



**Maithya v Mulwa t/a Skyview (Environment and Land Appeal
E123 of 2022) [2024] KEELC 626 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 626 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E123 OF 2022
LN MBUGUA, J
FEBRUARY 8, 2024**

BETWEEN

SHADRACK N MAITHYA APPELLANT

AND

BENJAMIN MULWA T/A SKYVIEW RESPONDENT

RULING

1. Dissatisfied with the ruling of the learned Vice Chair Business Rent Tribunal Hon. Patricia May delivered on 11.11.2022, the Appellant filed a Memorandum of Appeal dated 2.12.2022 seeking to set aside the said ruling.
2. In response, the Respondent filed the Preliminary Objection dated 5.5.2023 which is for determination. He contends that this court lacks jurisdiction to hear the appeal for want of leave to appeal from the Business Rent Tribunal since the ruling being appealed against arose from provisions of Order 51 Rule 1(1) of the *Civil Procedure Rules*, Section 3 and 3A of the *Civil Procedure Act* and Article 50 (1) and 159 of the *Constitution* of Kenya, 2010 and does not fall under the thematic orders which appeals lie as of right as envisaged under Order 43 Rule 1(1) of the *Civil Procedure Rules* and Section 75 of the *Civil Procedure Act*.
3. The Preliminary Objection was canvassed by way of written submissions.
4. The Respondent filed submissions dated 2.12.2023, where reference is made to the case of *Mike Muli v Justus Mwandikwa Kilonzo & 4 others* [2022] eKLR to submit that since the dispute herein arose from a complaint and not a reference, the Appellant has no express rights to bring this Appeal pursuant to Section 15 of the *Landlord and Tenant (Shops, Hotels and Catering Establishment) Act*, Chapter 301 Laws of Kenya.



5. The Appellant filed submissions dated 19.12.2023 admitting that leave was not sought before filing this appeal, but contends that the appeal herein lies as of right as per Order 43 Rule 1 of the [Civil Procedure Rules](#) and Section 75 of the [Civil Procedure Act](#) as the issue concerns temporary injunctive orders.
6. The Appellant further argues that the matter was commenced by a reference and not a complaint and as such, an appeal lies as of right by virtue of Section 15 of Cap 301.
7. The case of [Microsoft Corporation v Mitsumi Computer Garage Ltd & another](#) [2001] eKLR as well as the case of [Abdirahman Abdi v Safi Petroleum Products Ltd & 6 others](#) [2011] eKLR are cited to urge the court to consider the overriding Objective and give the Appellant a chance to be heard.
8. The issue for determination is whether the Respondent's Preliminary Objection is merited. The same raises the question as to whether this court has jurisdiction to hear this Appeal.
9. The provisions of Section 15 (1) of the [Landlord and Tenant \(Shops, Hotels and Catering Establishment\) Act](#), Chapter 301 Laws of Kenya provides that;

“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...”
10. A reference is defined under Section 2 of the [Act](#) as;

“A reference to a Tribunal under section 6 of this Act”
11. Section 6 (1) of the [Act](#) 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:”
12. The Court of Appeal in the case of [Gatanga General Store & 2 others v Githere](#) [1988] eKLR stated that;

“However, 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”
13. Was the dispute before the tribunal filed as a reference or a complaint?. In [Mike Muli v Justus Mwandikwa Kilonzo & 4 others](#) [2022] eKLR, the court stated 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”.
14. The respondent has told the court that the matter before the tribunal was filed as a complaint registered as E699 of 2021, but there is no supporting evidence to that effect. The ruling appealed against commences with the following words “The present proceedings were commenced by the Tenant's reference dated 19.11.2021....”. Thus the Tribunal identified the matter as a reference.



15. Going by the ruling of 11.11.2022, it is clear that the Tribunal was not dealing with a mere complaint as envisaged in the case of *Gatanga General Stores & 2 others v. Gitbere* (*supra*), so much so that some issues could not even be determined at that stage of the trial.
16. I conclude that the matter before the tribunal was not a mere complaint and the dispute goes into the heart of the tenancy relationship between the protagonists. To this end, I find that the Preliminary Objection is not merited.
17. Despite the pronouncement that this court has jurisdiction, the court hesitates to deal with the dispute for the reason that the appeal is against an interlocutory application. Looking at paragraph 43 of the ruling in question, it is apparent that the premises have been closed since May 2022 for reasons which the Tribunal is yet to determine. There are also other applications pending before the said tribunal. The finalization of the matter will greatly be hampered if this court proceeds to hear the appeal. The faster the matter is finalized, the better for the parties. Thereafter, any aggrieved party can approach the court on the substantive issues.
18. In the circumstances, even though this court has jurisdiction to hear the matter, the appeal is summarily rejected under the provisions of Section 79B of the *Civil Procedure Act*.
19. The final orders given are as follows;
 1. The Preliminary Objection is hereby dismissed.
 2. The Appeal is hereby struck off.
 3. Each party is to bear their own cost of the Preliminary Objection and the appeal.
 4. This file is to be transmitted back to the tribunal forthwith for the hearing and determination of the reference.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF FEBRUARY, 2024 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Ngure holding brief for Uvyu for the Appellant

M/s Oketch for the Respondent

Court Assistant: Cheronno

