



# THE JUDICIARY



## **REPUBLIC OF KENYA**

### **IN THE ENVIRONMENT AND LAND COURT AT NAROK**

### **ELC CONSTITUTIONAL PETITION NO. E012 OF 2025**

**IN THE MATTER OF ALLEGED INFRINGEMENT OF THE PROVISIONS OF ARTICLES 1 (1), 2(1), 3(1), 10, 22, 23, 28, 29, 40, 48, AND 259(1) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION) OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF**

**HAMMERKOP MIGRATION CAMP LTD.....  
PETITIONER**

**VERSUS**

**MAASAI MARA CONSERVANCY..... 1<sup>ST</sup>  
RESPONDENT**

**COUNTY GOVERNMENT OF NAROK..... 2<sup>ND</sup>  
RESPONDENT**

## **RULING**

1. The matter for determination is a ***Notice of Preliminary Objection*** dated ***6<sup>th</sup> October 2025***, wherein the County Government of Narok, the 2<sup>nd</sup> Respondent, contends that the application and suit herein as filed by the petitioner are fatally incompetent under ***Sections 2(1)*** and ***12(1)*** of the

***Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301.***

2. Further, the 2<sup>nd</sup> Defendant contends that, to the extent that the dispute concerns a ***landlord-tenant relationship***—specifically allegations of forceful entry by the Respondents without termination of tenancy, then this court lacks jurisdiction to entertain the matter.
3. The 2<sup>nd</sup> Respondent urged the court to dismiss the instant application and the entire suit, and / or ***struck it out*** with costs.
4. The Preliminary Objection is opposed by the Petitioner herein. The court directed the said Preliminary Objection be canvassed first by way of written submissions.
5. The 2<sup>nd</sup> Respondent/Objector filed its written submissions dated ***5<sup>th</sup> December 2025***, through ***Allan Meingati, the County Attorney***, and submitted on the statutory framework of the ***Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301***, which governs ***controlled tenancies***.
6. The 2<sup>nd</sup> Respondent relied on ***Section 2(1)*** which defines ***Controlled tenancies*** and ***Section 12***, which vests exclusive jurisdiction in the ***Business Premises Rent Tribunal*** (“BPRT”) to determine disputes arising thereunder and raised the following issues for determination;
  - i. Whether the objection dated 6<sup>th</sup> October 2025 is merited.***

**ii. Who bears the cost of this objection?**

7. On whether the objection is merited and within the jurisdiction of this court, the 2<sup>nd</sup> Respondent relied on the case of **Dr. A.W.G vs D.N.K & Crescent View Holdings Ltd, Petition No. E018 of 2021 HC, Nairobi.**
8. Further, while interpreting **Section 12** of the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act**, the 2<sup>nd</sup> Respondent relied on the case of **Pritma vs Ratilal & another, Nairobi HCCC No.1499 of 1970[1972] EA 560.**
9. On whether there was a **landlord-tenant relationship**, the 2<sup>nd</sup> Respondent defined tenancy as it is provided by **Section 2** of **Landlord and Tenant Act**, and submitted that the lease entered into between the parties on **24<sup>th</sup> July 2016** is a conclusive evidence of **Landlord-tenant relationship**, and it reveals features of a **Controlled tenancy**, including a **termination clause requiring six months' notice**, thereby bringing the tenancy within the purview of **Cap 301**. The 2<sup>nd</sup> Respondent relied on other decided cases such being:
  - **Republic v Chairperson, BPRT & Rosemary Wangari Chege, Ex-Parte Suraj Housing [2016] KEHC 4525**, which clarified that only controlled tenancies fall within the Tribunal's jurisdiction, and that existence of a landlord-tenant relationship is a prerequisite to the application of Cap 301.
  - **Faraja Guest Apartment Ltd v Kendal Energy Solutions Ltd [2024] KEBPRT 1890**, which

reinforced that controlled tenancies alone fall within the Tribunal's remit.

10. The 2<sup>nd</sup> Respondent argued that the Petitioner's business (**Hammerkop Campsite**) of providing accommodation, meals, drinks and hospitality services falls squarely within the definitions of a "hotel" or "catering establishment" under **Section 2(1)**, thereby satisfying the statutory character of a tenancy governed by **Cap 301**.
11. The Respondent further invoked Section **12(1)(e)**, of empowering the Tribunal to adjudicate disputes on eviction, recovery of possession, arrears, mesne profits, and compensation. In addition, reliance on **Section 12(3)** underscores that **valuations, inspections, and assessments** are the exclusive function of the Tribunal, rendering the Petitioner's reliance on a private valuation report (TSM-12) dated **25<sup>th</sup> November 2024** by Sterling Auctioneers Limited misplaced. Further, the said valuation was indicative of the Tribunal's proper jurisdiction.
12. To reinforce the jurisdictional challenge, the 2<sup>nd</sup> Respondent raised the **doctrine of constitutional avoidance**, and relied on the cases of: -
  - **Naomi Kemunto Amuguni v Sisters of Mercy (2025)**,
  - **Ibrahim Wakhanyanga v Chief Magistrate's Court Kakamega (2022)**, and
  - **Gabriel Mutava & 2 others vs Managing Director Kenya Ports Authority & another [2016] eKlr**,

which collectively articulate the principle that constitutional litigation should not be invoked where adequate statutory mechanisms exist.

13. The 2<sup>nd</sup> Respondent further submitted that the Petitioner improperly escalated ordinary tenancy and contractual disputes into a constitutional petition, despite the existence of an elaborate statutory scheme complete with an appellate pathway under **Section 15 of Cap 301**.
14. The 2<sup>nd</sup> Respondent further submitted that, having established the exclusive jurisdiction of the Tribunal, and the Petitioner's failure to **exhaust statutory remedies**, the 2<sup>nd</sup> Respondent prays that the **Preliminary Objection** be upheld and the Petition be struck out.
15. On costs, the 2<sup>nd</sup> Respondent relied on the case of **Haraf Traders Ltd vs Narok County Government [2019] ekr**, which supports the argument that the unsuccessful party must bear costs, particularly where litigation is improperly instituted.
16. In opposition to the Preliminary Objection, the Petitioner filed its written submissions dated **12<sup>th</sup> November 2025, b** through **JGS LAW LLP**, and raised one issue for determination being;
  - i) **Whether the Application and suit is fatally incompetent pursuant to Section 2(1) and 12(1) of the Landlord and Tenant (Shops, hotels and catering establishments) Act Cap 30.**

17. The Petitioner submitted that the **Preliminary Objection** cannot stand as it raises factual matters, particularly the nature and origin of leases issued before the **Maasai Mara Conservancy** obtained a title deed, and before standardized registered leases were introduced under the **Maasai Mara National Reserve Management Plan 2023-2033**.
18. The Petitioner further submitted that the lease it hold was granted in **2016** before the 2<sup>nd</sup> Respondent was given mandate to managed the 1<sup>st</sup> Respondent, and before the 1<sup>st</sup> Respondent had a title, therefore no lease could have been registered.
19. On the legal merits, the Petitioner argued that Cap 301 applies only to **controlled tenancies**, defined in **Section 2(1)** as tenancies not exceeding five years or containing termination clauses within five years. Since the Petitioner's lease is for **25 years** (commencing **24<sup>th</sup> July 2016**), then it is not a controlled tenancy.
20. Reliance was sought in the case of **Kiptoo v North Eastern Investment Limited & another (Tribunal Case E1424 of 2024) [2025] KEBPRT 222**, where the Tribunal held that;  
**"6. The tribunal has perused the lease agreement signed by the 2<sup>nd</sup> Respondent and the tenant/Applicant dated 2<sup>nd</sup> December 2022 and finds that the said lease agreement would run for a period of 6 years and has no termination clause thereby making it an uncontrolled tenancy.**

**7. Section 2(1) of Cap301 Laws of Kenya defines a controlled tenancy as follows; -**

**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 determination, otherwise than for breach of covenant, within five years from the commencement thereof or**

**iii) relates to premises as a class specified under subsection (2) of this section.”**

**8. in view of the foregoing provision of the applicable law, it is clear that where a tenancy has been reduced into writing and is for a period of more than 5 years, and has no termination clause, this tribunal would not have jurisdiction to hear and determine any dispute arising therefrom.”**

21. The Petitioner further submitted that the Respondents' on **4<sup>th</sup>** September **2025**, through their agents **unlawfully and without** any **justifiable reasons** or cause, raided the Petitioner's Camp site destroying it and unlawfully detained its staff and confiscated their mobile phones at gun point.

22. The Petitioner further submitted that the alleged forceful eviction violated constitutional rights under **Articles 28, 29 and 40 of the Constitution** , and that the **Environment and Land Court** has jurisdiction to determine the constitutional violations relating to land as affirmed in **Lorunyei & another v Attorney General & 3 others (ELC Petition 1 of 2023) [2025] KEELC 3053**, where the Court held that under **Article 23(1)**, as read with **Articles 165(5) (b)** and the **ELC Act, Section 13**, the ELC may determine petitions involving infringement of property rights.
23. Accordingly, the Petitioner argued that the Preliminary Objection is meritless and should be dismissed with costs.
24. The above are the ground in support of the Preliminary Objection and the submissions for and against the said Preliminary Objection, which this court has carefully considered.
25. Preliminary Objection was defined in the case of **Mukisa Biscuits Manufacturing Ltd v West End Distributors (1969) EA 696** to mean;

***“ A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the***

**parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.**

26. Further **page 701, Sir Charles Newbold, P** held;

**“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 has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.**

27. From the above definition, it is clear that a Preliminary Objection is on pure points of law, and it is capable of disposing off the matter preliminarily. See the case of **Quick Enterprises Ltd v Kenya Railways Corporation, Kisumu High Court Civil Case No 22 of 1999.**

28. Further, in the case of, **Oraro vs. Mbaja [2005] 1 KLR 141,** the court held as follows; -

**“...I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and 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."***

29. In ***Omondi -vs- National Bank of Kenya Ltd & Others {2001} KLR 579; [2001] 1 EA 177***, the court observed that a Court in determining a ***Preliminary Objection*** can look at the pleadings and other relevant documents, but it must abide by the principle that the Preliminary Objection must raise pure points of law. The court held: -

***"...In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to***

***stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion.***

30. Before delving into the merit of the Preliminary Objection, the court will first determine whether what has been raised by the 2<sup>nd</sup> Respondent is indeed a Preliminary Objection as per the above definition.
31. The 2<sup>nd</sup> Respondent averred that the suit entire suit and the accompanying Application are ***fatally defective***, for contravening the provisions of ***Cap 301***, and thus the court lacks jurisdiction.
32. The issue of contravening provisions of law, and lack of jurisdiction goes to the core of any pleadings, and is therefore a pure point of law. Therefore, it is evident that a challenge to jurisdiction is indeed a pure point of law and thus a proper Preliminary Objection because it questions the court's fundamental power to hear the case, not the merits of the facts, and is thus a pure point of Law.
33. In the case of ***Mary Wambui Munene v. Peter Gichuki Kingara and Six Others, [2014] eKLR***, the Supreme Court spelt out the place of jurisdiction, and observed thus:...  
***'jurisdiction is a pure question of law' and should be resolved on priority basis.***
34. Therefore, this Court is persuaded that the challenge on jurisdiction based on claim that the suit is fatally incompetence for contravening the provisions of ***CAP 301***, is a pure question law, capable of disposing the suit at once.

Thus the court finds and holds that the Preliminary Objection herein is a pure point of law as described in the **Mukisa Biscuits** case above.

35. The next issue is whether the said Preliminary Objection is merited.
36. It was the 2<sup>nd</sup> Respondent's submissions that jurisdiction is everything, and without it, the court has no option, but to down its tools. It submitted that this court lacks jurisdiction because the issues raised herein involves a landlord and tenant relationship, which relationship is controlled and enforced through **Cap 301** Laws of Kenya.
37. The 2<sup>nd</sup> Respondent further argued that a scrutiny of the tenancy agreement on page 5 para 1 on Renewal which expressly provides that either party may issue a **six months' Notice of termination**, and thus this brings the agreement squarely within the statutory definition of a controlled tenancy, and the suit ought to have been filed before the BPRT.
38. On its part, the Petitioner submitted that the lease in issue is for a period of 25 years, and it falls outside the purview of controlled tenancy, since it is a long term lease.
39. The court has considered the lease agreement in issue between the Petitioner and the 2<sup>nd</sup> Respondent, and it is clear that the said lease is for a period of **25 years**, commencing on **24<sup>th</sup> July 2016**, and thus is a long term lease.

40. Under the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301)**, a tenancy is "controlled" only if:

- i. It is not in writing.*
- ii. It is in writing but for a period not exceeding five years.*
- iii. It contains a provision for termination within five years from commencement (other than for a breach of covenant).*

41. Therefore, the lease in issue was commenced on **24<sup>th</sup> July 2016**, for a period of **25 years**, and does not fall in the above category.

42. Further, the 2<sup>nd</sup> Respondent submitted that on page 5 of the lease agreement, para 1 on Renewal it provided that either party may issue six months termination notice, and thus this clause brings the suit squarely within the definition of controlled tenancy. However, **Section 2(iii)** provides provisions for termination within **5 years**. Para 1 on renewal is after the expiry of the lease period, which is **25 years**, and that cannot qualify the lease herein to be a controlled tenancy.

43. It is evident Para 1 on Renewal is a standard form clause and a standard clause requiring a tenant to give notice to renew a long-term lease such as **25 years**, does not qualify it as a controlled tenancy.

44. Under the ***Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301)***, a written lease only becomes "controlled" if it is for a term of five years or less, or if it contains a clause allowing for termination within the first five years, but not a notice for renewal.
45. It is evident that a ***renewal notice*** is meant to extend the relationship, not to terminate it within the restricted five-year window. Under ***Section 2 of Cap 301***, it specifically targets clauses that make a tenancy "determinable" or terminable within five years. A renewal option at the end of a ***25-year*** term does not make the lease terminable during that initial five-year period, and thus the court cannot find and hold that the ***six months'*** notice of termination qualifies the lease herein as controlled tenancy.
46. For the above reasons, this court finds and holds that the lease herein in issue is not ***a controlled tenancy*** and the ***Preliminary Objection*** is ***not merited***.
47. Consequently, the said ***Preliminary Objection*** is ***dismissed*** with costs being in the cause. Let the matter proceed for hearing and be determined on merit.

**It is so ordered.**

***Dated, signed and delivered virtually at Narok this 18<sup>th</sup> day of December 2025***

***L. Gacheru***  
***Judge***

***Delivered online in the presence of***

***Elijah Meyoki - Court Assistant***

***Mr. Majimbo for Petitioner***

***Mr. Migwi holding brief for Mr. Mengati for 2<sup>nd</sup>  
Respondent/Objector***

***L. Gacheru  
Judge***