



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC JUDICIAL REVIEW CASE NO E020 OF 2024
IN THE MATTER OF THE LAND ACT
AND
IN THE MATTER OF: ARTICLES 22 AND 23(3) (F) OF THE
CONSTITUTION OF KENYA
AND
IN THE MATTER OF: ORDER 53 RULE 1 OF THE CIVIL
PROCEDURE
RULES 2010
AND
IN THE MATTER OF: THE LANDLORD AND TENANT (SHOPS,
HOTELS
AND CATERING ESTABLISHMENTS)
ACT
AND
IN THE MATTER OF: BUSINESS PREMISES RENT TRIBUNAL
CASE NO. E139 OF 2024
AND

**IN THE MATTER OF: PAN AUTO EQUIPMENT LIMITED AND
PADDY**

TO APPLY

EQUIPMENT LIMITED SEEKING LEAVE

FOR JUDICIAL REVIEW ORDERS

AND

**IN THE MATTER OF: THE RULING AND ORDERS DELIVERED
BY HON**

BUSINESS

MIKE MAKORI - MEMBER OF THE

JUNE 2024 IN

PREMISES RENT TRIBUNAL ON 21ST

2024

NAIROBI BPRT CASE NO. E139 OF

JUDICIAL REVIEW PROCEEDINGS

BETWEEN

**REPUBLIC.....
APPLICANT**

=VERSUS=

**HON MIKE MAKORI
MEMBER - BUSINESS PREMISES RENT TRIBUNAL.....
RESPONDENT**

AND

**PAN AUTO EQUIPMENT LIMITED.....1ST EX PARTE
APPLICANT**

**PADDY EQUIPMENT LIMITED.....2ND EX PARTE
APPLICANT**

**AQUITY LINKS LIMITED.....3RD EX PARTE
APPLICANT**

RULING

1. This ruling is in respect to the Notice of Preliminary Objection dated 19th February 2025, raised by the Respondent on the grounds that the Applicant failed to exhaust the alternative remedies available under Section 15 of the Landlord and Tenant (Shops, Hotels, and Catering Establishments) Act, contrary to Section 9(4) of the Fair Administrative Action Act. It was argued that the Applicants improperly joined the Respondent in these proceedings. It was also argued that the request for a stay of execution of the Tribunal's decision constitutes an abuse of the court process.
2. Based on the foregoing, the Respondent urged the Court to strike out the application with costs.
3. The preliminary objection was canvassed by way of written submissions.

THE RESPONDENT'S SUBMISSIONS

4. The Respondent filed his submissions dated 19th February 2025.
5. On behalf of the Respondent, Counsel submitted that the Applicants have not exhausted the alternative remedies available under Section 15 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, which provides for the right to appeal decisions made by the Business Premises Tribunal. To support this point, Counsel relied on **Mason Services Limited v Parklads Baptist**

Church Registered Trustees & Another (2018) eKLR,

where the Court held that a party seeking a judicial review remedy against an order of the BPRT must first exhaust the review and appeal remedies provided by the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.

6. Counsel further submitted that the Applicants failed to comply with the procedural requirements outlined in Section 9(4) of the Fair Administrative Action Act, which requires a party to exhaust available remedies before seeking judicial review.
7. Counsel contended that the Applicants improperly included the Respondent in the proceedings, asserting that judicial review relates to the legality, fairness, or procedural propriety of a tribunal's decision, not the actions of individual members. To support this argument, Counsel relied on **Republic v Kenya Revenue Authority Ex Parte Yaya Towers Limited (2008) eKLR** and **Republic v Kenya Revenue Authority & another ex parte Bear Africa (K) Limited.**
8. Counsel argued that the request for leave to seek judicial review and stay of execution is an abuse of the court process because the applicants have failed to show that the Tribunal's decision is marred by illegality, irrationality, or procedural unfairness. To support this point, reliance was placed on **Ahmad & another v Kadhi Mombasa: Khalifa & another (Interested Party) Judicial Review 4 of 2020) (2021) KEHC 133 (KLR).**

9. In conclusion, Counsel urged the court to strike out the application with costs to the Respondent.

THE APPLICANTS SUBMISSIONS

10. The Applicants filed their submissions dated 4th November 2025
11. On behalf of the Applicants, Counsel submitted that the only issue for determination is whether the Preliminary objection is merited.
12. Counsel submitted that the preliminary objection does not raise a pure point of law as it requires examination of evidence and facts to determine whether an alternative remedy was available to the Applicants. To support this argument, Counsel relied on **Independent Electoral and Boundaries Commission v Jane Cheperenger & 2 others (2015)**, where the Court held that preliminary objections should not be used to bypass factual or evidentiary issues that require proof.
13. Counsel relied on **Republic v Kenya Revenue Authority E Parte Stanley Mombo Amuti (2018) eKLR** to argue that it would be premature to dismiss the proceedings at the leave stage because the Court can only determine whether the Applicant has presented an arguable case.
14. Counsel argued that judicial review is available when the statutory appeal process is illusory, impractical, or incapable of providing effective relief. Counsel argued that whether exceptional circumstances exist to justify bypassing the statutory appeal mechanism is a question to be established

through affidavit evidence. To support this point, reliance was placed on **Republic v National Environmental Management Authority (2011) KECA 412 (KLR) and Republic v National Environmental Management Authority & 2 others ex parte Greenhills Investment Ltd & 2 others (2006) 1 KLR (E&L) (2006) KEHC (KLR).**

15. Counsel argued that having an alternative remedy does not prevent judicial review when a decision violates the rules of natural justice or is made without jurisdiction.
16. Regarding the issue of misjoinder, Counsel submitted that the decision in question was made by the Respondent in his official capacity. Counsel argued that no prejudice had been shown that would justify the remedy of striking the Respondent from these proceedings. Counsel maintained that the alleged misjoinder, which is denied, constitutes a defect that can be remedied.
17. Regarding whether the application is an abuse of the court process, Counsel submitted that the preliminary objection is based on factual matters requiring evaluation by evidence.
18. In conclusion, Counsel urged the Court to dismiss the preliminary objection with costs.

ANALYSIS AND DETERMINATION

19. Having considered the preliminary objection and the rival submissions, the following issues arise for determination:
 - a) *Whether the preliminary objection is merited;*
 - b) *Whether the judicial review application is incompetent for want of exhaustion of remedies.*

20. The law on preliminary objections is well settled. A Preliminary Objection must be based on a pure point of law.
21. In **Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors Ltd (1969) EA 696**, Law JA stated;
“So far as I’m aware, 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 submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
22. Further on, **Sir Charles Newbold JA** stated;
“The first matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a 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 points by way of preliminary objection does nothing but unnecessarily increase costs

and, on occasion, confuse the issue. The improper practice should stop.”

23. In **Oraro Vs Mbaja (2005) eKLR** Ojwang J (as he then was), described it 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 process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears 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.”

24. The Respondent contends that the Applicants have not exhausted the available remedies before approaching this court. The doctrine of exhaustion of remedies provides that where a statute has established a dispute resolution mechanism, that procedure must be exhausted before a party can approach the court for relief. Courts will generally decline to exercise jurisdiction where a party has bypassed an available statutory mechanism unless exceptional circumstances are demonstrated.
25. In Kenya, this doctrine has been affirmed in several decisions. It was perhaps most felicitously stated in **Speaker**

of National Assembly v Karume [1992] KLR 21, where the Court of Appeal held that:

“Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”

26. The doctrine was also discussed in **Geoffrey Muthiga Kabiru & 2 others - vs- Samuel Munga Henry & 1756 others [2015] eKLR**, where the Court of Appeal held that:

“It is imperative that where a dispute resolution mechanism exists outside the Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution, which commands Courts to

encourage alternative means of dispute resolution.”

27. However, the doctrine is not absolute. Courts have recognised an exception where:

a) There is an alternative remedy

b) the impugned decision is made without jurisdiction

c) there is a violation of the Constitution or fundamental rights.

d) the process is tainted by procedural impropriety.

28. The Respondent argues that the Applicants should have challenged the impugned decision through an appeal as outlined in Section 15 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, instead of filing judicial review proceedings. It was contended that the statute provides a clear appellate mechanism enabling a party dissatisfied with the Tribunal's decision to seek redress in court. According to the Respondent, by bypassing the statutory appeal process and resorting to judicial review, the Applicants violated the doctrine of exhaustion of remedies.

29. The Applicants, on the other hand, contended that the Tribunal issued final orders against them without giving them an opportunity to be heard. They argued that the decision was made in violation of the rules of natural justice, and on that basis, they filed for judicial review.

30. The record shows that the Applicant's complaint is not merely that the Applicant reached an erroneous decision.
31. Allegations of breach of the rules of natural justice and denial of a fair hearing go to the legality of the decision-making process.
32. Where a party claims that a Tribunal violated its right to be heard, the complaint transcends from mere dissatisfaction with the outcome and raises a procedural question. At this stage, the Court is not determining the merits of the judicial review application but whether it has jurisdiction due to failure to exhaust remedies.
33. The issues raised regarding denial of a fair hearing and the finality order present arguable questions of procedural illegality that rightfully invoke this Court's supervisory jurisdiction.
34. The Respondent contends that it was improperly joined in the proceedings. The proceedings sought to be impugned emanate from the BPRT, a statutory body established under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.
35. Judicial review proceedings are ordinarily directed at the decision-making body or public authority responsible for the impugned action. Where a Tribunal acts in its official capacity, it is the Tribunal as an institution, not its individual members, that is liable. A member who issues a decision does so on behalf of the Tribunal.

36. Based on the foregoing, I find that the Respondent was improperly joined and is hereby struck out from these proceedings. The preliminary objection lacks merit and succeeds to the extent that the Respondent is struck out from the proceedings herein.

RULING SIGNED, DATED, AND DELIVERED VIA MICROSOFT TEAMS THIS 27TH DAY OF FEBRUARY, 2026.

.....
HON. T. MURIGI
JUDGE

IN THE PRESENCE OF: -
Munene for the Applicants
Ahmed - Court Assistant

ORIGINAL