tenant's tenancy, although there is a termination notice subject to reference No BPRT 298 of 2020 pending in the tribunal.
  - b. That in any event, the tenant has until 30/8/24 to file a reference in respect of the incompetent notice dated 7/6/24.
7. Vide a pleading christened Landlord's grounds of opposition to the Notice of Preliminary objection dated 26/7/24, the Landlord opposed the objection on the following grounds;
  - a. The purpose of the termination of the tenancy notice dated 7/6/24 is because the landlord intends to occupy the premises for a period of not less than one year.
  - b. The Tenant filed BPRT 298 of 2020 in response to the landlord's notice to vacate issued in 2020.
  - c. That BPRT 298 of 2020 was filed on 12/3/2020 and has never been prosecuted hence the delay is prejudicing the landlord.

- d. That there is a pending application seeking to dismiss BPRT 298 of 2020 scheduled for hearing on 22/8/24
  - e. The court was urged not to allow the objection as it was viewed as draconian and would be prejudicial to the landlord if the suit is struck out, given the substantial court fees already expended.
8. On 15/8/24, the tenant moved the tribunal and filed a reference under BPRT E881, section 6 of Cap 301, indicating that the tenant wishes to oppose the notice of termination served by the landlord dated 7/6/24, and urged the tribunal to investigate the matter and determine the issues involved.
  9. According to the proceedings in the tribunal, the court directed that the tenants Preliminary Objection dated the 26/7/24 and the landlord's notice of motion dated the 26/7/24 be heard simultaneously. Parties were directed to file and exchange written submissions, and a ruling date was set for 31/8/24.
  10. Come the 31/10/24 the tribunal delivered its ruling in the following terms;
    - a. The Tenant's Preliminary Objection dated 26/7/24 is devoid of merit and the same is hereby dismissed with costs.
    - b. The Landlord's application of the same date is allowed subject to the following conditions;
      - i. The Tenant is granted 30 days from the date of delivery of the Ruling to vacate Shop No. 3 in the suit premises.
      - ii. Prayer for distress is declined as no evidence of rent arrears due have  
  
been adduced by the Landlord herein. In the event that the Tenant  
  
would not have vacated the premises upon the lapse of 30 days stated

in (i) above, the Tenant will be forcefully evicted under the supervision

or assistance of the OCS Kamukunji Police Station.

- c. Costs of the application and the Reference to be borne by the Tenant herein, to be assessed by the Deputy Registrar of this Honorable Tribunal.
  - d. Right of appeal 14 days.
11. Interestingly, on 31/10/24, Ms Gakii, Counsel for the Landlord, in the absence of Counsel for the Tenant, successfully sought for the consolidation of BPRT 756 of 2024 with BPRT E881 of 2024. The court duly obliged and granted the following orders;  
“Application for consolidation is allowed. This matter (BPRT E881 of 2024) be consolidated with BPRT E756 of 2024. BPRT No E756 of 2024 becomes the lead file. In light of the ruling delivered on 31/10/24, this suit stands struck out or dismissed. file closed.”
12. It is not clear to the court whether, given the conclusion of the Tribunal's ruling in BPRT E756 of 2024, there were any live proceedings in the said file to warrant any consolidation with BPRT E881 of 2024. I will return to this issue later.
13. Aggrieved by the decision of the Tribunal outlined in para 10 above the Tenant filed this appeal based on the grounds hereto. Briefly the grounds are;
- a. The learned Member of the tribunal, Hon. Gad. Chemoiyai, erred in law by dismissing the applicant’s preliminary objection, and this act of judicial impunity unjustly terminated the tenant’s tenancy in a summary manner without hearing evidence from the parties, contrary to the provisions of section 9 of the

Landlord and Tenants/Shops, Hotels and Catering Establishment Act Cap 301.

- b. The learned Member of the tribunal erred in law in taking into account the burden of proof in termination cases is upon the landlord.
  - c. The learned Member of the tribunal erred in law in terminating the tenancy of the appellant/tenant while the main reference in BPRT E881 OF 2024.
  - d. The learned Member of the tribunal misdirected himself in the law relating to preliminary objection and not taking into account all the exhibits which the appellant/ tenant had exhibited in his replying affidavit.
  - e. The learned Member of the tribunal erred in law in violating the appellant's right to a fair hearing under Article 50(1) of the Constitution of Kenya 2010.
  - f. The learned Member of the tribunal erred in law in giving the tenant 14 days remit to appeal in ignorance of Section 15 of the Landlord and Tenant/Shops, Hotels and Catering Establishments Act (Cap 301), which gives aggrieved parties 30 days remit to appeal.
  - g. The learned Member of the tribunal erred in law in taking into account the objectives of the landlord and tenant/Shops, Hotels and Catering Establishments Act (Cap 301), which is to protect the tenant from unlawful eviction and exploitation by the landlords.
14. Consequently, the Tenant/Appellant sought the following orders on appeal;
- a. THAT the appeal be allowed and the orders of the tribunal be set aside.
  - b. THAT the appellant be awarded costs in the lower court and for the appeal.

- c. Any other relief that this Honourable court may deem fit to grant.

**The written submissions**

15. On 31/7/25, parties elected to canvass the appeal via written submissions, which I have read and considered, thus forming part of the judgment herein.

**The Appellant (Tenant's) written submissions**

16. While providing the background on the dispute, Counsel for the appellant submitted that the relationship between the parties was that of a controlled tenancy within the meaning of Section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act 301.
17. Counsel for the appellant submitted that the landlord issued a notice to terminate tenancy on 7/6/2024, upon the tenant, because the landlord intended to occupy the premises for purposes of carrying out the business of high-value machine storage and related services.
18. On 19/6/2024, the tenant notified the landlord that he did not wish to comply with the notice; therefore, the tenant had until 1/9/2024 to file a reference in the tribunal under section 6 of the Act.
19. Before the notice to terminate the tenancy matured, the respondent filed an application seeking to end the tenancy, notwithstanding that the tenant had until 1/9/2024 to file a reference.
20. Notwithstanding, case No. BPRT No. E881 of 2024, in which the tenant has filed a reference, which is still pending hearing and determination. See pages 14 - 17 of the record of appeal.

21. Furthermore, another termination case is pending between the parties in the tribunal that has not yet been heard or decided, namely BPRT No. 298 of 2020.
22. Counsel for the appellant argued that the tribunal erred in law by dismissing the tenant's preliminary objection in a summary manner before hearing evidence from the parties in accordance with Section 9 of CAP 301.
23. It was stated that the termination notice was to take effect on 1/9/2024, but the tribunal approved it prematurely. The landlord's notice to terminate was stayed by law, and the reference should not have been heard and decided. The tribunal thus pre-empted the full hearing of the tenant reference in BPRT E881 of 2024. The tribunal should have upheld the objection instead of dismissing it.
24. Counsel for the appellant criticised the tribunal for permitting the landlord's application in a summary proceeding before the evidence was presented at a hearing.
25. The tribunal was further criticised for misdirecting itself by failing to consider all the exhibits annexed by the tenant to his replying affidavit. The preliminary objection raised was a pure point of law, as the landlord sought to enforce a premature notice that was the subject of a reference to the tribunal under Section 6 of Cap 301.
26. Counsel for the appellant argued that the tribunal erred in law by violating the tenant's right to a fair hearing when it permitted the landlord to end the tenancy without any evidence and without giving the tenant an opportunity to present evidence. The entire Cap 301 does not provide for a summary hearing for tenancy termination. Counsel emphasised the provisions of Article 50 (1) of the Constitution, which requires every tribunal to ensure parties have a fair hearing before reaching a decision.

27. Counsel for the appellant criticised the tribunal for granting the tenant a 14-day right of appeal, contrary to the law which provides for a 30-day right of appeal.

**The Respondent (Landlord's) written submissions**

28. The respondent opposes the appeal vide its written submissions dated 1/10/2025.

29. Regarding the dismissal of the preliminary objection, Counsel for the respondent stated that the objection had been correctly dismissed. Furthermore, he argued that the objection did not meet the criteria of a pure legal point. He contended that the objection involved contested factual issues, namely, whether there was a pending reference in BPRT 298 of 2020 and whether the landlord's notice of 7/6/2024 was premature. Additionally, the earlier reference BPRT 298/2020 had been dismissed for want of prosecution on 30/9/2024, with costs awarded to the landlord, as the tenant had failed to prosecute the matter for over four years.

30. On the alleged summary termination, Counsel for the respondent submitted that both parties were afforded the opportunity to file pleadings and written submissions before making its determination and that the tenant participated fully and was heard. And therefore, the complaint of the summary dismissal has arisen merely from dissatisfaction with the outcome and not any procedural unfairness.

31. Regarding the burden of proof, it was submitted that the landlord discharged the initial burden by issuing a valid statutory termination notice under Section 4 of Cap 301, and that a reference was supported by a notice of motion and affidavit evidence. It was up to the tenant to demonstrate that the landlord lacked any good faith in its intention.

32. Regarding BPRT E881/2024, Counsel submitted that it was consolidated with BPRT E756/2024, with the latter being the lead file.
33. Upon receiving the termination notice dated 7/6/2024, the tenant, through a letter dated 19/6/2024, expressly rejected the notice, thereby properly invoking the tribunal's jurisdiction under section 12 (2) of Cap 301.
34. It was submitted that the appellant was accorded a fair hearing as guaranteed under Article 50 (1) of the Constitution, which provides that every person has the right to a fair and public hearing before an independent and impartial tribunal. It was further added that the tenant was represented by Counsel throughout the process and that he filed a preliminary objection, a replying affidavit, and detailed submissions, all of which were considered by the tribunal. At no stage did the tenant raise any complaint about being denied an opportunity to be heard. He cannot therefore allege a violation of the right to be heard merely because he lost the case.
35. Regarding the 14-day appeal period, the landlord admitted that it was a mere clerical error, and in any case, the tenant filed its appeal within the required time frame and therefore suffered no prejudice at all.
36. In conclusion, Counsel for the landlord submitted that although Cap 301 protects tenants from unlawful eviction, it does not shield them from lawful termination carried out in accordance with the provisions of the Act. The tenant, therefore, cannot rely on the otherwise protective provision of Cap 301 to perpetuate unlawful occupation, and once the tribunal lawfully granted vacate possession, the tenant was bound to vacate in compliance with the law.

### **Analysis and determination**

37. Having considered the appeal in its entirety together with the written submissions, the key issues for determination are;
- a. Whether the tribunal erred in allowing the preliminary objection as a pure point of law.
  - b. Whether the tribunal erred in law in summarily terminating the tenancy between the parties before considering the references of the parties that were before the tribunal.
  - c. Whether the tribunal denied the tenant/appellant the right to fair hearing.
  - d. Whether the consolidation of the BPRT No E881 of 2024 was improper?
  - e. Who meets the cost of the appeal?
38. 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...."
39. 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 tribunal erred in allowing the preliminary objection as a pure point of law.

40. Regarding what constitutes a Preliminary Objection, in the case of Hassan Ali Joho & Another -Vs- Suleiman Said Shabal & 2 others SCK Petition No. 12013[2014] eKLR, the Supreme Court restated the definition in the case of Mukisa Biscuit Manufacturers Ltd vs West End Distributors Ltd (1969) E.A, where the Court of Appeal said that:

“...a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact need to be ascertained or if what is sought is the exercise of judicial discretion.”

41. Before addressing the question raised as a Preliminary point, the Court must first establish that the issue involves a pure point of law.

42. The required threshold for distinguishing between questions of law and fact for the purpose of sustaining a preliminary objection is also a well-established point. In the case of George Oraro -vs- Eston Mbaja [2005] eKLR, the Court held that:

“A preliminary objection is ... declared to be a point of law which must not be blurred

with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed...”

43. In this case the git of the preliminary objection as outlined in the tribunal was that the Landlords notice to terminate the tenancy was sub judice in view of another notice of termination subject of BPRT No 298 of 2020. Secondly that the complaint dated the 10/7/24 was brought prematurely.;

44. The doctrine of sub judice is provided under Section 6 of the Civil Procedure Act which states that: -

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

45. To determine whether the application is sub judice, the Court must analyse the pleadings and the contested facts to establish whether the issues raised in the current suit and those in the case before the Commercial Court are the same. This, effectively, ousts the objection from being a pure legal point.

46. I agree with the decision in **Henry Wanyama Khaemba -vs- Standard Chartered Bank Ltd & Another (2014) eKLR**, where the court pronounced itself as follows: -

“The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1<sup>st</sup> Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of jurisdiction on Preliminary Objections.”

47. I am further persuaded by the court’s holding in the case of Margaret Wachu Karuri -vs- John Waweru Ribiro (2021) eKLR, where the Court was faced with a similar question whether sub-judice can be raised as a preliminary point and held as follows;

“For the Court to determine whether the issues herein were directly and substantially in issue with the other suit, it is this court’s considered view that it will have to ascertain facts and

probe evidence by ascertaining whether the issues raised in the instant suit are the same as the ones in the Appeal aforesaid and further interrogate the prayers sought whether they are the same and relate to the same issues. On whether or not the same is sub-judice, facts have to be ascertained and a preliminary objection cannot be raised on disputed facts. Therefore, this court holds and finds what has been raised by defendant/objector does not amount to a preliminary objection, and thus the preliminary objection is not merited.

48. From the foregoing, I agree with the tribunal that the objection raised required the tribunal to consider facts, which removes the objection from being a purely legal point. The tribunal correctly concluded that the objection lacked merit.

**Whether the tribunal erred in law in summarily terminating the tenancy between the parties before considering the references of the parties that were before the tribunal.**

49. It is the appellant's case that the tribunal summarily terminated the tenancy without hearing evidence. The respondent/Landlord is of the view that the tribunal entertained both parties who were duly represented by counsel and therefore having lost the case, the tenant cannot be heard to raise the issue of not been accorded a fair hearing.

50. I have perused the record of appeal and it is clear that the parties have filed a multiplicity of suits before the tribunal. In the instant case alone, there exist two references; in this file, it is filed by the Landlord and in E881 of 2024, the tenant raised his own reference.

51. With the dismissal of the preliminary objection, the tribunal was bound to hear the parties on the landlord's complaint/reference dated 10/7/24 and the tenant's reference filed in E881 of 2024 .
52. The court finds that the tribunal erred in dismissing the case vide a notice of motion without interrogating the issues raised by the parties in the references. The notice of motion sought final orders in the interlocutory application and therefore the same ought to have been heard on its merits. Having filed a reference in response to the termination notice as well as the Landlord's complaint/reference, the issues raised therein ought to have been heard on merits. Such issues included interrogating the reason for the termination of the tenancy. To say the least, it is perplexing that the tenant's reference in E888 of 2024 was consolidated post the Ruling and thereafter struck out and/or dismissed before it was heard on its merits.
53. 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. For the above reasons, the court answers the issue in the affirmative.
54. For the foregoing, issues no (c ) and (d) are answered in the affirmative.
55. In the end I allow the appeal partially as follows;
- a. THAT the Preliminary objection was not a pure point of law. It is hereby dismissed.
  - b. The Ruling of the tribunal issued on 31/10/24 be and hereby set aside partially.
  - c. The parties' references in BPRT E 756 of 2024 and BPRT E881 of 2024 be heard on their merits.
  - d. Each party to bear their costs

56. Orders accordingly

**DATED, SIGNED & DELIVERED AT NAIROBI VIA MICROSOFT  
TEAMS THIS 11<sup>TH</sup> DAY OF NOVEMBER 2025.**

**J G KEMEI**

**JUDGE**

**Delivered Online in the presence of:**

1. Mr. Kinyua for the Appellant
2. Ms.Gakii for the Respondent
3. CA - Ms. Yvette