



**Mwongela v Mutinda & another (Land Case E005 of 2024)
[2024] KEELC 5760 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5760 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
LAND CASE E005 OF 2024
LG KIMANI, J
JULY 25, 2024**

BETWEEN

CHRISTOPHER MWONGELA PLAINTIFF

AND

JOHN MUTINDA 1ST DEFENDANT

MANSIONS WORLD LTD 2ND DEFENDANT

RULING

1. This ruling is in respect of the respondent's Notice of Preliminary Objection dated 4th July 2024 based on the following grounds:
 1. This Court lacks jurisdiction to entertain this suit on grounds that this is res judicata on grounds that the same issues between the same parties were determined by the Business Rent Tribunal in Nairobi BPRT Case No. E529 of 2024 by an order dated 3rd June 2024.
 2. That the court has no powers to give any orders or reliefs in a relationship that does not exist and by so doing, it will be rewriting a contract for the parties which offends the right to contract freely.
2. The objection was raised as a result of the plaintiff's suit filed herein which was accompanied by the Application by way of the Notice of Motion dated 6th of June 2024 seeking the following orders:-1. Spent. 2. Spent. 3. Spent. 4. That pending the inter-party hearing and determination of this application, there be preservative orders restraining the respondents from evicting or taking over, or repossessing or entering the demised premises to writ Shop No.7 in LR 4096/63 Kitui Municipality and removing the applicant or doing anything else that would amount to a constructive locking out of the premises. 5. THAT pending the service and final determination of the main suit, there be preservative orders restraining the respondents from evicting or taking over, or repossessing or



- entering the demised premises to writ Shop No.7 in LR 4096/63 Kitui Municipality and removing the applicant or doing anything else that would amount to a constructive locking out of the premises.
3. The Notice of Motion is supported by the grounds on the face of it and the affidavit of the applicant. The applicant claimed that the respondents issued him a notice dated 5th June 2024 requiring him to vacate the demised premises within twenty-four hours and a further notice asking him to vacate by 7th June 2024 and in default, the respondents would help the applicant to do it.
 4. The applicant contests the notices issued and the decision to take over the premises as being unfair, unjust, unreasonable, irrational and actuated by mala fides and malice. He claimed to have been in occupation and possession of the premises as a tenant for over 15 years acquiring goodwill and continuity of business. He contends that the respondent should have afforded him time to plan, prepare and secure alternative premises.
 5. As a result of the notices issued to the applicant, he filed a reference before the Business Premises Rent Tribunal vide BPRT No. E529 of 2024-Nairobi and obtained temporary orders against the respondents. The applicant stated that the Respondents filed a preliminary objection and the tribunal delivered its determination on 3rd June 2024 dismissing the cause reasoning that it had no jurisdiction because the tenancy was not controlled. Consequently, on 5th June 2024, the respondents through their advocates and their caretaker gave the applicant notices to vacate by 7th June 2024.
 6. The respondents filed a replying affidavit sworn by the 1st respondent wherein he stated that the applicant's lease expired on 30th April 2024, and he had failed and/or refused to vacate despite notices requiring him to do so. He further claimed that the applicant filed a suit in the Business Premises Rent Tribunal and lost and instead of appealing the decision he filed the present suit.

The hearing of the Preliminary objection

7. On the hearing of the preliminary objection, Counsel for the Respondents, Mr. Mwendwa, pointed out that the applicant was a tenant of the 2nd respondent while the 1st respondent was an agent. He mentioned that the Applicant had confirmed that there was a case before the Business Premises Rent Tribunal Case No. E529 of 2024 and the Tribunal had ordered the Applicant to vacate the premises immediately. He referred to the order annexed to the Applicant's supporting affidavit. He stated that the lease between the parties was to expire on 30th April 2024 after 6 years and the 3 letters issued to the applicant were reminders of the expiry of the lease.
8. Counsel for the respondents relied on section 7 of the *Civil Procedure Act* and submitted that this application offends the doctrine of res-judicata because the issue of the Applicant's tenancy was already heard and concluded.
9. It was submitted that a court decision is final unless it is appealed from, therefore the Tribunal order stands. Counsel for the respondents relied on the Supreme Court case of John Maritim Services Ltd & another vs Cabinet Secretary of Infrastructure and Another (2021) eKLR where the court affirms that the doctrine of res judicata is based on the principle of finality.
10. Counsel submitted that this court has no jurisdiction to issue the orders sought since there is no tenant/ landlord relationship between the applicant and the respondent and any court action would amount to re-writing the contract between the parties.
11. Kilonzi Advocate for the Applicant submitted that the Preliminary objection is misconceived given that the key component to the doctrine of res judicata is that the suit ought to be before a competent court. He highlighted that the Respondents had raised the issue of jurisdiction before the Tribunal stating that the tenancy was not a controlled tenancy under Section 2 of the Act because the lease was



for 6 years. The tribunal determined that the Business Premises Rent Tribunal had no jurisdiction to hear the matter and the reference was dismissed.

12. Further, counsel for the Applicants submitted that the ruling was not a final determination because the issues raised were not determined on merit contrary to section 7 of the *Civil Procedure Act*. It was submitted that the Applicant is still in occupation of the business premises and is still paying rent and that the Applicant has a proprietary interest as a tenant.
13. Counsel for the Respondent Mwendwa Advocate in rebuttal denied that the order of the Business Premises Rent Tribunal was given based on a preliminary objection because the said objection was never heard. That the suit was settled to finality.
14. He stated that the applicant is only in possession of the business premises through a court order and that there is no mutual agreement between the parties. The Tribunal had ordered the Applicant to vacate the premises.

Analysis and Determination

15. The Court has considered the primary application dated 6th of June 2024, the preliminary objection by the respondents dated 4th of July 2024 and submissions of Counsel for the parties. The Preliminary objection is on the ground that the court lacks jurisdiction to hear the present suit as it is res judicata. The Respondent also claims that the court has no power to grant relief in a landlord-tenant relationship that does not exist.
16. The Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696 found that a preliminary objection must be on a point of law. Law JA as he then was had this to say:

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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....”

“....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 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.” Sir Charles Newbold, P. added the following:

17. Section 7 of the *Civil Procedure Act* lays the basis for the doctrine of res judicata and provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”



18. The doctrine was discussed in the case of Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR, where the Supreme Court held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

“(a) The suit or issue was directly and substantially in issue in the former suit. (b) That former suit was between the same parties or parties under whom they or any of them claim. (c) Those parties were litigating under the same title. (d) The issue was heard and finally determined in the former suit. (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

19. The dispute herein was first filed before the Business Premises Rent Tribunal as a reference accompanied by an application for interim orders. The applicant filed a reference challenging the Respondent's decision to evict him from the suit premises on Shop number 7 on LR 4096/63 in Kitui Municipality, Kitui Town. The Applicant states that the suit before the Business Rent Premises Tribunal was dismissed for lack of jurisdiction arising from the preliminary objection filed before the tribunal dated 14th May 2024.

20. On the other hand, Counsel for the Respondents submitted that the Preliminary Objection filed in the tribunal was never heard and the orders granted on 3rd June 2024 were not based on the objection. He further stated that the suit was settled with finality.

21. The court has looked at the order issued by the Tribunal on 3rd June 2024. The order shows that the Counsel for the Respondent was present in court but the tenant was absent. The final order was that the tenant's application was dismissed with costs to the landlord, interim orders were reviewed and/or vacated and the tenant was ordered to vacate the premises and in default to be evicted. The landlord was awarded costs of Kshs. 25,000/-.

22. From the foregoing, it is clear that there is no agreement between the Counsel for the Applicant and Counsel for the Respondent as to the tribunal's reasoning in arriving at its decision on 3rd June 2024. None of the parties supplied the court with the proceedings before the tribunal to ascertain whether the issues currently before this court were before the tribunal and were heard and finally determined.

23. With the documents on record, it is not possible to determine whether the tribunal made its decision based on a finding on the preliminary objection on the question of its jurisdiction. It is also not clear whether the tribunal found that it was competent to try the dispute before it since the order of the tribunal did not make any mention of the preliminary objection or the question of the tribunal's jurisdiction.

24. It is not in doubt that a Preliminary Objection raises pure points of law, which are argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or if the court is called upon to exercise judicial discretion. Further, the Preliminary Objection must stem from the pleadings and should not deal with disputed facts nor should it derive its foundation from factual information. See the case of Oraro v Mbaja[2005] 1KLR 141, where it was held that:-

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence.”



25. For the Court to ascertain whether or not the matter is Res Judicata, it will have to confirm the facts as pleaded by the Applicant and probe the bundle of documents filed in court. As stated above, some crucial documents not in the bundle of documents will be required to ascertain certain facts. In doing so, the Court will be probing evidence. In the case of *Henry Wanyama Khaemba v Standard Chartered Bank Ltd & Another* [2014] ECLR, the Court held that:

“That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1st Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objections. Court of laws have always had a well-founded quarrel with parties who resort to raising preliminary objections improperly.”

26. Further, in the case of *George Kamau Kimani & 4 Others v County Government of Trans Nzoia & Another* [2014], eCLR, where the Court held that: -

“I have considered the points raised by the 1st Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of Preliminary Objection. The best way to raise a ground of res judicata is by way of a Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection.”

27. For the foregoing reasons, the Court finds and holds that the issue raised in the preliminary objection dated 4th July 2024 does not amount to a Preliminary Objection since it raises disputed facts that require ascertainment by the court.

28. The second ground in the preliminary objection on whether a tenant/landlord relationship exists between the parties to this suit, the court finds that this is not a pure point of law as we must examine the terms of the parties' agreement.

29. The final order of the court is that the Respondents' preliminary objection dated 4th July 2024 is not founded on pure points of law and therefore cannot stand. The same is hereby dismissed with costs to the Applicant.

DELIVERED, DATED AND SIGNED AT KITUI THIS 25TH DAY OF JULY, 2024.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE – KITUI

The ruling read in open court and virtually in the presence of;

Mwendwa for the Respondent

Kilonzi for the Applicant

Musyoki - Court Assistant

