



Gamaleldien v Binyenda & another (Environment & Land Case E361 of 2024) [2025] KEELC 1138 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEELC 1138 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E361 OF 2024
TW MURIGI, J
FEBRUARY 27, 2025**

BETWEEN

ELARABI KHALID GAMALELDIEN PLAINTIFF

AND

OSCAR BINYENDA 1ST DEFENDANT

MAMADOU KOLADE 2ND DEFENDANT

RULING

1. Before me for determination is the Notice of Motion dated 30th August 2024 brought under Order 40 and 51 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the [Civil Procedure Act](#) in which the Applicant seeks the following orders:-
 - a. Spent.
 - b. Spent
 - c. Spent
 - d. Spent
 - e. That pending the hearing and determination of this matter this Honourable Court be pleased to issue a temporary injunction restraining the Defendants whether by themselves, their agents and/or servants from collecting rent from the suit premises.
 - f) That pending the hearing and determination of this matter, this Honourable Court be pleased to order that the tenants in occupation of the suit premises to forthwith vacate the suit premises and the subsequent closure therein.
 - g) Any other order that meets the ends of justice.



- h) The costs of the application be provided for.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Elarabi Khalid Gamaleldien sworn on even date.

The Applicant's Case

3. The Applicant averred that pursuant to a sub-lease agreement dated 9th December 2023, the 2nd Defendant being represented by the 1st Defendant agreed to sublet the premises known as 305 Pacha Gardens located along Gitanga road (the suit property herein) to him on the strength that the 1st Defendant had authority to sublet from the lessor.
4. He further averred that he paid Kshs. 3.3 million in cash consisting of Kshs.1.5 million as the deposit and rent and Kshs.1.8 million as good will for the equipment in the suit premises as confirmed at clause 3.2.1 of the sublease agreement dated 9th December 2023.
5. He deposed that on 21st December 2023, he paid the outstanding electricity bills of Kshs.200, 000/= via Mpesa to Kenya Power and Lightning Company, for account No.48045660 belonging to the suit premises.
6. He further deposed that to date he has not taken possession of the suit property or received back his deposit, rent and goodwill. He contended that the 1st Defendant's breach of the lease agreement has occasioned him loss of income to the tune of Kshs. 17,506,200/=. He stated that the 2nd Defendant is actively collecting rent thereby benefitting from the continued breach. In conclusion, the Applicant urged the court to allow the application as prayed.

The 1st Defendant's Case

7. In opposing the application the 1st Defendant filed a Notice of Preliminary Objection dated 29th September 2024 raising the following grounds:-
- a. The Notice of Motion dated 30th August 2024 is incompetent and an abuse of the Court process.
- b. The Notice of Motion is incurably defective.
- c. The Notice of Motion dated 30th August 2024 is not based on any grounds in law upon which the prayers sought can be granted.
- d. The Notice of Motion dated 30th August 2024 does not disclose any cause of action.
- e. The Applicant in the Notice of Motion dated 30th August 2024 is guilty of material non disclosure.
- f. The suit filed by the Plaintiff is misconceived and fatally defective having been filed contrary to Article 161(2)(b) of *the Constitution* of Kenya.
- g. The suit filed by the Plaintiff is misconceived having been brought and filed contrary to Section 13 of the *Environment and Land Court Act* No. 3 of 2012.
- h. The Plaintiff has unredeemably failed to comply with the mandatory provisions of the law.
- i. That this Honourable court lacks jurisdiction to entertain the suit filed herein and any application arising thereunder.



- j. That the entire suit is fatally defective having been filed contrary to Section 162(2) (b) of *the Constitution* of Kenya, 2010 and Section 13 of the *Environment and Land Court Act*, No.3 of 2012.
 - k. That costs be awarded to the 1st Defendant.
8. The 2nd Defendant's Case
- In opposing the application, the 2nd Defendant also filed a Notice of Preliminary Objection dated 24th September 2024 raising the following grounds: -
- i. The Notice of Motion as drawn is incurably defective and the same does not lie in law.
 - ii. The provisions under which the Notice of Motion was brought cannot be the basis for this Honourable Court to grant the orders sought.
 - iii. The Plaintiff inexcusably omitted to comply with the mandatory provisions of the law before instituting the suit herein.
 - iv. The Notice of motion is incompetent as drawn and an abuse of the court process and is for dismissal.
 - v. The Notice of Motion is grossly misconceived in law, fatally defective and ought to be struck out.
 - vi. The Notice of Motion dated 30th August 2024 contravenes the major provisions of the laws of Kenya.
 - vii. That this Honourable court lacks jurisdiction to entertain the suit filed herein and any application arising thereunder.
 - viii. That the entire suit is defective having been filed contrary to Article 162(2)(b) of *the Constitution* of Kenya 2010 and Section 13 of the *Environment and Land Court Act* No. 3 of 2012.
 - ix. The Notice of Motion is bad in law and guilty of material non-disclosure.
 - x. That the costs be awarded to the Defendant.
9. The preliminary objections were canvassed by way of written submissions.

The 1st Defendant's Submissions

- 10. The 1st Defendant filed his submissions dated 26th September 2024.
- 11. On his behalf, Counsel outlined the following issues for the court's determination: -
 - i. Whether the preliminary objection raised by the 1st Defendant is justifiable.
 - ii. Whether the Plaintiff's pleadings as filed conform with the jurisdiction of this Honourable Court.
- 12. On the first issue, Counsel submitted that this court lacks jurisdiction to hear and determine the suit herein.
- 13. With regards to the second issue, Counsel submitted that the Plaintiff's pleadings do not conform with the jurisdiction of this Court since the pre-dominant issue for determination is based on a monetary



claim arising from a breach of contract. Counsel further submitted that the Plaintiff's claim squarely falls under the jurisdiction of the High Court. Counsel further submitted that the Plaintiff's claim relates to refund of rent and damages and not to the use of land. It was submitted that the sublease dated 9th December 2023 does not reflect any particulars of title as no registerable interest was created.

14. On costs, Counsel submitted that the 1st Defendant has demonstrated merit in the Preliminary Objection and is therefore entitled to costs.
15. None of the authorities cited by Counsel were availed for the court's perusal.

The 2nd Defendant's Submissions

16. The 2nd Defendant filed its submissions dated 24th September 2024. On his behalf, Counsel identified the following issues for the court's determination:-
 - i. Whether the preliminary objection raised by the Defendant is sustainable?
 - ii. Whether this court has jurisdiction to entertain the current suit in the form and manner it has been filed?
 - iii. What is the consequence of filing without jurisdiction?
 - iv. Who should bear the costs of these proceedings?
17. On the first issue, Counsel submitted that the preliminary objection raises a pure point of law and therefore meets the threshold set out in the case of *Mukisa Biscuits Manufacturing Company Limited vs West End Distributors (1969) E.A 696*. Counsel submitted that jurisdiction is everything and without it the court cannot take one more step.
18. On the second issue, Counsel submitted that the sub-lease dated 9th December, 2023 is neither stamped/registered nor linked to any title under the *Land Registration Act*. It was submitted that the Plaintiff is not seeking possession or any proprietary rights in the suit property.
19. Counsel submitted that the Plaintiff's claim is commercial in nature and therefore falls under the jurisdiction of the High Court.
20. On the third issue, Counsel urged the court to down its tools for lack of jurisdiction.
21. On the fourth issue, Counsel urged the court to uphold the preliminary objection and strike out the suit with costs to the 2nd Defendant.
22. To buttress his submissions, Counsel relied on the following authorities:-
 - i. *DJC v BKL 9 Civil Suit (E021 OF 2021) [KEHC 108189 (KLR) (27 June 2022)(Ruling)*.
 - ii. *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR*.
 - iii. *Bank of Africa Limited & 2 others v TSS Investment Limited & 2 others [2024] KECA 410 (KLR)*.
 - iv. *Owners Motor vessel Lilian v Caltex Oil (Kenya) Limited [1989] eKLR*.
23. As at the time of writing this ruling, the Plaintiff had not filed his submissions as directed.



Analysis And Determination

24. The law on preliminary objections is well settled. A preliminary objection must be on a pure point of law. In *Mukisa Biscuits Manufacturing Company Ltd vs West End Distributors Ltd* (1969) EA 696, Law JA stated as follows:-

“So far as I’m aware, a preliminary objection consists of point of law which have 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.”

25. 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 had 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.”

26. 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.”

27. For a preliminary objection to be valid, it must be on a point of law and must be founded on facts that are not in dispute. It should not be proved through facts or evidence or deal with disputed facts.

28. The Defendants grounds in the preliminary objection can be condensed into one ground namely:-

Whether this court has jurisdiction to hear and determine this suit.

29. The issue of jurisdiction is a pure point of law which can determine the matter without having to consider the merits of the case. This Court is therefore satisfied that the Defendants Preliminary Objections are based on a pure point of law. Having considered the preliminary objections and the submissions by the Defendants, the only issue that arises for determination is whether this court has jurisdiction to hear and determine this suit.



30. It is trite law that jurisdiction is everything and without it the court cannot take one more step in the case. The locus classicus on jurisdiction is the celebrated case of Owners of Motor Vessel ‘Lillian S’ Vs Caltex Oil (Kenya) Limited (1989) eKLR where the Court held that:-

“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...”

31. Similarly, in the case of Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR the Supreme Court pronounced itself thus;

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation....”

32. A court derives its jurisdiction from *the Constitution* or legislation or from both. The jurisdiction of this court is derived from Article 162(2)(b) of *the Constitution* and Section 13 of the *Environment and Land Court Act*.

33. The Defendants are challenging the jurisdiction of this court on the grounds that the dispute between the parties herein is commercial in nature and therefore falls under the jurisdiction of the High Court.

34. The Plaintiff instituted this suit against the Defendants vide a Plaint dated 30th August 2024 seeking the following orders:-

- a. A declaration that the Defendant has fundamentally breached the agreement for sale dated 9th December 2023.
- b. An order for refund of Kshs. 3,300,000/= together with interest at court rates from January 2024 up to date of payment in full.
- c. An order for payment of Kshs. 17,506,200/= being the projected loss of income from the date of filing suit until payment in full.
- d. Damages for breach of contract.
- e. Costs of this suit with interest at court rates.
- f. Any other or further relief that this Honourable Court may deem fit and just to grant.

35. The Defendants contended that the dispute does not relate to the Environment, the use and occupation of and/or title to land.

36. In the case of Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR, the Court of Appeal held that;

“As seen before, land use connotes the alteration of the environmental conditions prevailing on the land and has nothing to do with dispositions of land. Saying that creation of an interest or disposition amounts to use of the land, is akin to saying that writing a will bequeathing land or the act of signing a tenancy agreement constitute land use. The mere acquisition or conferment of an interest in land does not amount to use of that land.”



37. In the Co-operative Bank of Kenya case(supra), the Court of Appeal essentially settled that when faced with a controversy whether a particular case is a dispute about land a commercial matter, the predominant purpose of the transaction should be established.
38. In the matter at hand, it is clear from the Plaint that the Plaintiff did not take possession of the suit property and is not asking the court to put him in possession thereof.
39. From the Plaintiff's pleadings, the dispute between the parties herein relates to a breach of contract arising out of a lease agreement between the parties herein. The orders as sought in the Plaint do not relate to the environment or the use and occupation of and or title to land. The dispute is purely commercial and falls outside the jurisdiction of this court.
40. From the foregoing, I find that the Preliminary Objections raised by the Defendants' are merited and I uphold the same. The upshot of the forgoing is that the Plaintiff's suit is hereby struck out with costs to the Defendants.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 27TH DAY OF FEBRUARY, 2025.

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T. MURIGI

JUDGE

In the presence of

Ms Umwoma holding brief for

Osundwa for the 1st Defendant and Sheunda for the 2nd Defendant.

Ahmed – Court assistant

