



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**Civil Appeal 381 of 2011**

**GULED HOUSING CO. LTD.....APPELLANT**

**AND**

**DEKEE HOLDINGS LIMITED.....RESPONDENT**

**RULING**

**Introduction**

1. This appeal arises out of a landlord and tenant dispute determined by the Business Premises Rent Tribunal (BPRT) established under the ***Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Chapter 301 of the Laws of Kenya)*** (hereinafter referred to as ‘the Act’).
2. In the case before the BPRT, the tenant, the respondent in this appeal, filed a complaint against the landlord, the appellant, alleging certain acts of interference and disruption of its business. The BPRT ruled in the tenant’s favour and issued certain orders which precipitated this appeal by the landlord.
3. By a Notice of Motion dated 8<sup>th</sup> August 2011, the appellant sought a stay of execution of the orders of the BPRT pending the hearing of the appeal. On 9<sup>th</sup> August 2011, the Court granted orders of stay *ex parte*.
4. The respondent then moved the court by an application dated 11<sup>th</sup> August 2011, to strike out the Appeal and Notice of Motion dated 8<sup>th</sup> August 2011 on the ground that the court had no jurisdiction. The application was heard by Hon. Lady Justice Ang’awa and on 11<sup>th</sup> September 2011 the judge made the following order, ***“To this end I would set aside the ex parte orders granted by the vacation judge ..... on 9<sup>th</sup> August 2011 to the landlord. That the application of 8<sup>th</sup> August 2011 be and is hereby struck out.”***
5. The learned Judge was of the view that under **section 12(4)** of the Act no appeal lies to this High Court from the determination of a complaint by the BPRT. She relied on the well established authorities; ***Re Hebtulla Properties Limited [1979] KLR 96 and Dynamic Institute of Management and Accountancy (DIMA) Ltd v Apollo Insurance Co. Ltd Civil Appeal No.18 of 2000 (Unreported)***.
6. Following Hon. Lady Justice Ang’awa’s ruling, the appellants filed a Notice of Motion dated 3<sup>rd</sup> October 2011 seeking conservatory orders pending the hearing and determination of the appeal. The appellant also amended the Memorandum of Appeal dated 3<sup>rd</sup> October 2011 which included amendment alleging that the operation of **section 15(1)** of the Act was discriminatory and in contravention of **Article**

27 of the Constitution and seeking several declarations to that effect.

7. On 5<sup>th</sup> October, 2011, Hon. Mr Justice Mwera granted interim conservatory orders in favour of the appellant. He directed that the matter be placed before the Constitutional and Human Rights Division as constitutional matters had been raised. On 15<sup>th</sup> November, 2011, the Head of the Constitutional and Human Rights Division, Hon. Mr Justice Lenaola directed that parties to file written submissions and the matter be heard by two judges of the division; Hon Justices Mumbi Ngugi and David Majanja.

8. When the matter came up for hearing on 20<sup>th</sup> November. 2011 we directed the parties to raise and submit on all the issues before us so that we could determine the matter conclusively.

### **Parties' Submissions**

9. Mr. Kinyanjui, representing the appellant proceeded to argue the issues set out in the Amended Memorandum of Appeal. In short, he argued that prima facie **section 15(1)** of the Act which grants the right of appeal from a reference to the High Court does not include a complaint. As there is no definition of a complaint in the Act, **section 15(1)** differentiates those who file a reference and those who file a complaint and there is no equality of treatment. In the circumstances there is a breach of **Article 27** of the Constitution.

10. Mr. Kang'atta, for the respondent, denied that **section 15(1)** of the Act was discriminatory. He submitted that there was a difference between a reference and a complaint under the Act but in respect of the right of appeal, both the landlord and tenant are treated equally in respect of the right of appeal to the High Court hence there is no discrimination.

11. Mr. Kang'atta relied on the written submissions dated 11<sup>th</sup> November 2011 and grounds of opposition dated 10<sup>th</sup> October 2011 where he argued that the issues raised in the application is *res judicata* in that through the application, the appellant seeks to achieve substantially the same results and orders that were sought earlier in the Notice of Motion dated 8<sup>th</sup> August 2011 and which was struck out by the Court on 21<sup>st</sup> September, 2011.

12. Further, the appellant seeks to raise the constitutional issues in the Amended Memorandum of Appeal, which issues ought to have been raised in the motion that was dismissed by Hon. Lady Justice Ang'awa. In effect the amended memorandum of appeal is a challenge to the decision made by Hon. Lady Justice Ang'awa.

13. The respondent further contends that the constitutional issues cannot be raised through an amendment of the Memorandum of Appeal but through a distinct suit or petition.

14. Mr. Kinyanjui, submitted that the doctrine of *res judicata* does not apply to these matters and the order made on 11<sup>th</sup> September 2011 resulted in a striking out and not a dismissal. Secondly, as the appeal was not struck out the appellant was entitled to file an Amended Memorandum of Appeal.

15. Counsel for the appellant further submitted that this court must adopt the general judicial policy set out in **Article 159** of the Constitution to the extent that this Court is bound to deal with matters without delay and without undue regard to technicalities. In his view, to insist on further proceedings for the enforcement of fundamental rights and freedoms would be to impose on the parties an unnecessary burden of costs and expense. He stated that this court has jurisdiction to deal with the constitutional issues presented.

### **Issues for Determination**

16. We have reviewed the matter in light of the proceedings and submissions, oral and written by the parties. In our view, it is proper to dispose of the issue of *res judicata* and abuse of process which are preliminary issues.

## Res Judicata

17. The first issue to determine is the effect of the orders 21<sup>st</sup> September 2011. Whereas the learned Judge, found that the court did not have jurisdiction, she did not strike out the appeal. Both counsel before us, informed us that the judge was of the view that the appeal could only be struck out by two judges hence her order was limited to striking out the notice of motion dated 9<sup>th</sup> August 2011 and discharging the interim relief.

18. We are aware that the general practice relating to appeals from the BPRT is that appeals are heard by two judges because it is the final appeal as there is no further right of appeal to the Court of Appeal in respect of the orders of the BPRT. However, we do not see any limitation in law in one judge striking out an appeal as the jurisdiction conferred on the High Court by the Constitution is exercisable by any judge. (See the case of *Ntoithia M'mithiaru v Richard Maoka Maore and 2 Others* [2008] 3 KLR EP 730)

19. On one hand, Mr. Kinyanjui argues that since the appeal was not struck out, it follows that there was no determination of the issues. Mr. Kang'atta, on the other hand, asserts that there has been a final determination of the appeal.

20. In our view, whether or not a matter is *res judicata* is a matter of substance. It is not how the orders of a judge are couched but what was decided by the court and whether the court conclusively decided the matters before it. In this case, the learned Judge heard full arguments and determined that no appeal lies to the High Court under **section 12(a)** of the Act.

21. In dealing with the matter before us, we cannot ignore the findings of the learned judge. We are indeed bound by the decision as we are not sitting as an appellate court. The effect of the decision of 21<sup>st</sup> September, 2011 was to determine the appeal on the basis of want of jurisdiction.

22. It therefore follows that once the court found that the appellant had no right of appeal, the appellant could not file an amended memorandum of appeal or continue with these proceedings. The finding of the court that it had no jurisdiction removed the substratum of the appeal. It is therefore our position that we cannot entertain these proceedings.

## Jurisdiction

23. Counsel for the appellant argued that this court should adopt the new judicial policy set out in **Article 159** of the Constitution particularly **Article 159(2)(d)** which provides that justice shall be administered without undue regard to procedural technicalities.

24. We must disabuse the appellant of the notion that jurisdiction is a mere technicality. The Supreme Court in the recent decision *Re The Matter of the Interim Independent Electoral Commission Constitutional Application 2 of 2011 (Unreported)* at *para. 29 and 30* discussed the issue of jurisdiction in the following terms;

[29] *Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14): "I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step."*

[30] *The Lillian 'S' case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the*

## *Constitution.*

25. Each court under the Constitution has specific jurisdiction. In addition to the unlimited original jurisdiction in criminal and civil matters conferred upon it by the Constitution, the High Court under **Article 165(2)(e)**, has additional jurisdiction, original or appellate conferred on it by legislation. The **Landlord and Tenant (Shops, Hotels and Catering Establishment) Act** is one of the statutes that confers upon the High Court appellate jurisdiction. The issue of jurisdiction is not a technical matter to which we can close our eyes. For a court, jurisdiction is everything and without jurisdiction, a court is nothing.

26. It must also be remembered that **Article 159(2)(d)** does not do away with all technicalities. It states that justice shall be administered **without undue** regard to procedural technicalities. In this case the court has already determined the appeal by declining jurisdiction in accordance with an Act of Parliament. Once jurisdiction is declined, the Court must down its tools.

### **Enforcement of fundamental rights and freedoms**

27. It also does not matter that the appellant now seeks to enforce its fundamental right and freedoms. The appellant can only do so in a manner consistent with the established laws and procedures. Even if we were to take a very liberal view of the procedural issues, we would be doing violence to the concept of jurisdiction which guides the courts by interposing it with enforcement of fundamental rights proceedings.

28. These proceedings were commenced by way of an appeal in accordance with procedures established by an Act of Parliament. While it is true the constitutional issues can be raised in these proceedings, it is neither a breach of **Article 159(2)(d)** nor **Article 23** for the Court to decline jurisdiction where the subject matter is not permitted as in this case where the court has ruled that there is no jurisdiction. This is not to say that the appellant has no remedy because such remedy is to be found in instituting proceedings under **Article 23** of the Constitution.

### **Conclusions**

29. Since we have found that this appeal was determined for want of jurisdiction, we cannot assume jurisdiction through the back door by invoking **Article 23**. It is therefore unnecessary for us to make any determination on the breaches alleged in respect of **Article 27** of the Constitution.

30. We hold that the appeal before us has been determined by the ruling of Hon. Lady Justice Ang'awa made on 21<sup>st</sup> September 2011 where she held that there is no right of appeal under **section 12(4)** of the Act.

31. In order to complete this matter and to avoid further litigation, we strike out this appeal commenced by the Memorandum of Appeal dated 8<sup>th</sup> August 2011 and the amended Memorandum of Appeal dated 3<sup>rd</sup> October 2011. We discharge all interim orders in force.

32. As the matter before us was for all intents and purposes an appeal from the decision of the BPRT, we do not see any reason why we should depart from the general rule regarding costs. We therefore award costs of this appeal to the respondent.

**DATED and DELIVERED at NAIROBI** this 20<sup>th</sup> day of January, 2012.

**MUMBI NGUGI**

**JUDGE**

**D.S. MAJANJA**

**JUDGE**

Mr H. Kinyanjui instructed by J. Harrison Kinyanjui & Company Advocates for the appellant.

Mr L. Kang'atta instructed by Mutimu Kang'atta & Company Advocates for the respondent.