



**Gulf Intertrading Company Ltd & another v Total Energies Marketing Kenya PLC  
(Tribunal Case E658 of 2023) [2023] KEBPRT 1154 (KLR) (3 November 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 1154 (KLR)

**REPUBLIC OF KENYA  
IN THE BUSINESS PREMISES RENT TRIBUNAL  
TRIBUNAL CASE E658 OF 2023  
CN MUGAMBI, CHAIR  
NOVEMBER 3, 2023**

**BETWEEN**

**GULF INTERTRADING COMPANY LTD ..... 1<sup>ST</sup> TENANT**

**BUSCAR E.A. LIMITED ..... 2<sup>ND</sup> TENANT**

**AND**

**TOTAL ENERGIES MARKETING KENYA PLC ..... LANDLORD**

**RULING**

1. The landlord's/Respondent's notice of preliminary objection dated 9.8.2023 is brought on the grounds:-
  - a. That this Honourable court lacks jurisdiction to entertain the instant complaint and application as the same are *res judicata* by dint of Section 7 of the [Civil Procedure Act](#).
  - b. That suits/cases concerning the subject premises have been instituted, litigated and conclusively resolved across three distinct legal fora, delineated as follows:-
    - i. Nairobi BPRT Case No. 217 of 2011, adjudicated within the jurisdiction of the Nairobi Business Premises Rent Tribunal.
    - ii. Milimani Environment & Land Court No. 105 of 2014, conducted within the ambit of Milimani Environment & Land Court and
    - iii. The present matter, Nairobi BPRT No. E658 of 2023.
  - c. That the complaint and the notice of motion application dated 4.7.2023 is therefore incurably defective, grossly misconceived and an abuse of the court/Tribunal process.
  - d. The Respondent therefore proposes in its preliminary objection that the application and the complaint be struck out with costs to the Respondent.



2. The tenant's complaint in this matter is the one dated 4.7.2023. The Tenants complaints are that the landlord is interfering with their peaceful occupation of the suit premises and has issued the tenants with a seven (7) days' notice to vacate the premises without an order of the court. The tenants have further complained that the landlord is threatening to evict them from the suit premises without issuing a notice in accordance with Section 152(E) of the [Land Laws \(Amendment\) Act 2016](#) and without adhering to the provisions of Section 4(4) of the [Landlord and Tenant \(shops, hotels and catering establishments\) Act](#).
3. The issue that arises is whether the above complaint as set out is *res judicata*, whether the said complaint has been directly and substantially in issue in a former suit between, the same parties or between the same 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 and whether the above questions can be determined by way of a preliminary objection as sought by the Respondent.
4. The Respondent's notice of preliminary objection revolves around the allegation by the Respondent that cases concerning the subject premises have been litigated upon and concluded in previous suits being Nairobi BPRT Case No. 217 of 2011 and the Environment & Land Court Case No. 479 of 2014.
5. In order to establish whether or not the present complaint was directly in issue in the cases quoted by the Respondent, the Tribunal would have to determine as a matter of fact if indeed those cases existed, and what particular findings was made in those cases. Evidence of the existence of those cases and the decisions made by the court thereon would be material to determining whether indeed the present complaint is *Res judicata* or not.
6. I do note that the Respondent has given an elaborate background of this matter and other matters in its submissions but I think it is improper to attempt to introduce the evidence of the existence of the previous suits through submissions. Submissions are not evidence and cannot take the place of affidavits in introducing evidentiary material.
7. In the case of; [Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi & Another](#) [2014] eKLR, the court of Appeal stated;
 

“Submissions cannot take the place of evidence. The 1<sup>st</sup> Respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties “marketing language”. Each side endeavoring to convince the court that its case is the better one. Submissions we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”
8. Does the Landlord's notice of preliminary objection amount to a proper preliminary objection in Law? In the often quoted case of; [Mukisa Biscuits Manufacturing Co. Ltd. Vs West End Distributors Ltd](#) [1969] EA 696, the court stated;
 

“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 other 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.”



Further, in the case of; *Quick Enterprises Ltd vs Kenya Railways Corporation* Kisumu HCCC No. 22 of 199, the court stated;

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

And in *Oraro vs Mbaja* [2005] IKLR 141, the court 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.”

9. I have already stated that evidence of the existence of the suits and the decisions made in the suits referred to by the Respondent would be necessary in order to determine their relationship with the instant suit. In order to achieve that objective, the pleadings and decisions in those suits would have to be availed to the Tribunal for scrutiny. In these circumstances, it is therefore my finding that the notice of preliminary objection raised by the Respondent does not meet the set standards of a proper notice of a preliminary objection, consequently, the same is unmeritorious and is hereby dismissed with costs to the tenants.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 3<sup>RD</sup> DAY OF NOVEMBER 2023.**

**HON. CYPRIAN MUGAMBI**

**CHAIRPERSON**

**11.2023**

**In the presence of;**

Ms. Ndung'u for the Tenant

Ms. Lagat for the Landlord

