



**ARC Packaging Limited & another v Sundries Bargains (Nairobi) Limited & another
(Environment & Land Case E344 of 2022) [2025] KEELC 942 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 942 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E344 OF 2022
OA ANGOTE, J
FEBRUARY 27, 2025**

BETWEEN

ARC PACKAGING LIMITED 1ST PLAINTIFF

CEMPACK SOLUTIONS LIMITED 2ND PLAINTIFF

AND

SUNDRIES BARGAINS (NAIROBI) LIMITED 1ST DEFENDANT

**ADAM NG'ETHE T/A GARAM INVESTMENTS AUCTIONEERS 2ND
DEFENDANT**

RULING

1. What is coming up is the 1st and 2nd Defendants'/Applicants' Notice of Preliminary Objection dated 8th March, 2024 for the dismissal of the suit on the grounds that:
 - i. This Honourable Court lacks jurisdiction.
 - ii. The Plaint dated the 18th October, 2022 offends the doctrine of Res Sub Judice as the same issues being litigated on are before the Business Premises and Rent Tribunal (Nairobi BPRT No E863 of 2022).
 - iii. The Plaint is an abuse of court process, incompetent, misconceived, bad in law and incurably defective. The Plaintiffs are forum shopping as the issues being litigated on are before another Tribunal (Business Premises and Rent Tribunal).
2. The Objection was canvassed by way of submissions.
3. The 1st and 2nd Defendants/Applicants filed submissions on the 22nd July, 2024. Counsel submitted that as stated by this court in its Ruling of 25th May, 2023, the Tribunal as a subordinate court is well vested with jurisdiction to issue injunctive orders.



4. According to Counsel, the other limb of the Objection is based on the doctrine of res sub judice set out in Section 6 of the [Civil Procedure Act](#), which prohibits the court from determining a suit where the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or parties under whom they claim, litigating under the same title, in the same court or any other court having jurisdiction.
5. Reliance in this respect was also placed on the cases of Independent Electoral and Boundaries Commission vs Jane Cheperenger & 2 Others[2015]eKLR and Republic vs Paul Kihara Kariuki, Attorney General & Others ex-parte Law Society of Kenya[2020]eKLR.
6. It was urged that the present suit not only contravenes the res sub judice rule on account of BPRT No E863 of 2022, but is a classic example of forum shopping by the Plaintiffs who have filed numerous cases in various courts and tribunals fishing for similar orders and that ultimately, though differently worded, the Plaintiffs are primarily seeking injunctive orders from the Magistrates Court, Tribunal and this court.
7. The Plaintiffs/Respondents filed submissions on 25th July, 2024. Counsel submitted that as expressed in Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd(1969)E.A 696, preliminary objections must be founded on pure points of law and that from the onset, the Defendants objection is incompetent and does not meet the threshold for res sub judice as set out in Section 6 of the [Civil Procedure Act](#).
8. Counsel submitted that the Plaintiffs have acknowledged the existence of Nairobi BPRT E863 of 2022 in their pleadings and the pleadings aforesaid have been supplied to this court; that in order to make its determination, the court will have to interrogate the pleadings filed in the Tribunal to ascertain the facts and evidence and as such, this issue does not constitute a pure question of law. Reliance in this respect was placed on the case of Margaret Wachi Karuri vs John Waweru Ribiro[2021]eKLR.

Analysis and Determination

9. Having considered the Preliminary Objection, and the submissions thereto, the issues that arises for determination are;
 - i. Whether the Preliminary Objection is competent and if so?
 - ii. Whether the Preliminary Objection is merited?
10. Vide the present objection, the Defendants contend that that this court does not have the requisite jurisdiction to entertain this matter and secondly, the suit contravenes the principle of res sub judice. In response, the Plaintiffs state that the objection is only with respect to the issue of res sub judice which does not in any event constitute a pure point of law.
11. It is the Plaintiff's argument that in determining the same, the court is mandated to interrogate the pleadings filed in the Tribunal to ascertain the facts and evidence.
12. As correctly stated by the parties, the threshold of a Preliminary Objection was set out by the Court of Appeal in the locus classicus case of Mukisa Biscuits Manufacturing Co. Ltd. vs West End Distributors (1969) EA 696 at 700 wherein Law, JA stated:

“...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.”

13. Newbold, P further 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 points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”

14. The Supreme Court in the case of Hassan Ali Joho & Another vs Suleiman Said Shahbal & 2 Others [2014] eKLR re-affirmed the principle as set out in the Mukisa Case(supra) stating 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.”

15. As aforesaid, the objection herein is stated to be premised on two issues, to wit, jurisdiction of the court and contravention of the doctrine of sub judice. As regards jurisdiction, there can be no doubt that the same constitutes a pure question of law. Indeed, it is one of the pleas referenced in the Mukisa Biscuits case(supra).

16. Moving to the concept of sub judice, the same is a legal concept codified under Section 6 of the [Civil Procedure Act](#). It provides thus:

“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”

17. It is clear that the concept of res sub judice goes to the jurisdiction of a Court. As to whether the same can be brought by way of preliminary objection, the court relies on the exposition by the Court of Appeal in John Florence Maritime Services Limited & Conken Cargo Forwarders Limited vs Cabinet Secretary for Transport and Infrastructure, Attorney General, Kenya Maritime Authority & Office De Gestion Du Freit Maritime (OGEFREM) albeit discussing the related concept of res judicata, noted thus:

“There is no legal requirement or factual basis for the submission that the doctrine must only be invoked and or ventilated through a formal application. It can be raised through pleadings as well as by way of preliminary objection.”

18. The Defendants have annexed the pleadings in BPRT E863 of 2022. The Plaintiffs on their part not only concede to the existence of the BPRT No E863 of 2022, but state that they have annexed the



pleadings thereof and the same form part of the record of this court. The Defendants have similarly annexed the pleadings.

19. In the circumstances, the court is not determining and/or interrogating any contested facts. Rather, it is merely comparing the proceedings herein vis the proceedings in the Tribunal, none of which are disputed, in a bid to determine whether the principle of sub judice has been contravened. In the end, the court finds that the Preliminary Objection is well founded.
20. Beginning with the question of res sub judice, this principle as codified in Section 6 of the *Civil Procedure Act* prevents a Court from litigating a matter in which the issue is substantially in issue in another suit, before a competent court and between the same parties and/or their representatives.
21. Speaking to its rationale, the Supreme Court in *Kenya National Commission on Human Rights vs Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties [2020] eKLR* stated as follows:

“The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” 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.”

22. The Defendants contend that the present suit is res sub judice BPRT E863 of 2022. No substantive response has been made to this assertion by the Plaintiffs who only submitted on the competency of the Preliminary Objection.
23. The matter before the Tribunal is a Reference instituted by Arc Packaging Limited, the 1st Plaintiff herein as a tenant against the 1st Defendant herein as the landlord.
24. Vide the Reference, the 1st Plaintiff herein seeks inter-alia, a declaration that the tenancy over the suit property-L.R 336/1257(Original Number 336/106/2) is a controlled tenancy and orders restraining the 1st Defendant from purporting to exercise any rights of re-entry into, or regaining possession of the suit property without due process under the Landlord and Tenant(Shops, Hotels and Catering Establishments) Act.
25. The reference before the BPRT also sought for an order that the letter demanding payment of the outstanding rental amounts and purporting to terminate the tenancy as well as the oral notice thereof are defective and of no consequence.
26. Vide the Plaint herein, the Plaintiffs seeks declarations that the Defendants have taken the law into their own hands thereby violating their fundamental right under Article 50 of *the Constitution* and that the multi-wall kraft sack manufacturing plant and equipment that is situate on the property belongs to the 2nd Plaintiff and is therefore not available for purposes of levying for distress for rent that the 1st Plaintiff may allegedly owe to the 1st Defendant.



27. This suit also seeks permanent injunctive orders restraining the Defendants from levying for distress rent that the 1st Plaintiff may allegedly owe to the 1st Defendant by seizing or causing the multi-wall kraft sack manufacturing plant and equipment belonging to the 2nd Plaintiff to be seized and sold by public auction or private treaty.
28. Further, the Plaintiffs have also sought for injunctive orders restraining the Defendants from exercising any rights of re-entry into, or regaining possession of or otherwise interfering with its possession of the suit property provided the 1st Plaintiff pays the reserved rent pending hearing and final determination of the reference.
29. The suit further seeks orders annulling the notice of 29th September 2022 issued to it by Sharon Njeri on behalf of the 1st Defendant insofar as the same purports to require the 1st Plaintiff to remove the multi-wall kraft sack manufacturing plant and equipment from the property known as Land Reference Number 336/1257 (Original Number 336/106/2) without following due process of the law under the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* and/or section 152E of the *Land Act*, mesne profits, general damages and aggravated damages.
30. The court has considered the foregoing vis the parameters of Section 6 of the *Civil Procedure Act*. The existence of BPRT E863 of 2022 is not disputed. The same was instituted by way of Reference by Arc Packaging Limited as a tenant against the Sundries Bargains(Nairobi)Limited on the 26th September, 2022. This matter having been filed on 11th October, 2022, the Tribunal matter is for purposes of Section 6, the previously instituted matter.
31. So is the matter herein, directly and substantially in issue before the Tribunal? The term "matter" alludes to the subject matter for determination in a legal proceeding and not the legal proceeding in itself. This position was articulated by the Supreme Court in Re the matter of the In the Matter of the Interim Independent Electoral Commission (Applicant) [2011] KESC 1 (KLR) (20 December 2011), which, cited with approval the Australian decision in Re Judiciary Act 1903-1920 & In re Navigation Act 1912-1920 (1921) 29 CLR 257, where it was held:

“.... we do not think that the word “matter” ...means a legal proceeding, but rather the subject matter for determination in a legal proceeding. In our opinion there can be no matter... unless there is some right, duty or liability to be established by the determination of the court...”
32. Having keenly considered the proceedings, there is no doubt that the issues in both cases arises from a tenancy dispute between the 1st Plaintiff and the 1st Defendant with respect to the tenancy over the parcel of land known as L.R 336/1257(Original number 336/106/2).
33. In both the Reference and this suit, the 1st Plaintiff concedes to being in a tenant-landlord relationship with the 1st Defendant in the nature of a controlled tenancy being for a period not exceeding 5 years. It is its case that it fell into rental arrears for reasons explained to the 1st Defendant, and that notwithstanding the foregoing, the 1st Defendant instructed Advocates to issue it with a demand notice demanding payment of rent within 14 days failure of which it would institute proceedings and/or terminate the license and re-enter the property.
34. The 1st Plaintiff is aggrieved that rather than referring the dispute to the Tribunal, the 1st Defendant instructed the 2nd Defendant to levy distress and the 2nd Defendant went ahead to recover possession; that further, the 1st Defendant unlawfully terminated the tenancy resulting in losses to the 1st Plaintiff



which it seeks to recover vide both the Reference and this suit. The court finds that the issues in both suits are the same.

35. As to the parties, before the Tribunal are the 1st Plaintiff and 1st Defendant as tenant and landlord respectively. Whereas the 2nd Plaintiff and the 2nd Defendant respectively are not named as parties before the Tribunal, this does not in itself remove the matter from the ambit of res sub judice.
36. As succinctly stated by the court in Republic vs Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020]eKLR, the mere addition of a party or parties does not alter the pith and substance of the suit.
37. In any event, whereas there were not named parties in the reference, they have been severally mentioned therein and are intrinsically connected to the issues in dispute in both the Reference and this suit.
38. Consequently, it is the finding of this court that the two suits are between the same parties or those claiming under them over the same subject matter. The outcome of one suit will affect the outcome of the other suit, which may result in the courts issuing conflicting decisions over the same subject matter. Ultimately, the suit contravenes the doctrine of res sub judice.
39. Moving on to the next limb of the objection, the same is founded on the contention that this court does not have jurisdiction to entertain the matter.
40. This court is a creature of *the Constitution* under the provision of Article 162 (2) (b) of *the Constitution* of Kenya. The court also draws its mandate from the provision of Sections 3 and 13 of the ELC Act.
41. On the other hand, the Business Premises Rent Tribunal (BPRT), was established in 1965 through an Act of Parliament known as ‘The Landlord and Tenant (Shops, Hotels and Catering Establishments Act) Cap.301. The Tribunal is tasked with resolving disputes between landlords and tenants in respect of “controlled tenancies” of business premises falling under the definition of “shop, hotel or catering establishments.”
42. The Act defines a “shop” as premises occupied wholly or mainly for the purposes of a retail or wholesale trade or business or for the purpose of rendering services for money or money’s worth. On the other hand, a controlled tenancy is defined as a tenancy of a shop, hotel or catering establishment:
 - “(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 termination, otherwise than for breach of covenant, within five years from the commencement thereof; or
 - (iii) relates to premises of a class specified under subsection (2) of this section Provided that no tenancy to which the Government, the Community or a local authority is a party, whether as landlord or as tenant, shall be a controlled tenancy.”
43. The parameters of the Tribunal’s jurisdiction are laid out in Section 12 of the Act. It being undisputed that the parties were in landlord-tenant relationship over business premises for a period not exceeding 5 years, it is clear that they were in a controlled tenancy which falls under the jurisdiction of the Tribunal.
44. Courts have held that where a Tribunal is seized of a dispute as herein, it may, guided by Section 12(4) of the Act, investigate any complaint relating to a controlled tenancy made to it by the landlord or



the tenant, and may make such order thereon as it deems fit. [See Migiro vs Paintmart and Allied Building Equipment (K) Limited (Civil Suit E448 of 2021) [2023] KEELC 18523 (KLR) (6 July 2023) (Ruling)].

45. The court therefore agrees that the Tribunal, rather than this court, has the requisite jurisdiction to determine the matter at the first instance.
46. In the end, the court finds the Preliminary Objection dated 8th March, 2024 to be merited and proceeds to strike out the suit herein with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 27TH DAY OF FEBRUARY, 2025.

O. A. Angote

Judge

In the presence of;

Mr. Muriithi for Omwanza for Plaintiffs

Mrs Muthoni holding brief Ahmednassir (SC) for Defendants

Court Assistant: Tracy

