



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ISIOLO
CIVIL SUIT NO. E 002 OF 2024

**ABDI SALAT
MAALIM PL
AINTIFF**

VERSUS

**ISIOLO CENTRAL FARMERS
CO-OPERATIVE SOCIETY LTD & 13
OTHERSDEFENDANTS**

RULING

1. By way of a plaint dated 14/10/2024, and later amended on 27th May, 2025, the plaintiff herein seeks for a mandatory injunction reinstating him to the suit premises, and restraining the defendants from *inter alia* interfering with the quiet and peaceful occupation of the said premises. He also seeks for return of his goods and items that were taken away from the premises, compensation for loss of business and mesne profits.
2. The 1st, 11th, 12th, 13th & 14th defendant (hereinafter: The defendants) filed a defence and a counter-claim, seeking for Ksh. 3,560,000 on account of unpaid rent and a permanent injunction against the plaintiff from interfering with the premises. The defendants also seek for a declaration that the 1st defendant is entitled to exclusive and unimpeded right of possession and

occupation the suit premises. The suit premises is described as **plot No. 560, Isiolo Township.**

3. Thereafter the defendants filed a preliminary objection on grounds that:
 - a) *The matter is totally defective and an abuse of the court process as the court does not have jurisdiction by dint of **Section 13 of the Environment and Land Court Act** as the issue relates to land rights and interest.*
 - b) *That the matter is Sub-judice as there exists Meru BPRT 32/2019 Abdi Salat Maaline -vs- Isiolo Central Farmers Cooperative Society Ltd.*
4. The defendants pray that the suit be struck off with costs to the defendants.
5. The preliminary objection (the objection) proceeded by way of Written Submissions.

Defendant /Objector's Submissions

6. It is the defendant's submission that the issue of jurisdiction is a matter of law and therefore the objection meets the threshold of a preliminary objection .To buttress their submissions they have relied on the decision of **Mukisa Biscuits Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696, Hassan Ali Joho & Ano -vs- Suleiman Said Shahbal & 2 others [2014]eKLR** and **Mashin Construction Co. Ltd -vs- Villa Care Ltd [2022] eKLR** on the concept , and effect of a preliminary objection.

The Jurisdiction

7. It is submitted that the subject matter of the present suit is a lease agreement for house on plot No. 560 Isiolo Township. That pursuant to **Article 162 (2) (b) of the**

Constitution of Kenya and **Section 150 of the land Act, 2012**, the Environment and land Court (ELC) has the exclusive mandate to hear and determine disputes touching on land or interests on land.

8. The defendants further submit that when a court is faced with a controversy on whether a dispute is about land or not, courts should apply the “**Pre-dominant purpose test**” as was held, and defined in the case of **Suzanne Butter & 4 others -vs- Redhill investments & Ano.[2017] e KLR** .
9. It is pointed out that in paragraph 7 and the subsequent paragraphs of the plaint, the plaintiff has admitted that the issue is in regard to land; that the issues raised touch on eviction and destruction of property following an alleged breach of the lease agreement, reinstatement and trespass. All these aforesaid issues, the defendants argue, are matters that appertain to land Rights and interest on land ,which fall under the exclusive jurisdiction of ELC .

Sub-judice

10. On the *Sub-judice* rule, it is submitted that the plaintiff has referred to the existence of a case before the Business Premises Rent Tribunal (BPRT) at Meru. That the BPRT case seeks similar orders as the present suit, and consequently, this court has no jurisdiction to entertain the present suit.

Plaintiff's Submissions

Jurisdiction

11. It is the plaintiff's submissions that his claim is founded on wrongful eviction, destruction of property and the consequential loss of business, culminating in a prayer for compensation. The plaintiff argues that to

camouflage the above issues as “land disputes” or “lease enforcement” is a misplaced characterization of the plaintiff’s case.

12. It is further submitted that the objection is intermixed with factual matters, such as the nature of the claim and the existence and scope of BPRT case , and therefore fails the test of a preliminary objection as enunciated in ***Mukisa Biscuits Case (Supra)***.

13. The plaintiff argues that the issues he has raised are commercial in nature ; that jurisdiction is determined by the pleadings and the reliefs sought and not by the incidental reference to Land. In this regard the plaintiff has relied on the decisions in the case of ***Kinuthia vs Kanyi & Ano[2024]KELC 1625(KLR)*** and ***Diamond Homes Ltd vs Shapi [2024] KECA 1161(KLR)***

Sub-judice

14. On the *sub-judice* , it is submitted that the present suit is not about controlled tenancy or rent arrears, but about illegal attachment, breach of court orders and recovering of losses occasioned by the defendant. The plaintiff has gone ahead to make a distinction between the BPRT case and the present matter, arguing that whereas the BPRT case was about rent dispute and controlled tenancy, the present one seeks compensation for destruction of property and loss of business.

15. It is also submitted that the parties and prayers sought in each case are different; that as was held in the case of ***Wainaina -vs- Naibare [2021] KEHC 950 (KLR)*** sub-judice rule doesn’t apply where cause of action and reliefs differ.

16. It is the plaintiff's final submission that striking out suit is a draconian measure, reserved for clearest cases of abuse which, it is argued, is not the case in the present suit.

Determination

17. I have identified Three issues for determination. These are:

- a). Whether the objection meets the threshold of a preliminary objection
- b). Whether this court has jurisdiction to try this suit.
- c). Whether the suit is sub-judice.

Preliminary objection

18. The nature of a preliminary objection was laid out in the landmark case of **Mukisa Biscuit**(supra).It was defined as follows: "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 the contract giving rise to the suit to refer the dispute to arbitration ... 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."

19. In the present case , I need not belabor the issue; Jurisdiction is a point of law , and if any objection to it is upheld , it outrightly terminates the suit , as per **Mukhisa's decision** (supra). The current objection

therefore, being an objection on jurisdiction , meets the threshold of a preliminary objection.

Whether this court has jurisdiction to try this suit

20. The question of whether a court has jurisdiction is a preliminary issue, as aforesaid , and ought to be addressed at the onset of the case . However, it is trite law that it can be raised at any stage of the proceedings.

21. It is also trite that jurisdiction can only be conferred by the constitution or a statute. It cannot be assumed, implied and or arise by interpretation. The celebrated case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd. (1989)** is relevant in this regard. The court held :*"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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."*

22. In the present case , the jurisdiction of the high court is set out under Article 165 of the constitution, and under clause (5) of the Article, the high court is expressly barred from determining matters which fall within the jurisdiction of the courts established under Article 162(2). Article 165(5) provides as follows: *The High Court shall not have jurisdiction in respect of:*
(a) matters reserved for the exclusive jurisdiction of the Supreme Court under this Constitution;

(b).falling within the jurisdiction of the courts contemplated in Article 162 (2).

23. Article 162(2) and (3) provide as follows: -

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause”

23. Pursuant to Article 162 of the constitution, parliament enacted the **Environment and Land court Act No. 19 of 2011**, which established the Environment and Land court(ELC). Section 13 of the ELC Act outlines the Environment and Land Court’s jurisdiction as follows: -

(1) The Court shall have original and appellate jurisdiction to hear and determine all dispute in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use, planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d)relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

24. It is evident that the issues in the present case touches on the interest in land as well as those of commercial interest. I have looked at the Amended Plaintiff and for clarity and appreciation of the import of the pleadings, the relevant paragraphs of the plaintiff are reproduced as hereunder:

Paragraph 11 “ The plaintiff avers that the acts of the defendants constituted an outright illegality the particulars of which included:-

- a) Locking up premises under the disguise of distraining from rent.
- b) Evicting the Appellant under the disguise distraining from rent.
- c) Failing to account for the detached goods and failing to release the said goods back to the appellant (sic) in good order.
- d) Swearing a false affidavit to obtain break-in orders from the court”

Paragraph 15.

“The plaintiff avers that the defendants trespassed the suit premises and as such have caused the plaintiff actual damage and by virtue of such actions of the defendant, the plaintiff is entitled to receive such amount as will compensate him for the loss he has fallen into”

Paragraph 20.

“The plaintiff’s cause of action against the defendants is based on wrongful eviction and

wanton destruction of his hotel has since caused him immense loss”

Final prayers:

“ a). A mandatory injunction reinstating the Plaintiff to the suit premises and restraining the defendants by themselves, servants or agents or any of them or otherwise howsoever and preventing the Plaintiff, his employees, customers and/or visitors from access to the suit premises or in any way obstructing or interfering with the Plaintiff’s quiet and peaceful occupation and enjoyment of the suit premises until the expiry of his lease period as outlined in the agreement dated 30th October, 2016.

b). The Defendants be ordered to return all the Plaintiff’s goods and items carried from the suit premises on the 9th May, 2022 as tabulated 8, 10 & 17, 19 above and or in the alternative the Defendants be directed to compensate the Plaintiff to a tune of Two Million Three Hundred and Eleven Thousand only for the loss of such items.

c). The Plaintiff be compensated for loss of business to a tune of Twelve Million for such period he has missed out on being in gainful user of the business premises.

d). Mesne profits, aggravated, exemplary and punitive damages loss, disturbance and interruption be awarded to a tune of Thirty Million in favor of the Plaintiff.

e) Special damages pleaded herein above. “

24. On the other hand, in their counter-claim, the defendants under paragraph 20 seek for *interalia*:-

a) A declaration that the 1st defendant is entitled to exclusive and unimpeded right of possession and occupation of all that property known as Plot No. 560 Isiolo County.

b) A permanent injunction restraining the plaintiff whether by himself or his servant, agents or otherwise howsoever from trespassing or in any way interfering with the suit property and from dealing with it or in any way interfering with the parcel of land.

c). Unpaid Rent amounting to Ksh. 3,560,00.

25. Thus in both pleadings, three of the paragraphs touch on the land (the tenancy) and others on the issue of business or unpaid rent. In my observation, central to dispute is the occupation of the suit premises. The plaintiff wants reinstatement while the defendants want the plaintiff barred from re-entry and further interference. However, it is also evident that both parties are seeking to be compensated for some loss.

26. When faced with a mixture of issues in the pleadings some courts have applied the “predominant purpose test” In ***Suzanne Butler & 4 other -vs- Redhill Investments & Ano [2017] e KLR held*** cited by the defendants Justice Joel Ngugi expressed himself as follows: “*The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse. Ordinarily, the*

pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue.....

In my view, the following factors are significant in determining the nature of the contract:

a.The language of the contract;

b.The nature of the business of the vendor;

c.If the contract is mixed, the intrinsic worth of the two parts - land acquisition and other services or provision of materials;

d.The gravamen of the dispute - whether rooted in contests about ownership, deficiency in title, occupation or use of the land or whether the genesis of the dispute is something else like the quality of services offered, construction, works and so forth; and the remedies sought by the Plaintiff”

27. However in ***Lydia Nyambura Mbugua -vs- Diamond Trust Batex (k) & ano [2018] e KLR*** Justice Munyao took the view that the test should be one of *predominant issue* and not the aim of the transaction.

28. In this case, both the predominant issue and purpose of transaction is the same; the occupation of the suit premises. The plaintiff seeks for a mandatory injunction to regain entry and continued tenancy while, the defendant seeks for a permanent injunction to restrain the plaintiff from, further interference. I take the view that these two issues are primary. For instance, if the court is going to determine whether the plaintiff should be reinstated

to the premises, it will have to first determine if the eviction was lawful. The court would then have to look at the tenancy Agreement if any. Such issues are issues of interests on land, and they fall within the exclusive mandate of ELC. The same applies to the issue of whether the plaintiff should be barred from any interference of the suit premises. Indeed, the plaintiffs' complaint under paragraph 14 of the plaint that *"the conduct of the 1st defendant was deliberate and calculated to secure him high profit by leasing the property at the expense of the plaintiff"* is instructive. The *main issue* and aim of the *"transaction"* were the occupation of the suit premises and its use.

29. In terms of Article **162 (2) (b) & section 13 of the ELC Act** any matter that touches on the occupation and use of land or interest in land belongs exclusively to ELC.

30. It is evident therefore that the high court has no jurisdiction to entertain this suit. As it has been often stated *"jurisdiction is everything"* and if the court does find that it is not possessed of the jurisdiction, it should not take any further step in the matter (**see: Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1**

31. The plaintiff has reminded the court that striking off a suit is draconian and should be the last resort. I agree, but the words of the Judge in the **owners of the vessel Lilain** (supra) are worth recalling : *....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision*

amounts to nothing. Jurisdiction must be acquired before judgement is given.”

32. In other words, if a court has no jurisdiction over a matter, there is no salvation for the affected suit. This is the inevitable end of this case.

Sub-judice

33. The principle of *Sub-Judice* is also a Principle of Law. In its advisory opinion in the case of **Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] KESC 54 (KLR)**, the Supreme Court explained the doctrine in the following terms:- *The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”*

34. Turning to the present case am not satisfied that the defendants have proved all the elements as set out by the supreme court and section 6 of the civil procedure Act. Firstly, the pleadings in the BPRT case No. 32 of 2019 have not been attached. This court is therefore not in a position to ascertain the particulars of the suit in the Business premises Tribunal. Further from the order dated 9th March 2020, I have observed that the present suit include more parties than those appearing on BPRT case.

35. In brief, there is not enough material to help this court in determining whether the present suit is offends the *sub-judice* rule. As held by the supreme court in the Kenya **Human Rights commission case(supra)** the onus was on the defendants to provide the material upon which the court can decide in this regard. This ground of objection has not been sufficiently proved, and it is hereby dismissed.

36. In conclusion the court finds that it has no jurisdiction to try this suit. The suit is hereby struck off with costs to the 1st, 11th,12th 13th and 14th defendants.

Dated, Signed and delivered at Isiolo, this 12th day of February, 2026

S. Chirchir
Judge

In the presence of: -

Roba Kalelo-Court Assistant
Mr. Jarso- for the 1st, 11th, 12th, 13th and 14th defendants.
Mr. Ashaba -for the plaintiff.

ORIGINAL