



Gitu t/a Aqua Gardens v Kinuthia; Kinuthia & 3 others (Interested Parties) (Commercial Case E013 of 2022) [2022] KEHC 13718 (KLR) (Commercial and Tax) (29 July 2022) (Ruling)

Neutral citation: [2022] KEHC 13718 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E013 OF 2022
DO CHEPKWONY, J
JULY 29, 2022**

BETWEEN

GEORGE NDUNGU GITU T/A AQUA GARDENS APPLICANT

AND

CLAIRE WAMBUI KINUTHIA RESPONDENT

AND

JOSHUA KINUTHIA INTERESTED PARTY

ROSE MIHANO INTERESTED PARTY

VICTOR KINUTHIA INTERESTED PARTY

DENNIS KINUTHIA INTERESTED PARTY

RULING

1. The applicant/appellant filed a notice of motion application dated February 14, 2022 alongside a memorandum of appeal dated on even date. In the application, the applicant/appellant is seeking for:-
 - a. Spent;
 - b. That the honourable court be pleased to order a stay of execution of the orders made on February 9, 2022 in BRPT case No 63 of 2022, pending the hearing and determination of the appeal.
 - c. That the honourable court be pleased to grant any other orders that may deem fit.
 - d. That costs of the application be provided for.



2. The application is premise on the grounds on its face and the supporting affidavit of the appellant/ applicant sworn on February 14, 2022. The gist of it being that an application and reference be filed against the respondent with the Business Premises Rent Tribunal (BRPT) was dismissed for want of service and prosecution on February 9, 2022.
3. The 1st, 2nd and 3rd respondents have raised an objection *vide* a notice of preliminary objection dated February 18, 2022 against the said appellant/applicant’s notice of motion application and memorandum of appeal both dated February 14, 2022 on grounds that;
 - a. The law expressly bestows exclusive jurisdiction of appeals of this nature to another court *vide* section 15 of cap 301 of the Laws of Kenya;
 - b. That the *ex-parte* temporary conservatory order granted therefore ought to be vacated for want of jurisdiction.
4. The notice of preliminary objection is unopposed, in that the appellant filed no response.
5. The respondents filed submissions in support of the preliminary objection. It is their submissions that the matter being an appeal on a decision by the business premises rent tribunal made on October 28, 2021, section 15 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, cap 301 Laws of Kenya, specifically provides that such appeals lie within the jurisdiction of the Environment and Land Court. As such, it is sought that the orders issued by this court on February 17, 2022 be vacated and the appellant’s application together with the memorandum of appeal be dismissed for want of jurisdiction.

Analysis and Determination

6. In determining the notice of preliminary objection, I have read through the notice of motion application dated February 14, 2022, the affidavit in support thereof and the submissions by the respondent. It can be deduced from the pleadings filed herein that the appellant had filed an application and a reference before the business premises rent tribunal against the respondents for an alleged illegal notice of eviction in relation with the premises known as LR No 7977/3. However, the said application and reference were dismissed for want of service and prosecution. The appellant later sought to reinstate them *vide* another application dated November 8, 2021 which also suffered the same fate and its dismissal prompted the filing of the notice of motion application dated February 14, 2022 which the respondent has objected to, was yet again dismissed hence the appeal.
7. The respondents’ notice of preliminary objection challenges the appeal for want of jurisdiction. What constitutes a preliminary objection is well captured in the case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 where it was observed that;

“----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 or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case Sir Charles Newbold, P. 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 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. The improper raising of preliminary objections does nothing but



unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

8. In view of the above, a preliminary objection herein qualifies the definition in *Mukhisa Biscuits Case*(supra) as it raises the question of jurisdiction under section 15 of the [Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#), cap 301 Laws of Kenya which is a question of law. Section 15(1) provides;

“Any party to a reference aggrieved by any determination or order of a tribunal made therein may, within thirty days after the date of such determination or order, appeal to the Environment and Land Court:

Provided that the Environment and Land Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.”

9. Section 15 above, expressly provides for the forum which appeals from the Business Premises Rent Tribunal lie. It provides that the court with the requisite jurisdiction in this instance is the Environment and Land Court and not the High Court. I am persuaded by the decision of the Supreme Court in in the case of [Republic v Karisa Chengo & 2 others](#) (Supreme Court petition No 5 of 2015) 2017 eKLR, where the Supreme Court pronounced itself as follows with respect to demarcated jurisdiction of the High Court and the Environment and Land Court:-

“Flowing from the above, it is obvious to us that status and jurisdiction are different concepts. Status denotes hierarchy while jurisdiction covers the sphere of the court’s operation. Courts can therefore be of the same status, but exercise different jurisdictions. That is why this court has reaffirmed its position that the jurisdiction of courts is derived from the Constitution or legislation.....

In addition to the above, we note that pursuant to article 162(3) of the Constitution, Parliament enacted the [Environment and Land Court Act](#) and the [Employment and Labour Relations Act](#) and respectively outlined the separate jurisdictions of the ELC and ELRC as stated above. From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of courts, with *sui generis* jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal’s decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous courts and exercise different and distinct jurisdictions. As article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.”

10. The High Court is therefore precluded from entertaining this matter, the same being a reserve of the Environment and Land Court. Thus this court lacks the requisite jurisdiction to entertain the appellant’s appeal and as well as the application. The *locus classicus* is the case of [Owners of the Motor Vessel “Lillian S” v Caltex Oil \(Kenya\) Ltd](#) (1989) KLR 1, where on matters of jurisdiction it was observed as follows:-

“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 pending



other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

11. Owing to the above, this court without jurisdiction can do no better than down its tools and proceed to dismiss the appellant’s application and the memorandum of appeal dated February 14, 2022 for want of jurisdiction. Consequently, the interim orders issued by this court automatically lapse hence discharged.
12. In the upshot, the respondents’ preliminary objection succeeds with costs to the respondents.
It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 29TH DAY OF JULY, 2022.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Ndungu Gachiri counsel for Respondents

Court Assistant – Sakina

