



REPUBLIC OF KENYA



KENYA LAW
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**Mbugua v Ndambiri & 6 others (Environment and Land Appeal
E067 of 2022) [2022] KEELC 13510 (KLR) (3 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13510 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E067 OF 2022**

JO MBOYA, J

OCTOBER 3, 2022

BETWEEN

ANN NJERI MBUGUA APPELLANT

AND

JOHN GITARI NDAMBIRI 1ST RESPONDENT

PAUL MUHORO 2ND RESPONDENT

DAVID NDUNGU 3RD RESPONDENT

ROBERT MWERI 4TH RESPONDENT

SALOME WAIRIGU 5TH RESPONDENT

FRANCIS GICHURU 6TH RESPONDENT

PAUL KIWARA NJUGUNA 7TH RESPONDENT

RULING

Introduction and background:

1. Vide the Notice of Motion Application dated August 18, 2022, the appellant herein has approached the court seeking for the following reliefs;
 - i.Spent.
 - ii. An order be made by this honourable court to stay the judgment delivered by the Business Premises Rent Tribunal.
 - iii. It is in the interest of justice that the appeal be heard urgently in order to protect the appellant from suffering from further losses, irreparable harm, and rendering ELC 853 of 2012 (OS)



nugatory occasioned by the acts of the 1st respondent to evict her and the tenants in the property.

- iv. The costs of this application be in the cause.
2. The subject application is premised and anchored on the grounds which are enumerated in the body thereof and same is further supported by the affidavit of one Anne Njeri Mbugua, sworn on even date. For clarity, the supporting affidavit has been sworn on August 18, 2022.
3. Though served with the subject application, the 1st respondent instructed and retained counsel Mr Okwaro, but however by the time the application came up for hearing the said counsel had neither paid for nor filed the requisite Notice of appointment of advocate.
4. Nevertheless, counsel for the 1st respondent informed the court that same had uploaded a Notice of appointment of advocate on Saturday, October 1, 2022, but however the Notice of appointment had not been processed and an invoice had not been issued.
5. On the other hand, there was no appearance the 2nd to 7th respondents herein or at all.

Deposition by the parties:

A. Appellant's/applicant's case

6. Vide Supporting Affidavit sworn on August 18, 2022, the deponent has averred that same is the appellant/applicant herein and by virtue of being the appellant/applicant, same is conversant with the facts of the subject matter.
7. Further, the deponent has averred that same had filed and/or lodged a suit vide ELC 853 of 2012 before this honourable court and that the said suit is pending hearing and disposal.
8. Nevertheless, the deponent has added that despite the fact that there is a pending civil suit, namely, ELC 853 of 2012, the learned chair person of the Business Premises Rent Tribunal proceeded to and entertained tribunal Cause no E338 of 2021 and thereby rendered a judgment against the deponent.
9. As a result of the proceedings and the reported judgment of the vice chair of the Business Premises Rent tribunal, the deponent herein avers that same is now on the verge of being evicted from the suit premises.
10. Be that as it may, the deponent has added that at the time when the vice chair person of the Business Premises Rent Tribunal issued the impugned orders rendered on August 18, 2022, there was an existing inhibition issued by the High Court against the title in respect of the suit property.
11. In view of the foregoing, the deponent has added that same was therefore entitled to an order of stay of execution of the judgment of the business premises rent tribunal and that in default to grant such an order, then the deponent would be liable to eviction from the suit premises, which result will render the existing proceedings vide ELC 853 of 2012 nugatory.
12. Premised on the foregoing, the deponent has therefore implored the court to find and hold that there exists sufficient basis and ground to warrant the grant of the orders sought.

B. Response by the respondents:

13. It was pointed out elsewhere herein before that the 1st respondent retained and/or instructed counsel, but by the time the application herein came up for hearing, the said counsel had neither filed the requisite Notice of appointment of advocate or at all.



14. Be that as it may, the appointed counsel intimated to the court that same had lodged the Notice of appointment of advocate via the e-portal on Saturday, October 1, 2022. However, counsel reported that as at the time of the hearing of the application, same had neither been billed nor invoiced.
15. Owing to the foregoing, the court treated the 1st respondents advocate as having no right of audience before the honourable court and further directed that the application shall proceed on that basis.
16. In respect of the 2nd to 7th respondents, none of the said respondents appeared and or attended court. For clarity, no replying affidavit nor grounds of apposition were filed.

Submissions by the parties

A. Appellant's/applicant's submissions

17. When the subject matter was called out, counsel for the appellant/applicant intimated to the court that same would be ready to proceed. In this regard, the court ordered and or directed that the subject application be ventilated and or canvassed vide oral submissions.
18. Counsel for the appellant/applicant therefore submitted that the 1st respondent had filed and or commenced proceedings before the business premises rent tribunal and pursuant to the said proceedings, the vice chair person of the Business Premises Rent Tribunal proceeded to and issued the offensive orders which are the subject of the instant appeal.
19. Further, counsel for the appellant/applicant added that the impugned proceedings before the Business Premises Rent Tribunal, were neither commenced vide Complaint in line with section 12 of the *Land and Tenants (Shops, Hotels & Catering Establishment) Act* cap 301 Laws of Kenya, nor were same commenced by way of a reference.
20. Nevertheless, counsel for the appellant/applicant contended that despite the informal manner in which the proceedings were commenced before the Business Premises Rent Tribunal, the vice chair person of the tribunal proceeded to grant and issue orders which were beyond his jurisdiction and mandate.
21. At any rate, learned counsel for the appellant/applicant submitted that at the time when the vice chairperson of the tribunal issued the offensive orders, there was an existing suit namely ELC 853 of 2012 (OS) which was pending and which concerned ownership of the suit property.
22. In view of the foregoing, counsel for the appellant contended that the impugned proceedings and the judgment of the Business Premises Rent Tribunal was therefore irregular, unlawful and illegal.
23. Premised on the foregoing, counsel for the appellant therefore invited the court to find and hold that the impugned orders would occasion irreparable loss to the appellant/applicant and thus same ought to be stayed pending the hearing and determination of the appeal.
24. Notwithstanding the foregoing, counsel for the appellant acknowledged and confirmed that the proceedings which were mounted before the Business Premises Rent Tribunal were neither a complaint nor a reference.
25. Other than the foregoing, learned counsel for the appellant also conceded that despite the fact that the orders of the impugned orders were not made pursuant to a reference, same neither sought for nor procured Leave to appeal to this court.



26. In any event, counsel for the appellant/applicant added that to the extent that leave was necessary, same therefore sought to have the application adjourned to enable the appellant/applicant to procure and obtain leave to appeal.
27. In respect of the issue of jurisdiction of the court to entertain and adjudicate the subject appeal, albeit in the absence of leave, counsel for the appellant/applicant remained adamant that the court would still be seized of Jurisdiction to entertain the appeal and the subject application.
28. Consequently, counsel for the appellant added that it was therefore imperative that the orders sought at the foot of the Notice of Motion application dated August 18, 2022 be granted.

B. Submissions by the respondents:

29. Having neither filed the Replying affidavit nor Grounds of opposition to the subject application, the respondents herein did not make and or render any submissions, whatsoever.
30. In the premises, the subject matter fell for consideration on the basis of the grounds contained at the foot of the application, the Supporting affidavit thereto and the obtaining law, essentially the provision of the Landlord and Tenants (Shops, Hotels & Catering establishment) Act cap 301 Laws of Kenya.

Issues for determination

31. Having reviewed the application dated August 18, 2022, the supporting affidavit thereto and having similarly considered the submissions that were ventilated on behalf of the appellant/applicant, the following issue is pertinent and thus worthy of determination;
 - i. Whether this honourable court is seized of the requisite jurisdiction to entertain the subject appeal as well as the application mounted thereon.

Analysis and determination

Issue Number 1 - Whether this honourable court is seized of the requisite jurisdiction to entertain the subject appeal as well as the application mounted thereon.

32. It is important and paramount to observe and underscore that jurisdiction is central and key in respect of each and every matter that is placed before a court of law. For clarity, the statement herein is trite and hackneyed.
33. Given the centrality of the issue of jurisdiction, it therefore behooves the court before whom a matter/ dispute is filed to interrogate and ascertain, whether or not same is seized of jurisdiction to entertain and adjudicate upon the subject dispute.
34. At any rate, it is imperative to note that where a court of law is devoid and bereft of the requisite jurisdiction, then the honourable court has no mandate to continue with the hearing of the subject dispute or continuation with the proceedings for purposes of production of evidence.
35. To this end, it is apt to recall the dictum of the Court of Appeal in the case of *Owners of the Motor Vessel "Lillian S" versus Caltex Oil (Kenya) Ltd* [1989] eKLR, where the court observed as hereunder;

“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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.



36. Other than the foregoing decision, it is also appropriate to take cognizance of the holding of the Supreme Court of Kenya in the case of *Samuel K Macharia v Kenya commercial Bank Ltd & Another* (2012)eKLR, where the Supreme court at paragraph 68 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. This court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the *Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can parliament confer jurisdiction upon a court of law beyond the scope defined by the *Constitution*. Where the *Constitution* confers power upon parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

37. Having cited the foregoing decisions, it is now appropriate to interrogate and ascertain whether this honourable court is seized of the requisite jurisdiction to entertain the subject appeal.
38. In this regard, it is worthy to recall that counsel for the appellant submitted that the proceedings which were commenced before the Business premises rent tribunal were commenced in an informal manner, contrary to the established provisions of the Landlord and Tenant (Shops, hotels & Catering Establishment) Act cap 301. Consequently, counsel emphasized that the impugned proceedings and the ultimate decision were therefore irregular, illegal and unlawful.
39. On the other hand, counsel for the appellant submitted that the proceedings before the tribunal having been informal in nature, same were thus not commenced by way of a reference in line with the provisions of section 6 of the *Landlord and Tenants (Shops, Hotels & Catering Establishment) Act* cap 301 Laws of Kenya.
40. To the extent that the impugned proceedings were neither commenced nor originated by way of a reference, the question that arises for determination is whether a right of appeal would avail to the appellant in respect of any order, which was made and issued in the impugned proceedings.
41. Suffice it to point out that a right of appeal in respect of the matters from the Business Premises Rent Tribunal only arise and accrue, if the impugned order or determination arises out of a Reference and not otherwise.
42. In the premises, it is imperative to take cognizance of the import, tenor and scope of the Provisions of section 15 of the *Landlord and Tenants (Shops, Hotels & catering Establishments) Act* cap 301, For convenience, the said provisions are reproduced as hereunder;

Appeal to court:

- (1) 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:



Provided that the Environment and Land Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.

- (2) In hearing appeals under subsection (1) of this section the court shall have all the powers conferred on a tribunal by or under this Act, in addition to any other powers conferred on it by or under any written law.
- (3) Deleted by Act no 2 of 1970, s 13.
- (4) The procedure in and relating to appeals in civil matters from subordinate courts to the Environment and Land Court shall govern appeals under this Act:

Provided that the decision of the Environment and Land Court on any appeal under this Act shall be final and shall not be subject to further appeal.

43. Notwithstanding the foregoing provisions, the issue of jurisdiction of this honourable court to entertain an appeal arising from the Business Premises Tribunal, has hitherto been the subject of various court decisions.
44. In this respect, it is appropriate to recall the holding in the case of *Re-Heptulla Properties Ltd* (1979) eKLR, where the court observed as hereunder;

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.

45. Similarly, the same issue was also revisited by the Court of Appeal in the case of *Gatanga General Store & 2 Others v Gitbere* (1988) eKLR, where the Court of Appeal rendered herself as hereunder;

‘It appears that there might be three sources of appeal. The primary source lies in section 15(1) of the Act. Any party to a reference aggrieved by a determination or order of a tribunal made in the reference may appeal to the High Court within the time stated. Hence this appeal concerns decisions on a reference.



Such an appeal depends upon two steps, the giving of the tenancy notice by the landlord and the reference by the tenant to the tribunal against the landlord's notice. The landlord by himself cannot make a reference (*Pritam v Ratilal & Another*, (1972) EA 560); that is for the tenant. If no reference is made then the landlord's notice takes effect under section 10 of the Act. So he does not need to appeal in that case. But on the appeal section 9 of the Act explains the determinations and orders which it may make; and the orders may be "further or other orders as it thinks appropriate." This explains the phraseology of section 15 – aggrieved by "any determination or order of a tribunal".

A second source of aggravation stems from a complaint under section 12(4) of the Act. This is not an easy concept to follow at every stage. Madan, J in *Choitram v Mystery Model Hair Saloon*, [1972] EA 525, (followed in *Machenje v Kibarabara*, [1973] EA 481) explained the scope of a complaint in these words:

"The powers given in section 12 (4) are expressly in addition to any other powers specifically conferred."

I am of opinion however that the term "complaints" is intended to cover only complaints of a minor character.

"The term 'investigate' does not necessarily imply a hearing. Such complaints would include complaints by the tenant of 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."

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. Madan, J set out the history of the matter in *Choitram's* case at page 530 as follows:

"Prior to April 6, 1970, section 15 of the Act permitted an appeal to a senior resident magistrate and from there to the High Court on a question of law or mixed fact and law in terms which included appeals from decisions on complaints under section 12 (4).

As amended appeals were restricted to determinations or orders made on a reference. This strengthens my view that proceedings under section 12(4) are intended for complaints of a minor nature only. If the legislature had considered that the tribunal had power under that provision to award large sums by way of compensation to a landlord for example ... it would surely have continued the right of appeal."

There is no appeal from orders made under section 12 (4) of the Act, because that appeal was held to have been deleted.

Then there is the third source of appeals which is procedural. The present case comes under this heading. The statutory position is that the procedure in and relating to appeals in civil matters from subordinate courts to the High Court shall govern appeals under this Act. (Section 15(4)).

In hearing appeals under section 15, the court shall have all the powers conferred on a tribunal under the Act in addition to any other powers conferred on it by or under any written law. The *Civil Procedure Act* and Code would be such written law. Under the *Magistrates' Courts Act* the subordinate courts exercise civil powers and that would be under the *Civil Procedure Act* which regulates appeals from subordinate courts to the High Court.



The definition of court in that Act includes the High Court and a subordinate court acting in the exercise of its civil jurisdiction.

46. From the foregoing decisions, it is common ground that a right of appeal only accrues and/or avails to a party aggrieved by an order or determination made by the tribunal, whilst dealing with a Reference filed pursuant to the provisions of section 6 of the Act and not otherwise.
47. Premised on the foregoing, it is imperative to underscore that where the proceedings before the Business Premises Rent Tribunal were not commenced by way of Reference as admitted by learned counsel for the appellant, then no right of appeal avails and/or accrues to the appellant.
48. At any rate, in the course of the submissions counsel for the Appellant intimated to the court that same would require the court to grant leave, to enable the subject appeal and application to be heard and determined on merit.
49. Nevertheless, there is no gainsaying that where an appeal lies with leave, it is incumbent upon the claimant/applicant to first and foremost apply for the leave before the court of first instance/the tribunal that issued the impugned decision.
50. Further the court appealed to can only be approached for purposes to granting leave to appeal, if the court of first instance has declined to grant the Leave or dismissed the application for such leave. For clarity, this court was therefore not seized of the jurisdiction to even advert to the request by the appellant to grant the Leave sought.
51. Other than the foregoing, it also appropriate to observe that in instances where leave is necessary and a pre-requisite to an appeal, the application for leave to appeal must be filed and lodged within 14 days of the impugned order or decision.
52. Finally, having come to the conclusion that leave was therefore necessary before an appeal could be filed to this Honourable court and having confirmed that no such leave was procured, obtained and or sought for, it is therefore evident and or apparent that the impugned appeal is therefore incompetent.
53. As pertains to the import and implication of failure to procure and obtain leave, if any is required, it is paramount to state that a resultant appeal without leave would be therefore be incompetent.
54. To this end, it is sufficient to refer to the holding of the Court of Appeal in the case of *Johnson Home Gichuhi & George Muriuki Gichubi (suing as managers of the Estate of Margaret Wanjiru Gichui) v Isaac Gathangu Wanjohi & 5 Others*, Civil Appeal No. 335 of 2017 – Court of Appeal Nairobi (unreported), where the Court of Appeal observed at paragraph 27 as hereunder;

“The question that we must first address is the competence of the appeal. That is, whether leave to appeal was necessary, and if so, whether the failure to obtain leave to appeal as rendered the appeal incompetent. In the motion before the ELC which was brought under order 24 rule 3 and 7(2) of the Civil Procedure Rules, The applicant sought two main prayers. First to revive the abated suit, and secondly to have the name of Margaret substituted with that of Johnson. Order 43 of the Civil Procedure Rules which identifies orders from which leave to appeal is provided as of right, and those from which leave must be obtained, as categorized orders made under order 24 rule 3 as requiring leave whilst orders made under order 27 rule 7 as not requiring leave. This means that to the extent that the ruling made by the ELC in regard to prayer to revive the suit under order 24 rule 3, required leave to appeal, and no leave having not been obtained, the appeal was incompetent



55. Where leave is required, the failure to procure and obtain leave renders the resultant appeal incompetent.
56. In view of the foregoing, it is my considered view that the appeal that was mounted in respect of decision emanating from the Business Premises Rent Tribunal, which does not arise from a reference, was/is incompetent.
57. Consequently, it is my finding that the honourable court herein is devoid and divested of jurisdiction to entertain the subject appeal.
58. Without being seized of the requisite jurisdiction, there would be no basis upon which this court can continue with the proceedings, including the application, awaiting production of further evidence. Clearly, the court is obligated to down its tools.

Final disposition

59. Having found and held that the subject appeal does not fall within the purview of the provisions of section 15 of the Landlord and Tenants (Shops, Hotels & Catering Establishment) Act cap 301, it is thus apparent that the appeal is not only misconceived, but same is stillborn and legally untenable.
60. In the premises, the appeal herein is incapable of redemption by any amount of amendment and attempt to procure leave ex-parte. In a nutshell, the appeal be and is hereby struck out albeit with no orders as to cost.
61. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER 2022.

OGUTTU MBOYA

JUDGE

In the presence of;

Kevin Court assistant

Mr Otieno for the appellant/applicant

Mr Okwaro for the 1st respondent

No appearance for the 2nd to 7th respondents

