



**Otiende v Nadida (Environment and Land Appeal 12 of 2022)
[2022] KEELC 15574 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15574 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL 12 OF 2022
EK WABWOTO, J
DECEMBER 20, 2022**

BETWEEN

PAUL OTIENDE APPELLANT

AND

WIBERFORCE NADIDA RESPONDENT

JUDGMENT

1. This is an interlocutory appeal which arises from an order of the Rent Restriction Tribunal which directed that the matter before it be canvassed by way of written submissions.
2. The Tribunal's order was issued by Honourable Hillary K Korir its Chairperson on October 12, 2021.
3. By a Memorandum of Appeal dated December 27, 2021, the Appellant being aggrieved appealed the Tribunal's order on the following singular ground: -
 - a. That the trial Chairman erred in law for disregarding Order 18 rule 2 of the Civil Procedure Rules which provides for mode of hearing suits.
4. Thus the Appellant has sought the following orders: -
 - a. That this Appeal be allowed and the judgment of the Trial Subordinate Court be set aside with costs.
 - b. Further or other orders as this Honourable Court may deem just and expedient.



5. In opposing the Appeal, the Respondent filed a Notice of Preliminary objection dated July 14, 2022 which was raised in the following terms:-

“This Honourable Court does not have jurisdiction to hear and determine this matter pursuant to Section 8 of the Rent Restriction Act cap 296 of the Laws of Kenya”.

Court’s directions.

6. On July 27, 2022 and October 13, 2022, this court directed that the Appeal be canvassed by way of written submissions and the preliminary objection be considered alongside the submissions that were to be filed by the parties consequent of which this Court would render its judgment. Both parties complied and filed their written submissions.

The Appellant’s Submissions.

7. The Appellant acting in person filed written submissions dated November 6, 2022. He began by giving brief facts of the case and proceeded to outline seven issues for consideration by the Court. These included the following: -
- i. Whether the mere filing of a document in a court of law, automatically makes it admissible in evidence.
 - ii. Whether the documents filed before a civil court but have not yet been produced or marked for identification (MFI) suffices to be part of that court’s judicial records.
 - iii. Whether before a court applies its judicial mind to determine the relevance and veracity of the contents of any exhibit filed before it, can the documents then, qualify to be termed proper evidence and whether it suffices to be part of court judicial records.
 - iv. Whether averments in pleadings are evidence.
 - v. Whether dispensing with evidence production can be forced by a lower court upon one party to be determined of such party.
 - vi. Whether written submissions can replace the process of evidence taking and hearing at a Tribunal.
 - vii. Whether this court has jurisdiction to entertain this Appeal.
8. The Appellant submitted that the Chairman of the Rent Restrictions Tribunal has not yet applied his judicial mind to determine the relevance and veracity of the contents of any document filed before the Tribunal, neither have the said documents been produced before the Rent Restrictions Tribunal and in view of the foregoing all the documents filed by the Appellant cannot be considered as evidence. The Appellant made cited the case of Kenneth Nyaga Mwige v Austin Kiguta & 2 others (2015) eKLR.
9. It was also submitted that the averments in pleadings are not evidence and the Tribunal could not dispense with the production of evidence to the detriment of either party. The cases of Trust Bank Limited v Ajay Shah & 2 others Nairobi HCCC No 875 of 2001, Grace Kanini v Kenya Bus Services Nairobi HCCC No 4708 of 1989 and among others were cited in in support of this position.



10. The Appellant also contended that written submissions cannot replace evidence. It was argued that the order issued by the Tribunal was interpreted to mean that no hearing or evidence taking shall be undertaken by the Tribunal which order was prejudicial to him. Relying on the provisions of order 18 rule 2 of the *Civil Procedure Rules* and the case of *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR, the Appellant argued that submissions cannot replace evidence.
11. On the issue of jurisdiction, the Appellant submitted that pursuant to articles 165(3), 165(6) and 165(7) of the *Constitution* and Section 13 of the *Environment and Land Court Act, 2011* together with Section 8(2) of the *Rent Restriction Tribunal Act*, this Court has jurisdiction to hear and determine the Appeal before it. The Appellant also referred to Article 50 of the *Constitution* which grants him an opportunity to adduce and challenge evidence during trial.
12. The Appellant concluded his submissions by urging the Court to allow the Appeal with costs and set aside the Ruling of the Tribunal.

The Respondent's submissions.

13. The Respondent filed his written submissions dated November 1, 2022 through Owaga & Associates LLP Advocates. In the Respondent's submissions, Counsel outlined four issues for determination by the Court. These included the following: -
 - i. Whether the Appeal is properly filed?
 - ii. Whether there is judgment on record capable of being set aside?
 - iii. Whether the directions issued to proceed by way of written submissions are proper.
 - iv. Whether costs should be awarded.
14. On the first issue, Counsel submitted that the Appellant was appealing against the decision to have the matter canvassed by way of written submissions which decision was made on October 12, 2021. The Appellant filed the Appeal on March 14, 2022 which was contrary to the provisions of Section 8 of the *Rent Restriction Act* cap 296 of the Laws of Kenya.
15. It was also submitted that this case was of malicious litigation since the Appeal was also filed after thirty days as stipulated by the provisions of Section 79G of the *Civil Procedure Act*. The decision appealed against was made on October 12, 2021 while the Appeal was filed on March 14, 2022. No reasons for the delay had been offered and neither had the Appellant sought for leave to have the Appeal admitted out of time. Counsel for the respondent submitted that for this reason alone, the Appeal should be dismissed.
16. It was also argued that there was no decree attached to the proceedings and there being no judgment on record then the appeal is nullity void ab initio.
17. On whether the directions issued by way of written submissions are proper, Counsel for the Respondent submitted that the said directions were issued by the Tribunal after the matter had failed to proceed for about 5 times and the Tribunal with a view of ensuring that the matter is concluded directing the suit to be proceed by way of written submissions. The case of *Robert Ngande Kathathi v Francis Kivuva Kitonde* [2020] eKLR was cited in support of this position.
18. The Respondent concluded his submissions by urging the court to dismiss the Appeal with costs.



Analysis and Determination.

19. I have considered the ground of Appeal, the written submissions filed by the parties and in my view, the issues for determination are as follows: -
- i. Whether the Appeal is properly filed before this Court.
 - ii. Whether the Tribunal erred in issuing directions for the matter before it to be heard and determined by way of written submissions.
 - iii. What orders should issue as to costs.
20. I shall now proceed to analyze all the issues sequentially.
21. The law governing filing of appeals from the subordinate court to the High Court is governed by Section 79 G of the *Civil Procedure Act* (the Act) which provides that:
- “Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:
- Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”
22. In the instant case, the decision being appealed against was rendered by the Tribunal on October 12, 2021, the Appeal herein was filed on March 14, 2022. No application was made by the Appellant to seek to have the Appeal be admitted out of time neither has he offered any reasons as to why his Appeal was filed out of time.
23. From the above provision, it is clear that all appeals from the subordinate court to the High Court must be filed within 30 days from date of the decree or order appealed against.
24. On this ground alone, I find that the Appeal is not properly filed before this Court and I proceed to dismiss the same for having been filed contrary to the law.
25. On whether or not the Tribunal erred in directing the matter to proceed by way of written submissions instead of oral testimony, I have perused the *Rent Restriction Act* and noted that Sections 36 and 37 provides for the Minister and Chief Justice respectively to come up with Regulations and Rules necessary for managing of procedures and proceedings of the said Tribunal.
26. Regulation 11 of the Rent Restriction Regulations, stipulates as follows:-
- “The procedure to be followed by the tribunal shall, except as herein provided, be that prescribed under the *Civil Procedure Act* so far as is practicable.”.
27. Under the *Civil Procedure Rules*, the mode of hearing of suits is provided for in Order 18 Rule 2 of the *Civil Procedure Rules* which stipulates as follows: -
- “Unless the court otherwise orders-
1. On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.



2. The other party shall then state his case and produce his evidence and may then address the court generally on the case. The party beginning may then reply.
 3. After the party beginning has produced his evidence then, if the other party has not produced and announces that he does not propose to produce evidence, the party beginning shall have the right to address the court generally on the case; the other party shall then have to address the court in reply, but if in the course of his address he cites a case or cases the party beginning shall have the right to address the court at the conclusion of the address of the other party for the purpose of observing on the case or cases cited.
 4. The court may in its discretion limit the time allowed for addresses by the parties or their advocates.
28. In referring to this provision, the Respondent argued that the said provision permits the court to exercise its discretion on how the matter shall proceed. While this may be so, it however does not expressly permit courts to bar a party who wishes to proceed by way of oral evidence during the hearing of his or her case.
29. In respect to submissions, court have time without number stated that submissions are not evidence neither can they introduce new issues. Consequently, in legal proceedings, evidence ought not to be introduced by way of submissions. As was held by Mwera, J (as he then was) in *Erastus Wade Opande v Kenya Revenue Authority & another* Kisumu HCCA No 46 of 2007:
- “Submissions simply concretise and focus on each side’s case with a view to win the court’s decision that way. Submissions are not evidence on which a case is decided.”
30. In the case of *Nancy Wambui Gatheru v Peter W Wanjere Ngugi* Nairobi HCCC No 36 of 1993 the court stated as follows:
- “Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court’s view, are a course by which counsel or able litigants focus the court’s attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So, submissions are not necessarily the case.”
31. In view of the foregoing, I agree with the submissions made by the Appellant that indeed the Tribunal erred in directing that the matter proceeds by way of written submissions. However, having earlier held that the Appeal was not properly filed before this Court, I am unable to allow the appeal owing to the said reason.
32. On costs, I am guided by the provisions of Section 27 (1) of the *Civil Procedure Act* (Cap 21) and the decision in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* SC Petition No 4 of 2012: [2014] eKLR. The Supreme Court held that costs follow the event and that the Court has the discretion in awarding such costs. In the present case, looking at the circumstances herein and considering that this was an interlocutory appeal, I will direct that each party bear own costs of this Appeal.



Final orders

33. For the foregoing reasons, I make the following disposal orders:

- a. That the appeal is hereby dismissed.
- b. Each party to bear own costs of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF DECEMBER 2022.

E.K. WABWOTO

JUDGE

In the presence of:-

Paul Otiende the Appellant appearing in person.

Ms. Ochieng for the Respondent.

Court Assistant – Caroline Nafuna.

