



REPUBLIC OF KENYA



**Odembo v Kache & 2 others (Environment and Land Appeal  
7 of 2023) [2024] KEELC 1539 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1539 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL 7 OF 2023**

**MD MWANGI, J**

**MARCH 14, 2024**

**BETWEEN**

**CELYNE ODEMBO ..... APPLICANT**

**AND**

**VIVIAN KACHE ..... 1<sup>ST</sup> RESPONDENT**

**JIMLY PROPERTIES LTD ..... 2<sup>ND</sup> RESPONDENT**

**IRENE KIRAGU T/A JANICE INVESTMENT AUCTIONEER .... 3<sup>RD</sup>  
RESPONDENT**

*(In respect of the Respondents' Preliminary Objection dated 30th November, 2023)*

**RULING**

**Background**

1. This ruling is in respect to the Notice of Preliminary Objection dated 30th November, 2023 filed by the Respondents. The grounds of objection are;
  - a. That under Article 162(2) (b) of the *Constitution* and Section 13 (2) of the *Environment & Land Court*, this court has no jurisdiction to hear and determine Appeals arising from the Rent Restriction Tribunal on matters relating to rent payment, Distress of Rent and/or Eviction of Tenants.
  - b. That in any event the Application dated 23rd October, 2023 had been overtaken by events as the Items Distressed had been sold on 16th October, 2023 long before the application for stay was filed in Court.
2. The Preliminary objection is in response to the Appellant's application dated 16th October, 2023. In the application, the Appellant prays for a stay of execution of the sale of the Appellant's goods



attached on 9th October, 2023 pursuant to orders issued by the Rent Restriction Tribunal on 26th September 2023 and all consequential orders arising therefore pending the hearing and determination of the Appeal.

### **Court's Directions**

3. The court directed that the Preliminary Objection be dispensed with by way of written submissions. The Parties complied and filed their respective submissions. The Respondents' submissions are dated 15th February, 2024 whereas the Appellant's submissions are dated 12th January, 2024.

### **Objectors' submissions**

4. The Respondents' submit that this matter originates from the Rent Restriction Tribunal following the order issued by the Tribunal on 26th September, 2023. The Respondents make reference to Article 162(2) (b) & (3) of the Constitution which stipulates the jurisdiction of the Environment and Land Court. They submit that this court has power to hear and determine disputes relating to environment and use and occupation of, and title to land only.
5. The Objectors further refers to Section 13(1), (2) & (4) of the Environment and Land Court Act, 2011 on the jurisdiction of this court. They contend that the main appeal and the application filed herein raises matters that are not within the jurisdiction of the court. They aver that the issue raised in the Appeal relates to Levy of Distress for unpaid rent under the Distress for Rent Act.
6. It is therefore the Respondents' submission that this court lacks the jurisdiction to hear the application and the main Appeal. They implore the Court to uphold the Preliminary Objection and dismiss the application dated 23rd October, 2023 and the main Appeal with costs.

### **Appellant's submissions**

7. The Appellant on the other hand submits that Section 13(2) of the Environment and Land Court, 2011 grants this court jurisdiction to hear the Appeal filed herein and following therefrom any ancillary and/or collateral application emanating from it.
8. The Appellant submits that the Respondents levied distress on 9th October, 2023 yet the Preliminary Objection states that the goods were sold on 16th October, 2023 a mere 7 days after the said goods were attached. She argues that the Respondents statement amounts to an admission to violation of the provisions of the Auctioneer Act, Cap. 526 and the Distress for Rent Act, Cap. 293, as it is not lawful and procedural to sell any goods attached by an Auctioneer within 7 days. The Appellant cites Section 4 (1) of the Distress for Rent Act which requires that no sale can take place before the lapse of 14 days.
9. The Appellant submits that the Respondents did not comply with the Auctioneers Act and Section 12 (1) of the Rules of the Auctioneers Rules. Further, that no written notice was given to the Appellant informing her of her right to redeem the goods as per Section 12 (1) (c).
10. In addition, the Appellant cites Section 8 (1) of the Auctioneer's Rules that requires the Auctioneer to be responsible for the goods. If the Auctioneer does not have the goods in his possession, then he is bound to compensate the Appellant as it was his duty to ensure that they were kept in safe custody pending a lawful, procedural and legitimate sale.

### **Issues for determination**

11. The issues for determination then are whether the Preliminary Objection dated 30th November, 2023 by the Respondents meets the threshold of a preliminary objection and whether it is merited.



## Analysis and Determination

12. According to the [Black Law Dictionary](#), a Preliminary Objection is defined in the following terms:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary....”

13. The above legal preposition has been made graphically clear in the now famous case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd*. [1969] EA 696, where Lord Charles Newbold P. held that a proper preliminary objection constitutes pure points of law. The Learned Judge then stated that: -

“A preliminary Objection is in the nature of what used to be a demurer; 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.”

14. Does the instant Preliminary Objection meet the threshold of a Preliminary Objection?

15. The issue of jurisdiction of the court is a point of law which indeed ought to be raised by way of a preliminary objection at the earliest opportunity.

16. A court of law cannot validly take any step in a matter before it without jurisdiction. The moment a party in a suit successfully challenges the jurisdiction of the court, the court must down its tools. The Supreme Court [in the Matter of Interim Independent Electoral Commission](#) [2011] eKLR held as follows:

“Assumption of jurisdiction by Courts in Kenya is a subject regulated by the [Constitution](#), by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in *Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited* [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”

[30] The *Lillian ‘S’ case* establishes that jurisdiction flows from the law, and the Recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the [Constitution](#).”

17. The broad jurisdiction of the Environment and Land Court is donated by Article 162(2) of the [Constitution of Kenya](#) which provides that;

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-



- (b) the environment and the use and occupation of, and title to, land.”
18. Section 13(2) of the *Environment and Land Court Act* outlines the disputes which this court has powers to hear and determine, and subsection 4 further confers this court with the appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
19. In the instant application, the Appellant has moved this court for stay of the Rent Restriction Tribunal’s orders issued on 26th September, 2023 pending the hearing and determination of her appeal.
20. Section 4 of the *Rent Restriction Act* establishes the Tribunal, while Section 8 provides:
1. Except as provided by subsection (2), every decision, determination and order of the tribunal under the provisions of this Act shall be final and conclusive, and no appeal shall lie therefrom to any court.
  2. An appeal shall lie to the High Court from any such decision, determination or order in the following cases -
    - (a) in the case of an order under subsection (5) of section 6; or
    - (b) on any point of law; or
    - (c) in the case of premises whereof the standard rent exceeds one thousand shillings a month, on any point of mixed fact and law, and for the purposes of this subsection, the determination of any rent or of any sum shall be a matter of fact....
21. I have looked at the impugned Ruling by the Chairman of the Rent Restriction Tribunal over a dispute of rent arrears between the Appellant and the 1st Respondent, and having perused the Memorandum of Appeal herein, the issues arising herein are certainly a mixed grill of facts and law, hence this court has jurisdiction to hear the matter.
22. This matter was initially filed in the High Court before being transferred to this court pursuant to the order issued by Hon. Justice Janet Mulwa on 25th October, 2023. The court categorically stated that:
- “By dint of Section 13 of the *ELC Act*, the proper court to handle the dispute is the ELC this court lacks jurisdiction in that regard.”
23. The above order does confirm that this court is clothed with the jurisdiction to determine the dispute herein.
24. Off course the *Rent Restriction Act* was enacted before the *Kenya Constitution*, 2010 that established the Environment and Land Court. The transitional and consequential provisions under the sixth schedule of the *Constitution* contemplated the instances of such laws as the *Rent Restriction Act* which is yet to be amended to conform with the *Kenya Constitution*, 2010. Paragraph 7(1) provides that:
- “All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this constitution.”
25. That is how the provisions of section 4 of the *Rent Restriction Act* must be read. The Court with the jurisdiction on rental disputes is the Environment and Land Court and not the High Court.



26. I now turn to the second limb of the Preliminary Objection.
27. The Respondents contend that the Application dated 23rd October, 2023 had been overtaken by events as the items distressed had been sold on 16th October, 2023, long before the application for stay was filed in Court.
28. As earlier stated, a preliminary objection can only be raised on a pure point of law and must not be blurred with factual details. The issue whether the distressed goods have been sold or not is an issue of fact that can only be established by evidence. The court cannot from the face of the preliminary objection, conclude that the stay of execution application is overtaken by events. There is need to consider factual evidence. This is clearly not a preliminary objection.
29. Consequently, it is my finding that the Notice of Preliminary Objection dated 30th November, 2023 has no merit. I therefore dismiss it in its entirety with costs to the Appellant.

It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 14<sup>TH</sup> DAY OF MARCH, 2024.**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:-

Ms. Otieno for the Appellant

Mr. Kanyi Ngatia for the Respondent

Court Assistant: Yvette

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**M.D. MWANGI**

**JUDGE**

