REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

MISC APPLI 107 OF 2000

SILAS YIMBO T/A WOODVALE ASSOCIATES …….… APPLICANT

VERSUS

ELDOMART HOLDINGS LIMITED ……. RESPONDENT

RULING

The Appellant/Applicant, being aggrieved by a decision of the Business Premises Rent Tribunal (hereinafter "the Tribunal") pursuant to a "**complaint"** made to it under Section 12 (4) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301 (hereinafter "the Act") has sought to file "**an appeal**" to this Court. The present application is for **leave** to file such an appeal "**out of time".**

At the commencement of the hearing of this application, Mr Jimmy Rayani, Counsel for the Respondent, raised a Preliminary Objection on a point of law involving the jurisdiction of this Court to hear an appeal on this matter.

Mr Rayani argued that there was indeed no right of appeal from the Ruling of the Tribunal which arose from a "**complaint"** filed before the Tribunal under Section 12 (4) of the Act.

He submitted that Section 15 (1) of the Act gave the right of appeal to an aggrieved party to a "**reference".** The term "Reference", he argued, was defined in Section 6 which restricted it to a "**tenancy notice"** issued under Section 4 of the Act in respect of a controlled tenancy. According to Mr Rayani, the primary function of the Tribunal is to protect tenants from increased rents and against unlawful termination, and a right of appeal to the High Court exists only in relation to those matters, and **not** on "complaints" made to the Tribunal under Section 12 (4) of the Act. The Applicant, whose complaint to the Tribunal was based on Section 12 (4) of the Act, had no right of appeal to the High Court, and Mr Rayani urged that the application be disallowed.

Mr Kamande, Counsel for the Applicant, argued that a "complaint" under Section 12 (4) was only one of the many ways of "moving" the Tribunal, and that the term "Reference" in Section 15 includes all those methods. He submitted that he was properly before this Court.

This Court invited both Counsels to submit authorities in support of their respective contentions.

Unfortunately, neither Counsel had any authorities, and the Court reserved its Ruling for two weeks to reflect upon the submissions made. As I found, there is some interesting and useful jurisprudence on this subject.

As early as in 1979, Simpson, J (as he then was) in the case of ***Re Hebtulla Properties Ltd (1979) KLR 96*** held as follows:

(1) The right of appeal to the High Court (conferred by section 15 (1) from an order or determination of a tribunal on a reference to it does not extend to an order of the tribunal made on a complaint.

(2) The jurisdiction of the tribunal to hear complaints under Section 12 (4) is restricted to minor matters.

Simpson, J stated in that case that he had derived comfort from earlier decisions, and more particularly one handed down by Madan, J (as he then was) in ***Pritam vs Ratilal (1972) E. A. 560*** in which it was held that Section 12 (4) did not entitle the Tribunal to make an order for eviction and envisaged complaints other than eviction such as a landlord turning off a common water tap.

In another of those early cases in 1972, in ***Choitram vs Mystery Model Hair Saloon (1972) E. A. 525***, Simpson, J stated:

"***I am of the opinion however that the term "complaint" is intended only to cover complaints of a minor character. The term "investigate" does not necessarily imply a bearing. Such complaints would include complaints by the tenant of the 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."***

Likewise, in 1973, Sheridan, J in the case of ***Machenje vs Kibarabara (1973) E. A. 481*** took the same position.

There is, therefore, a litany of cases where the established view is that the right of appeal in cases brought before the Tribunal is restricted only to "References" under Section 15 (1) of the Act, and not to "complaints" under Section 12 (4). This is what I call **the conventional wisdom**.

However, the conventional wisdom has been challenged in at least one recent case that I have come across. In the case of ***Ruth K. Wachira T/A Amigirl Beauty Parlour vs Chairman, Business Rent Tribunal (Mis. App. 1242 of 2005, Nairobi)*** my brother Justice Emukule took a different approach. There the Applicant had in fact filed an appeal against the Tribunal's decision in respect of a "Complaint" under Section 12 (4) of the Act. Then, relying perhaps on the conventional wisdom, the Applicant withdrew the Appeal and instead filed an application for judicial review in the High Court. In dealing with that application, Emukule, J made certain observations regarding the Applicant's rights of appeal under the Act. Here is what he said:

"***Perhaps the notion that there is no right of reference to the Tribunal in respect of any complaint under Section 12 (4) is derived from the definition of the word "reference" in Section 2 of the Act where "reference" means- "a reference to a Tribunal under Section 6 of the Act." Reference under Section 6 of the Act relates specifically to a tenancy notice given under Section 4 (2) and (3) of the Act (either for termination of a tenancy, or reassessment of the rent of a controlled tenancy). If those cases be referred to as "major" complaints it does not diminish the power to make reference to the Tribunal under other Sections of the Act, including a determination or order arising from making a complaint under other Section 12 (4) of the Act provided that the complaint relates to a controlled tenancy for that is the only qualification to that right. It does not matter that "any complaint" is said to be "made" under Section 12 (4) whereas "a notice" to terminate the tenancy or reassess the rent is a***

"reference". The result in either case is a determination and order by the Tribunal. Neither diminish the right of an aggrieved party to a "reference" or to "a complaint" by a determination and order therein of a Tribunal to appeal.

The right of appeal is in respect of any determination and order therein (in respect of a reference or a complaint) by the Tribunal under the Act. <u>An aggrieved party from a determination and order from a complaint under Section 12 (4) of the Act is in my respectful view entitled to an appeal as much as a person aggrieved by a determination and order pursuant to a reference under Section 6 or other determination and order of the Tribunal under any of the powers conferred upon the Tribunal under Section 12 (1) (a) – (n) inclusive of the Act or any other provision of the Act conferring jurisdiction to the Tribunal to determine any matter thereunder</u>. I therefore reject the Applicant's contention to the contrary." (underlining mine).

These views are an interesting and welcome addition to the jurisprudence evolving on this subject. No doubt there will be more. For now, however, I am not persuaded to follow them for three reasons: one that they were expressed ***obiter dictum***, and were not ***germaine*** to the main issue before the Court, and consequently I think, the Court did not have the benefit of full argument on the same. Secondly, I believe that such an interpretation as expounded by Emukule, J could open up the flood gates to appeals in the High Court, and may further clog the already huge back log of cases with appeals on what I believe as relatively small complaints that should and must be put to rest at the level of the Tribunal. It would not be in the interest of public policy to add a further layer of litigation to minor complaints filed under Section 12 (4) of the Act.

Thirdly, and more importantly, I am of the view that "the conventional wisdom" is based on what I believe is the correct interpretation of Section 12 (4) of the Act. Simpson, J explained the background in the ***<u>Hebtulla</u> case*** (supra) as follows:

"***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 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."

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.

Accordingly, I find that this appeal is incompetently before the High Court and strike the same out with costs to the Respondent.

Dated and delivered at Nairobi this 7th day of March, 2008.

ALNASHIR VISRAM

JUDGE