



**Nairobi Grill Market Ltd & 2 others v Kifam Enterprises Limited & another
(Appeal 092 of 2022) [2022] KEELC 15465 (KLR) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15465 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

APPEAL 092 OF 2022

J OMANGE, J

DECEMBER 20, 2022

BETWEEN

NAIROBI GRILL MARKET LTD 1ST APPELLANT

TIKO FOODS LIMITED 2ND APPELLANT

CHECKERS BRANDS LIMITED 3RD APPELLANT

AND

KIFAM ENTERPRISES LIMITED 1ST RESPONDENT

NJOKA & NJOKA SERVICES LIMITED 2ND RESPONDENT

RULING

1. The appellants filed an application dated October 12, 2022 in which injunctive prayers were sought restraining the respondents from evicting them pending the hearing and determination of an appeal to this court.
2. The matter came up in court on the October 26, 2022 during which counsel for the Respondents indicated that they wished to raise a preliminary objection on the jurisdiction of the court.
3. The court directed that the issue of jurisdiction be canvassed as a preliminary point and be canvassed by way of written submissions. Both parties have filed written submissions which I have had occasion to consider.
4. Counsel for the Respondent commenced his submission by emphasizing the centrality of jurisdiction. He reiterated the celebrated case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd.* (1989): "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 5 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.... Where a court takes it upon itself to exercise jurisdiction which



it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

5. Counsel referred the court to section 15 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* under which the application by the appellants was brought. The section reads thus; Section 15 Appeal to court: (1) Any party to a reference (underline mine) 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.
6. Counsel emphasised that Section 2 of the Act defines a Reference as, “a reference to a Tribunal under section 6 of the Act. Counsel contended that by this clear definition a Reference could only be filed as envisaged by Section 6 of the Act which provides; A receiving party who wishes to oppose a tenancy notice, and who has notified the requesting party under section 4(5) of this Act that he does not agree to comply with the tenancy notice, may, before the date upon which such notice is to take effect, refer the matter to a Tribunal, whereupon such notice shall be of no effect until, and subject to, the determination of the reference by the Tribunal: Provided that a Tribunal may, for sufficient reason and on such conditions as it may think fit, permit such a reference notwithstanding that the receiving party has not complied with any of the requirements of this section. (2) A Tribunal to which a reference is made shall, within seven days after the receipt thereof, give notice of such reference to the requesting party concerned.
7. Counsel submitted that a right of appeal was only available to a reference under Section 6. Complaints referred to the Tribunal under Section 12 (4) while referred to as Reference could not be subject to appeal. He referred the court to several decisions in which the courts have made a determination on the issue.
8. Counsel for the appellants on the other hand brought to the attention of the court the fact that Form C which is used to move the court under Section 12 (4) was referred to as a reference. Counsel further argues that section 15 which provides for the right to appeal does not distinguish between reference as filed under section 6 and reference as filed under section 12 (4).
9. Counsel referred the court to the High Court decision by Hon Justice Emkule in the case of *Ruth K Wachira T/A Amigirl Beauty Parlour vs Chairman Business Premises Tribunal* in which the learned Judge found that an aggrieved party under section 12(4) was entitled to an appeal as much as an aggrieved party under Section 6.
10. Having considered the submissions by counsel and the various authorities the issues that arise for the courts determination are whether this court has jurisdiction to hear the appeal as the matter in the Tribunal was instituted by way of a complaint under section 12 (4) and not a reference as envisaged by Section 2 and 6 of the Act. Specifically, the question that arises is whether an order arising out of a complaint can be appealed to this court.
11. It is evident from the decisions that have been cited that individual High Court and Environment and Land Court Judges have two schools of thought regarding this issue. A two Judge bench of the Environment and Land Court on its part found that parliament could not have intended to oust complaints from the right to appeal as provided under section 15 of the Act. Hon Justice Ogutu Mboya departed from this decision of the two Judge bench.
12. I have had occasion to consider the authorities on this matter. It is clear to me that principles for a court to consider on issue of jurisdiction was clearly spelled out by the Supreme Court jurisdiction 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.

13. The question that then arises is that in the face of a specific section 2 which defines a reference to be as envisaged by section 6 can then the Court have jurisdiction to hear appeals in respect of a complaint under Section 12 (4)?
14. My interpretation of this issue is further shaped by the historical background of the present law as was outlined in the case of *Re Hebatulla Properties Ltd* [1979] KLR 96 where the court observed as hereunder; 9 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.

15. From this historical background, it is evident that parliament intended to restrict the right of appeal to instances where a reference had been filed as envisaged by Section 2 and Section 6 of the Act. I find that this court cannot grant itself a jurisdiction which defeats the clear intention of parliament which was to allow the right of appeal in very specific cases.
16. In the circumstances the Preliminary Objection is upheld with costs to the Respondents.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 20TH DAY OF DECEMBER 2022.

Judy Omange

JUDGE

In the presence of

Ms Sarange for the Applicant

Ms Zuri for the Respondent

Steve – Court Assistant

