



Koinange & another v Royal Gardens Limited (Environment and Land Appeal E098 of 2022) [2023] KEELC 16857 (KLR) (13 April 2023) (Ruling)

Neutral citation: [2023] KEELC 16857 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND APPEAL E098 OF 2022**

**AA OMOLLO, J
APRIL 13, 2023**

BETWEEN

BARBARA WAMBUI KOINANGE 1ST APPELLANT

HARIKI AUCTIONEERS 2ND APPELLANT

AND

ROYAL GARDENS LIMITED RESPONDENT

((Being an appeal from the orders issued in Nairobi Business Premises Rent Tribunal Case No. E781 of 2022 issued by the Business Premises and Rent Tribunal Hon. P. May on the 30th September, 2022))

RULING

1. The Respondent filed a preliminary objection to the application dated and the appeal dated 18th October, 2022. The Respondent pleaded thus:
 - a. This Court lacks jurisdiction to entertain, hear or determine the Notice of Motion Application dated 18th October, 2022 and Memorandum of Appeal dated 18th October, 2022 as brought against the Respondent since the Appellant herein did not seek or obtain leave to appeal from the Subordinate court (Tribunal). The Order and the ruling being appealed against does not fall under the thematic orders which appeals lie as of right as set forth under Order 43 rule 1(1) of the *civil procedure rules* and Section 75 of the *Civil Procedure Act*. The Ruling and Order being the subject of this Appeal arose from the provisions of Order 51 rule 1 of the *Civil Procedure Rules*, Sections 3 and 3A of the *Civil Procedure Act* and Article 50(1) and 159 of the *Constitution* of Kenya, 2010.
 - b. In the premises, this Court therefore lacks jurisdiction to entertain this matter since the appeal of the said Ruling and Order of the Tribunal does not lie as of right but only lies with the leave



of the court making such Order which is a procedure precedent before this Court exercises its Appellate jurisdiction.

- c. In whole, the Application and Appeal herein are inherently bad in law, vexatious and frivolous and the proceedings herein are thus an abuse of the court process.
2. The parties opted to prosecute the Preliminary Objection by way of written submissions. The Respondent stated that following instructions by the 1st Appellant to levy distress it filed a complaint under section 12(4) of the *Landlord and Tenant (shops, Hotels and catering establishment) Act* Cap 301 at the Business Premises Rent Tribunal. That pursuant to an application for injunction brought alongside the complaint, the vice chair Hon. Patricia May granted orders of injunction on 2nd September, 2022 restraining the Appellants from undertaking the unlawful distress.
3. The Appellant also filed an application for stay of those proceedings upon which the Hon. Chairman granted orders staying the injunctive reliefs earlier issued. Consequent to the obtaining of the stay orders, the Appellant brought an application dated 15th September, 2022 seeking for orders that the Hon. Vice Chair Ms. Patricia does recuse herself. The Respondent submitted that this application was dismissed and which dismissal is the genesis of this appeal. The Respondent argue that an appeal from the said application does not lie as of right and since no leave was granted, the court lacks jurisdiction to entertain the application and the appeal.
4. In supporting this argument, the Respondent cited the provisions of Sections 12 and 15 of Cap 301, Section 74 of the *Civil Procedure Act*, Order 43 of the *Civil Procedure Rules* and case law. The Respondent contended that no appeal lie in complaints brought under Section 12 (4) and cited the case of *Mike Muli v Justus Mwandikwa Kilonzo & 4 Others* (2022) eKLR where Oguttu – Mboya J. stated thus:

“In my humble view, a determination or order, which is capable of being appealed against by a Party to a reference must be a determination of order arising therefrom and not otherwise. For clarity, what constitute a Reference, has ably been defined by the Act and one need not travel far and yonder, to ascertain and/or discern the meaning of what comprises a Reference.

In view of the foregoing, my understanding of Section 15 of the *Landlord and Tenant (Shops, Hotels and Catering Establishment) Act*, Chapter 301 Laws of Kenya, is that the right of appeal is only available to parties to a Reference, who are aggrieved by a determination or order arising therefrom and a reference is statutorily circumscribed *vide* Section 2 of the Act.

Be that as at it may, I want to state that I am not alone in this thinking and that it is a thinking that has gained traction and accrued emphasis overtime, dating back to the decision in the case of *Re-Heptulla Properties Ltd* (1979) eKLR where the court observed as hereunder;

A party to a reference has a right of appeal to the High Court against any determination or order made therein, but the maker of a mere complaint has no such right. Mr. Gautama argued that, in this context, "reference" must be given a wider meaning and must include a complaint; but in a provision conferring a right of appeal I have no doubt that word "reference" was used in its technical meaning as defined in section 2.

Thus, until 1970, there was a right of appeal against an order made, not only on a reference, but a/so on a complaint. In inserting the words "to a reference" after the words "any party" and "made therein" after "tribunal" the Legislature must have had some object in mind; and that object could only have been to restrict the right of appeal to the High Court to



determinations and orders made on a reference. The Legislature would not have removed the right of appeal to the High Court against orders made on a complaint if the term "complaint" had been intended to include such matters as forcible dispossession by the Landlord, an act which amounts to the tort of trespass.

5. In the case of *Gatanga General Stores & 2 Others v Githere* (1988) eKLR the Court of Appeal held thus;

“It appears that there might be three sources of appeal. The primary source lies in Section 15(1) of the Act. Any party to a reference aggrieved by a determination or order of a tribunal made in the reference may appeal to the High Court within the time stated. Hence this appeal concerns decision on a reference.

Such an appeal depends upon two steps, the giving of the tenancy notice by the landlord and the reference by the tenant to the tribunal against the landlord’s notice.

A second source of aggravation stems from a complaint under section 12(4) of the Act. This is not an easy concept to follow at every stage. Madan, J in *Choitram v Mystery Model Hair Saloon*, [1972] EA 525, (followed in *Machenje v Kibarabara*, [1973] EA 481) explained the scope of a complaint in these words:

“The powers given in section 12(4) are expressly in addition to any other powers specifically conferred.”

I am of opinion however that the term “complaints” is intended to cover only complaints of a minor character.

“The term ‘investigate’ does not necessarily imply a hearing. Such complaints would include complaints by the tenant of turning off of water, obstruction of access, and other acts of harassment by the landlord calling for appropriate orders for their rectification or cessation, but not including payment of compensation for any injury suffered.”

.....

Then there is the third source of appeals which is procedural. The present case comes under this heading. The statutory position is that the procedure in and relating to appeals in civil matters from subordinate courts to the High Court shall govern appeals under this Act.

6. The Respondent went further to list orders under the provisions of Section 75 of the *Civil Procedure Act*, that he as of right to include;

1. An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted—
 - a. an order superseding an arbitration where the award has not been completed within the period allowed by the court;
 - b. an order on an award stated in the form of a special case;
 - c. an order modifying or correcting an award;
 - d. an order staying or refusing to stay a suit where there is an agreement to refer to arbitration; [Rev. 2012] Cap. 21 Civil Procedure 33 [Issue 1]
 - e. an order filing or refusing to file an award in an arbitration without the intervention of the court;



- f. an order under section 64;
 - g. an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;
 - h. any order made under rules from which an appeal is expressly allowed by rules.
2. No appeal shall lie from any order passed in appeal under this section.
7. The Respondent concluded that unless the order appealed from lie as of right under Order 43(1) of the Civil Procedure Rules then leave must be sought and obtained under order 43(2) for the appeal to stand. The Respondent submits that an appeal against an order of recusal does not have an automatic right of appeal. It urged the court to strike out the appeal with costs.
8. The Appellants also gave a background to this case for instance that the 1st Appellant is the registered proprietor of 30 acres in Close Burn estate which is leased out. The Appellant made reference to the two applications pending before the Tribunal. According to them, the Respondent had filed a reference. The Appellants argue that this court has jurisdiction to entertain this appeal as filed without leave having to be sought.
9. The Appellants argued that the impugned ruling on the dismissal of their application did not in any way touch on the complaint filed under section 12(4) of Cap 301. They added that on the date of delivery of the ruling on 30th September, 2022, they sought for and obtained leave to appeal. The Appellants cited several case law to buttress their submissions *inter alia* Gatimu Kinguru v Muya Gathangi (1976 – 1980) I KLR where Madan J. stated at page 331 thus;
- “In interpreting a Statute, in the absence of an express provision to that effect, it is always wrong for the Court to whittle down the rights and privileges of the subject. The Courts task is to protect the rights and privileges of the people, not to chip and shear them”
10. The Appellants also cited the cases of *E.A Railways Corporation v Anthony Sefu Dar es Salaam* (1983) EA 327 where it was held that “A statute cannot be construed to oust the jurisdiction of a superior court in the absence of a clear and unambiguous language to that effect.”
- In Transallied Limited v Sakan Trading Limited (2016) eKLR Okong’o J. held that, “it is our finding that a determination of a complaint referred to the tribunal under section 12(4) of the Act is appealable to this court under Section 15(1) of the Act.”
11. It is not in dispute that the suit originated before the BPR T was under section 12(4) of the Land Lord & Tenants Act Cap 301. Secondly, the appeal herein relates to an order from an interlocutory application within the complaint which complaint is still pending. The preliminary objection is asking the court to determine whether an appeal lie as of right or with leave of the court. The Respondent went in great detail to explain why the Appellants required leave to bring the present appeal.
12. It is a settled principle of law which found expression in the case of *Mukisa Biscuits v West End Distributors Ltd* (1969) EA 696 at page 701 paragraph B where Sir Charles Newbold JA stated that a preliminary objection should be explainable on its face without requiring proof by adduction of facts. The order appealed against was rendered on 30th September, 2023 after the tribunal was moved *vide* the application dated 15th September, 2022. The said application was not availed to this court because the matter was still at the preliminary stage with the record of appeal having not been filed.



13. The court is unable to discern on the face of the Preliminary Objection under what provisions of the law the application dated 15th September, 2022 was grounded on. The Respondent argued that no appeal lies as of right where the court is approached under section 12 of Cap 301 but conceded that the complaint is yet to be determined. For me, the Respondent needed to elaborate whether or not an appeal lies as of right under the sections on which the impugned application was brought since the order being appealed is not a decision on the Complaint.
14. A copy of the ruling appeal against was annexed to the replying affidavit of Susan Kihonge. The ruling at the introductory paragraph stated that the application dated 15th September, 2022 was brought under Section 1A, 1B and 3A of the Civil Procedure Act and Order 51(1) of the Civil Procedure Rules and article 50 and 159 of the Constitution. Although the application was brought within a complaint under Section 12(4) of Cap 301, the application was brought under the discretionary powers of this court and the constitution which may not be limited under order 43 of the Civil Procedure Rules. The order of recusal sought had nothing to do with the tenant's complaint as it touches on procedural matters. It would be a miscarriage of justice to gag a party from exhausting all their remedies by the narrow interpretation of proceedings commenced under Section 12(4) of Cap 301.
15. A second issue that was propped up by the Appellant that they applied for leave orally when the ruling was delivered. This is a factual statement which if true then it would render the preliminary objection null. The record of appeal has not been filed thus leaving it unclear to the court whether or not the objection was ripe. If the leave was indeed applied for as submitted by the Appellant (assuming it was necessary), then the objection raised has no basis.
16. In the case of *Galanga General Store & 2 others Supra*, the court of Appeal referred to the 3rd source of appeals which is procedural. One such procedure mentioned is granting of stay of execution. In the matter at hand, the Vice Chair dismissed an application requiring her recusal. In my opinion and I so hold, that the question of whether a judicial officer should hear a matter or recuse themselves is a procedure since in answering the question it does not touch on the merit or substance of the case/complaint. The learned judges went on to state in the Galanga case that;

“It would require express words to deprive the litigant of his right to appeal to this court.”
17. The Respondent has not pointed this court to the provision of law that bar a party from appealing an order refusing a recusal. Finally, the answer lies in the court of appeal statement in the Gatanga case where it noted that “interlocutory appeals were allowed because the established appeal system concerning interlocutory orders had not been ousted. After the amendment to the Constitution in Kenya, interlocutory appeals were no longer allowed in election cases. But there has been no amendment to Section 15 of Cap 301 to this effect.”
18. In conclusion and for the reason stated, I find that the Preliminary Objection is premature and without merit. It is dismissed with costs to Appellants.

Dated, Signed and Delivered at Nairobi this 13th Day of April, 2023

A. OMOLLO

JUDGE

In the Presence of

Mr Otwal advocate for the Respondent

Miss Ndungu h/b for Kingara for the Appellant



Mr Odera for the Interested Party

