



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL APPEAL NO. E002 OF 2022

MIKE MULI.....APPELLANT

VERSUS

JUSTUS MWANDIKWA KILONZO.....1ST RESPONDENT

ESTHER KALEE ARON.....2ND REPENDENT

PAULINE JOHANA.....3RD RESPONDENT

ROSE MWENDE JOHN.....4TH RESPONDENT

FRIDA KASILA REGINA T/A REGINA & SONS.....5TH RESPONDENT

RULING

INTRODUCTION

1. Vide Notice of Motion Application dated 14th January 2022, the Appellant has sought for the following orders;

a.(Spent).

b.(Spent).

c. Pending the hearing and determination of this Application inter-partes, there be a Temporary Stay of Execution of the Order issued by the Business Premises Rent Tribunal at Nairobi by Hon Gakuhi Chege, delivered on the 24th December 2021 virtually, in BPRT CAUSE NO. 38 OF 2021 at Nairobi between Mike Muli versus Justus Mwandikwa Kilonzo & Others T/A Regina & Sons.

d. Pending the hearing and determination of this Application, there be a Temporary Stay of Execution of the Order issued by the Business Premises Rent Tribunal at Nairobi by Hon Gakuhi Chege, delivered on the 24th December 2021 virtually, in BPRT CAUSE NO. 38 OF 2021 at Nairobi between Mike Muli versus Justus Mwandikwa Kilonzo & Others T/A Regina & Sons.

e. Pending the hearing and determination of this Appeal, there be a Temporary Stay of Execution of the Order issued by the Business Premises Rent Tribunal at Nairobi by Hon Gakuhi Chege, delivered on the 24th December 2021 virtually, in BPRT CAUSE NO. 38 OF 2021 at Nairobi between Mike Muli versus Justus Mwandikwa Kilonzo & Others T/A Regina & Sons.

f. Costs of this Application be in the Cause.

2. The subject Application is based and/or premised on the grounds contained at the foot thereof and same is further supported by the affidavit of the Appellant herein sworn on the 14th January 2022 to which the Appellant/Applicant has attached a total of 8 annextures.

3. Upon being served with the subject Application, the Respondents herein filed a Replying Affidavit sworn by the 1st Respondent for and on behalf of the rest of the Respondents and same is sworn on the 24th January 2022 and to which the Respondents have annexed 2 annextures.

4. For clarity, the annexures, include a notification of sale, issued by a nominated Auctioneer and an authority issued by the rest of the Respondents, to and in favor of the 1st Respondent, whereby same is duly authorized to execute the Replying affidavit on behalf of the rest.

DEPOSITIONS BY THE PARTIES:

DEPOSITION BY THE APPELLANT/APPLICANT:

5. Vide Supporting Affidavit sworn by Mike Muli on the 14th January 2022, the deponent has averred as hereunder;
6. That same filed and/or lodged a Complaint before the Business Premises Rent Tribunal at Nairobi, which Complaint was registered under cause No. 38 of 2021, between Mike Muli versus Justus Mwandikwa Kilonzo & Others t/a Regina & Sons.
7. For coherence, it is averred that the said Complaint touched on and/or concerned Business premises otherwise known as Regina & Sons situated at Mwingi Town, which was rented to and in favor of the Appellant/Applicant.
8. It is further averred that on the 14th January 2021, the acting chairperson of the Business Premises Rent Tribunal issued and/or granted interim orders, whose import and tenor was to preserve and or conserve the Appellant's/Applicant's tenancy in respect of the suit premises.
9. On the other hand, the deponent has averred that the orders which were issued by the Chairperson on the 14th January 2021, have never been varied, reviewed and/or set aside. In any event, the said orders have not been appealed against.
10. Be that as it may, the deponent has averred that the Respondents herein filed and/or lodged an Application dated the 25th October 2021, whereby same sought for the dismissal of the entire Complaint and/or suit before the Business Premises Rent Tribunal.
11. Pursuant to the filing of the said Application, the deponent has averred that same proceeded to and filed a Replying affidavit in opposition to the Application and thereafter the Application under reference was set down for hearing, culminating into directions being issued in respect thereof. For clarity, it has been averred that it was directed that the said Application be disposed of by way of written submissions.
12. The deponent has further averred that pursuant to the directions of the court, same proceeded to and indeed filed his written submissions, but however, the Respondents herein, who were the originators of the Application under reference, failed and/or neglected to file their written submissions.
13. Nevertheless, the Appellant/Applicant has proceeded to state that thereafter the chairperson of the tribunal proceeded to and delivered a Ruling in respect of the Application dated the 25th October 2021, whereby same was allowed, culminating into the entire Complaint hitherto filed by the Appellant/Applicant being dismissed.
14. Based on the foregoing, the Appellant/Applicant herein has averred that same felt aggrieved and/or dissatisfied and thus proceeded to and lodged the subject Appeal as well as the subject application, wherein, same is seeking for orders of stay of execution pending the hearing and determination of the Appeal against the impugned Ruling and Decision of the Business Premises Rent Tribunal.
15. It is further averred that unless the orders of stay sought are granted, the Appellant/Applicant will be evicted from the suit property and the suit tenancy would be terminated and hence the Appeal filed before this court would thus be rendered academic and futile.
16. On the other hand, the Appellant/Applicant has also averred that same shall also be exposed to suffer Substantial Loss, unless the orders of stay of Execution pending the hearing of the Appeal sought are granted.

RESPONSE BY THE RESPONDENTS:

17. Upon being served with the Application, the Respondents herein filed a Replying affidavit sworn by one Justus Mwandikwa Kilonzo, namely, the 1st Respondent and which is sworn on the 24th January 2022, and in respect of which same has averred as hereunder.
18. The Application by the Appellant/Applicant herein, as well as the orders of the court granted on the 17th January 2022 have been overtaken by events. For clarity, the Appellant/Applicant was evicted from the suit premises on the 14th January 2022.
19. Further, it has been averred that a new tenant was thereafter placed in occupation and possession of the Premises on the 15th January 2022, and in this regard the order of stay, cannot be actualized and/or be implemented.
20. On the other hand, it has also been averred that the Appellant/Applicant herein has come before the court with uncleaned hands to the extent that same has been substantially in arrears amounting to over Kshs. 271, 000/= Only, owing up to and including June 2021. In this regard, it is averred that the Appellant/Applicant is thus not entitled to the discretionary orders of the court.
21. Based on the foregoing, the Respondents have thus implored the court to dismiss the Application.

SUBMISSIONS:

22. The subject Application came up for hearing on the 24th February 2022, when the court gave directions that same be canvassed and/or disposed of by way of oral submissions.

23. Besides, given that the proceedings before the Business Premises Rent Tribunal were originated vide a Complaint pursuant to the provisions of Section 12 (4) of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya, the court also directed that the Parties do consider and address the question of jurisdiction of the court, namely, whether or not the subject Appeal was competent in line with the provisions of Section 15 of the parent Act.

24. Given that there was a Jurisdictional question, premised and/or anchored on the provision of Section 15 of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya, it became imperative that same be addressed and ventilated beforehand.

25. Based on the foregoing, the Parties therefore proceeded to and addressed the court on the question of Jurisdiction and more particularly, on whether or not an Appeal could lie to this honourable court from an order or determination arising from a Complaint and if so, whether such an Appeal could arise with or without Leave, having been sought for and obtained beforehand.

26. First and foremost, counsel for the Appellant/Applicant admitted and acknowledged that the proceedings before the tribunal were commenced vide a Complaint pursuant to and under the provisions of Section 12 (4) of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya and not otherwise.

27. Secondly, counsel for the Appellant/Applicant also admitted that upon the rendition and/or delivery of the ruling and/or decision of the tribunal which was rendered on the 24th December 2021, no Leave to appeal was ever applied for and/or obtained, either informally at the time of the delivery of the Ruling or at all.

28. Be that as it may, Counsel for the Appellant/Applicant submitted that the orders and/or decisions of the tribunal rendered on the 24th December 2021, which effectively dismissed the Complaint dated the 12th January 2021, was appealable as of right and that this Honourable court has the requisite Jurisdiction to entertain the subject Appeal.

29. In support of his submissions, counsel for the Appellant/Applicant sought to distinguish the decision in **Re-Hebtulla Proberties Ltd (1979) eKLR**, by invoking and relying in the decision in the case of **Trans Allied Ltd v Sakai Trading Ltd (2016) eKLR**, where a two (2) Judge bench of this Honourable court considered the import and tenor of Section 15 of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya and held that there exists a Right of Appeal in respect of a determination or order arising from a Complaint.

30. On the other hand, Counsel for the Respondent submitted that this Honourable Court was not seized of Jurisdiction to entertain and/or adjudicate upon the subject Appeal, insofar as the originating dispute was lodged and/or commenced by way of a Complaint under Section 12 (4) of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya and not by way of a Reference.

31. Secondly, counsel for the Respondent further submitted that the provisions of Section 15 of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya are so explicit and same only allow Appeal arising from determination and orders emanating from References strictly and not determination and orders arising from Complaints.

32. Thirdly, Counsel for the Respondent further submitted that what comprises a Reference is distinct from a Complaint vide Section 12 (4) of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya.

33. For the avoidance of doubt, Counsel further submitted that a Reference is well provided for in terms of Section 6 of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya.

34. Finally, Counsel for the Respondents invited the court to take note and/or cognizance of the decision in the case of **Re-Hebtulla Proberties Ltd (1979) eKLR**, where the issue of Jurisdiction of the High Court and by extension this Honourable court, namely, the Environment and Land Court, to hear an Appeal arising out of a Complaint, was extensively deliberated upon and discussed.

35. In short, Counsel for the Respondents implored the Court to find and hold that no Appeal lies from a determination and/or order arising from a Complaint pursuant to Section 12 (4) of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya.

ISSUES FOR DETERMINATION:

36. Having taken cognizance of the fact that the Originating process before the Business Premises Rent Tribunal was commenced by way of a Complaint pursuant to Section 12 (4) of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya and having reviewed the submissions by the Parties, the issues that arise for determination are as hereunder;

a. Whether this Court has Jurisdiction to entertain and/or adjudicate upon the subject Appeal.

b. Whether the Appeal filed by and/or on behalf of the Appellant/Applicant is Competent or otherwise.

ANALYSIS AND DETERMINATION:

ISSUE NUMBER 1

37. Jurisdiction of a Court is central and/or critical in handling and/or hearing of Judicial Disputes and/or matters that are placed and/or laid before the Honourable court. Consequently, before a court of law can commence the process of undertaking a hearing, the Court must be persuaded and be satisfied that same is duly seized of the requisite Jurisdiction.

38. The centrality and importance of Jurisdiction has been underscored in various Decisions of the Court of Appeal, as well as the Supreme Court Of Kenya. In this regard, it is imperative to take note of the decision in the case of **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR**, where the Court of Appeal held as hereunder;

In common English parlance, 'Jurisdiction' denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae.

39. Other than the foregoing observation by the Court of Appeal, the Supreme Court of Kenya had occasion to weigh in on the meaning and importance of Jurisdiction in the case of **Republic v Karisa Chengo & 2 others [2017] eKLR**, where the Supreme Court observed as hereunder;

[35] In the above regard, we note that in almost all the legal systems of the world, the term "jurisdiction" has emerged as a critical concept in litigation. Halsbury's Laws of England (4th Ed.) Vol. 9 at page 350 thus defines "jurisdiction" as "...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision." John Beecroft Saunders in his treatise Words and Phrases Legally Defined Vol. 3, at page 113 reiterates the latter definition of the term 'jurisdiction' as follows:

"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision.

The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given".

40. Based on the foregoing, I must now undertake the journey to authenticate and/or ascertain whether the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya, has conferred this Court with Jurisdiction to entertain an Appeal arising from a Complaint pursuant to and under Section 12(4) thereof or otherwise.

41. It is also important to note that the only provision that creates and/or confers a Right of Appeal under the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya is Section 15 thereof. For clarity, and for reasons that would thereafter become apparent, it is therefore appropriate to reproduce the said Section.

42. In the premises, the provisions of Section 15 of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya are reproduced as hereunder;

15. *Appeal to court:*

(1) 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.

(2) In hearing appeals under subsection (1) of this section the Court shall have all the powers conferred on a Tribunal by or under this Act, in addition to any other powers conferred on it by or under any written law.

(3) Deleted by [Act No. 2 of 1970](#), s. 13.

(4) The procedure in and relating to appeals in civil matters from subordinate courts to the Environment and Land Court shall govern appeals under this Act:

Provided that the decision of the Environment and Land Court on any appeal under this Act shall be final and shall not be subject to further appeal.

43. It is apparent from the foregoing provisions that the only persons who have a Right of appeal to the Environment and Land Court are Parties to a Reference, who are aggrieved by a determination or order, certainly arising from the reference and not otherwise.

44. In my humble view, the 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.

45. In any event, I beg to make myself clearer and in this regard, I can do no better than to reproduce the definition of what constitute a Reference as provided for vide Section 2 of the Act.

46. For coherence, Section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya defines a Reference as hereunder;

“Reference” means a reference to a Tribunal under [section 6](#) of this Act;

47. On the other hand, it is also appropriate to note that a Reference under Section 6 would ensue and/or arise, once either a landlord or a tenant has issued and served the requisite Statutory notices, whether for termination, alteration or otherwise, as stipulated and/or envisaged under the provisions of Section 4 of the Act.

48. 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.

49. Be that as 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 Proberties 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.

For this view I derive some support from the wording of the appeal provisions before they were amended by Act No 2 of 1970. Appeal then lay to the Court of a Senior Resident Magistrate or Resident Magistrate, with a further and final appeal to the High Court. Section 15(1) then commenced, “any party aggrieved by the determination or order of a tribunal may within fourteen days appeal against the same ...”.

Subsections (1) and (4) of section 12 as quoted above have remained unchanged.

Thus, until 1970, there was a right of appeal against an order made, not only on a reference, but also 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.

50. Other than the ageless decision alluded to in the preceding paragraph, I must also point out that the Court of Appeal has also had an occasion to deal with or address the subject matter before hand, that is whether a Right of Appeal attaches to a Compliant filed pursuant to Section 12 (4) of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya.

51. In this regard, I am minded to refer to the Decision in the case of **Gatanga General Store & 2 Others v Githere (1988) eKLR**, where the Court of Appeal rendered herself as hereunder;

‘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 decisions 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. The landlord by himself cannot make a reference (Pritam v Ratilal & Another, (1972) EA 560); that is for the tenant. If no reference is made then the landlord’s notice takes effect under section 10 of the Act. So he does not need to appeal in that case. But on the appeal section 9 of the Act explains the determinations and orders which it may make; and the orders may be “further or other orders as it thinks appropriate.” This explains the phraseology of section 15 – aggrieved by “any determination or order of a tribunal”.

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.”

It seems that the concept is that matters incidental to the protection of the tenancy given by the Act, especially security of tenure from dispossession and harassment may be dealt with at the level of minor complaints. Such complaints, having been entertained by the tribunal, and orders having been made, such orders have been held to be unappealable. Madan, J set out the history of the matter in Choitram’s case at page 530 as follows:

“Prior to April 6, 1970, section 15 of the Act permitted an appeal to a senior resident magistrate and from there to the High Court on a question of law or mixed fact and law in terms which included appeals from decisions on complaints under section 12 (4).

As amended appeals were restricted to determinations or orders made on a reference. This strengthens my view that proceedings under section 12(4) are intended for complaints of a minor nature only. If the legislature had considered that the tribunal had power under that provision to award large sums by way of compensation to a landlord for example ... it would surely have continued the right of appeal.”

There is no appeal from orders made under section 12 (4) of the Act, because that appeal was held to have been deleted.

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. (Section 15(4)).

In hearing appeals under section 15, the court shall have all the powers conferred on a tribunal under the Act in addition to any other powers conferred on it by or under any written law. The Civil Procedure Act and Code would be such written law. Under the Magistrates’ Courts Act the subordinate courts exercise civil powers and that would be under the Civil Procedure Act which regulates appeals from subordinate courts to the High Court. The definition of court in that Act includes the High Court and a subordinate court acting in the exercise of its civil jurisdiction.

52. Other than the foregoing decision by the Court of appeal, I have also encountered the Decision of Justice Visram, Judge (as he then was) in the case of **SILAS YIMBO T/A WOODVALE ASSOCIATES v ELDOMART HOLDINGS LIMITED [2008] eKLR**, where the learned judge held as hereunder;

On my part, I will stick to the conventional wisdom and hold that if the legislature had intended a right of appeal from decisions of the Tribunal in respect of complaints made under Section 12 (4) of the Act, it would have said so clearly and would not have amended the Act, as it did, in 1970.

53. With humility, I am persuaded that the provisions of Section 15 of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya cannot be stretched to include appeals in respect of Complaints, yet the legislature, namely, the law maker, in her wisdom only intended to confine and restrict appeals to Reference and not otherwise.

54. I must also point out that there are many instances where the law has restricted the extent and scope of the Right of Appeal and such restriction, have been deemed to be permissible and Constitutional.

55. Without endeavoring to exhaust such instances, one may need to take cognizance of the Arbitration Act 1995, Law of Succession Act, Chapter 160, Laws of Kenya and the Election Act 2011, which have limited the scope and extent of appeal.

56. Perhaps, for emphasis only, it may be important to take cognizance of the decision in the case of **Kakutia Maimai Hamisi v Peris Pesu Tobiko & Others (2013) eKLR**, where the Court of Appeal observed as hereunder;

A plain reading of that Rule without launching into any analytical discourse shows that the rule-maker intended for appeals to lie from final and conclusive determinations of election petitions, hence the use of the words ‘judgment’ and ‘decision’. The basic interpretation tenet of expressio unius est exclusio alterius applies with the common sense conclusion that had the rule maker intended for appeals to lie from the other determinations that take the form of rulings and orders within the petition proceedings, nothing would have been easier than for the rule maker to say so.

This Court’s decision in WAITITU referred to above addressed this issue specifically as follows;

“In our view, Rule 35 does not lend itself to an interpretation that a party has a right of appeal against an interlocutory order or ruling made by the High Court in an election petition. We think that the limitation to the right of appeal was deliberate, realizing that in the course of hearing an election petition a number of interlocutory applications that occasion interlocutory rulings do arise and if any party aggrieved by such decisions were to be allowed to appeal or seek stay of proceedings pending appeal it would be difficult, nay, impossible, to conclude an election petition before the High Court within the stipulated period of six months.”

We respectfully reiterate that analysis. The formulation of Rule 35 that limits the right of appeal to this Court is not an aberration. Nor is it accidental. It fits perfectly within the conceptual, doctrinal and philosophical framework that

informs the current electoral adjudication laws. There is method and deliberation behind the Rule and we cannot see how an interpretation of it can be embraced and espoused that would allow interlocutory appeals without doing violence to, breaching and uprooting the strict constitutional and statutory timelines adverted to above.

57. Notwithstanding the foregoing, I must also point out that I have had the occasion to read, examine, consider and internalize the decision in the case of **Trans Allied Limited versus Sakai Trading Limited (2016) eKLR**, where a Two-Judge bench of the Environment and Land Court had occasioned to consider and deal with the import and tenor of Section 15 (1) of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya.

58. For the avoidance of doubt, the bench in the **Trans Allied Limited v Sakai Trading Limited (2016) eKLR**, held as hereunder;

On the first issue, the Respondent had submitted that an appeal does not lie to this court on a determination of a complaint by the tribunal. In support of this submission, Mr. Kibe cited the decision of Simpson J. in the case of Re Hebatulla Properties Ltd. (1979 – 1980) KLR 96 in which he stated that the right of appeal to the High Court conferred by Section 15 (1) of the Act does not extend to an order of the tribunal made on a complaint.

The Respondent submitted that since the order of the tribunal which is the subject of this appeal arose from a complaint, the same is not appealable to this court and as such the appeal before us incompetent. We find no merit in this objection for a number of reasons. First, we have noted from the record that the issue as to whether an appeal lies to this court on complaint was raised by the Respondent by way of a preliminary objection dated 20th July 2011 which objection was heard by Angawa J. and was dismissed on 28th July 2011. The decision of Angawa J. on the issue has neither been reviewed nor set aside. The issue having been raised before this court, considered and conclusively determined between the parties herein, the same cannot be reopened before this court for another determination.

Independently of the decision of Angawa J, we have also considered the issue. With due difference to the decision of Simpson J. in the case of Re Hebatulla Properties Ltd. (Supra), we do not agree with the restricted interpretation which he gave to the word “reference” in Section 15(1) of the Act. The term reference is defined in Section 2 of the Act to mean “reference to a Tribunal under Section 6 of the Act.” For appeal purposes, we do not think that the term reference can be restricted only to reference to the tribunal under Section 6 of the Act. We are of the view that if that was the intention of the legislature, it would have stated so expressly in section 15(1) of the Act. Looking at the Act as a whole together with the regulations made thereunder, we have observed that reference can be made to the tribunal under section 6(1) of the said Act or under Section 12 (4) of the Act and the forms for instituting a reference in both cases are provided for in the regulations. See, Regulation 5 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Tribunal Forms and Procedure Regulations. Under Regulation 5 aforesaid as read together with Form C in the Schedule to the said Regulations, a complaint by a landlord or a tenant is lodged in the tribunal as a “reference.” A party to a complaint is therefore a party to a “reference” and should be covered under Section 15(1) of the Act. The Act having expressly given a right of appeal to “any party” to a reference, we can find no reason why we should restrict such parties only to those whose reference was brought pursuant to Section 6 of the Act in the absence of express provisions to that effect.

59. Personally, I have four difficulties with the observations made by the Two-judge bench in the said decisions. First and foremost, I am not aware whether the Two-judge bench was addressed on the import and tenor of the decision of the Court of Appeal in the case of **Gatanga General Store & 2 Others v Githere (1988) eKLR**, which I have alluded to hitherto.

60. Secondly, if the Two-judge bench were not addressed on the foregoing decision, what then would have been the thinking and perception of the Court in terms of the decision of the said Court of Appeal decision.

61. Thirdly, there is the question as to whether the rules made pursuant to the Act, can supersede and/or override the provisions of the Act, so that where Section 2 of the parent Act defines what constitutes a Reference, the Court would still seek to take refuge in a Form created pursuant to Regulation 5 and seek to use such a Form or the description in such a form, to override an express and explicit definition provided for by the Legislature.

62. Finally, it is difficult to understand how a Party to a Complaint can be constituted and/or be deemed to be a Party to a Reference, yet the dichotomy between a Complaint and a Reference is so evident and diverse, both in terms of the provisions of the law under which same are lodged as well as definitions assigned thereto.

63. With due deference, I chose to disagree with the decision in **Trans allied Limited v Sakai Trading Limited (2016) eKLR**, as well as the subsequent decision in the case of **Adiel Nthuni Maimbu v Mugo J Kirika (2020) eklr**, the latter, which is in tandem with the former.

64. Suffice it to say, that I endorse the position of the law as stated in the time honoured decision in the case of **Re-Heptulla Proberties Ltd (1979) eKLR**. Consequently, I find and hold that this court is not seized of Jurisdiction to entertain the subject Appeal.

65. Nevertheless, I may also wish to add that in endeavoring to ascertain and/or authenticate the existence of Jurisdiction or otherwise, a Court of law needs to pay fidelity to the Constitution, the Statute and by extension to obtaining corpus of Binding case law, if any.

66. In support of the foregoing position, I can do no better than to quote the Decision in the Case of **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**, where the Supreme Court observed as hereunder;

A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.

This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

ISSUE NUMBER 2

Whether the Appeal filed by and/or on behalf of the Appellant/Applicant is Competent or otherwise.

67. It was conceded from the onset that the originating proceedings before the Business Premises Rent Tribunal were commenced pursuant to and or under the provisions of Section 12 (4) of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya, which essentially relates to and/or deals with complaints.

68. To the extent that the originating proceedings were brought pursuant to the said provisions, the question then is; can the appellant herein therefore file and/or mount an appeal as a matter of right and if so, what provision of the law would anchor the filing of such an appeal.

69. Without sounding repetitive, I have pointed out elsewhere herein before that Section 15 (1) of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya, only deals with Appeals relating determinations and/or orders arising from a Reference and not otherwise.

70. On the other hand, I have not found any provision of the Act that confers upon the court the Jurisdiction and/or mandate to entertain an Appeal arising out on a Complaint and hence the Act is therefore silent. In this regard, my take is that no Right of Appeal ensues and/or arises in respect of a Complaint.

71. Consequently, if a Party to a Complaint is keen to lodge and/or mount an appeal against a determination and/or order arising therefrom, then it behooves such a party to seek for and procure leave of the tribunal in the first instance or if declined, to seek and obtain Leave from this Honourable court.

72. For the avoidance of doubt, it is imperative to take cognizance of the provisions of Section 75 of the civil Procedure Act, Chapter 21 Law of Kenya, which provides as hereunder;

75. Orders from which appeal lies

(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—

73. In support of the forgoing legal position I adopt and restate the position of the court of appeal in the case of **Micro-House Technologies Limited v Co-operative College of Kenya [2017] eKLR**, where the court pronounce herself as hereunder;

9. The question that we must answer is whether, in light of the above summarized position, this Court has jurisdiction to hear this appeal. Our simple answer is in the negative, that the Court lacks jurisdiction. The appellant had no right of appeal to this Court not having obtained leave under section 39(3) (b) of the Arbitration Act. This Court emphatically so held in Nyutu Agrovet Limited v Airtel Networks Ltd.(supra). Karanja, J.A. stated inter alia:

“I hold the view that no right of appeal is provided for in arbitral awards save for matters pegged on section 39 of the Act. I am convinced that a right of appeal is conferred by statute and cannot be inferred.”

74. It must be recalled that counsel for the Appellant/Applicant herein clearly admitted that no leave to appeal was ever sought for and/or obtained beforehand. At any rate, I must also add that a right of appeal must be expressly provided for and cannot be inferred.

75. In the premises, I find and hold that the appeal herein is incompetent.

FINAL DISPOSITION:

76. Having reviewed the issues for determination that were outlined herein before, it is now appropriate to render a disposition and thereby make the final orders in respect of the subject matter.

77. To my mind, the provision of Section 15 (1) of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya, are explicit and devoid of ambiguity. Consequently, same deserve to be interpreted in their literal and grammatical sense.

78. Premised on the foregoing, I find and hold that this Honourable court is devoid and bereft of Jurisdiction to entertain the subject Appeal. Consequently, the Appeal be and is hereby struck out.

79. The Respondents be and are hereby awarded half costs of the proceedings.

80. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20th DAY OF APRIL 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

June Nafula Court Assistant

Mr. Orina H/B for Mr. Mwaniki for the Respondent

No appearance for the Appellant/Applicant